CASE LAW DIGEST

RAPE SHIELD LAWS

CURRENT AS OF FEBRUARY 2013

COMPLILED BY

AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN
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Rape Shield Digest

Purposes of Rape Shield Laws

Generally, the Rape Shield statutes have been enacted across the country to protect alleged victims from unnecessary embarrassment and reluctance to testify at the chance their entire lives are up for judgment by the jury. The courts and legislatures consider the balance between the inflammatory or prejudicial nature of the evidence and the probative value of the evidence.

Prejudice to the victim is not the only basis for excluding evidence of prior sexual conduct or behavior of the victim; another rationale is that such evidence is simply irrelevant to the charges or defense. Relevance is a large rationale for excluding evidence that is protected under the rape shield law and it is important to understand the typical ways, in which defense attorneys will attempt to pierce the rape shield protection. For example, defense attorneys may seek to challenge the consent or credibility of the victim by introducing evidence of prior sexual conduct. There are certain circumstances where the courts have allowed for the introduction of prior sexual conduct to prove consent and credibility and other circumstances where such evidence is excluded.

PUBLIC POLICY

The public policy behind rape shield laws is to protect sexual assault victims from humiliating and embarrassing public 'fishing expeditions' into their past sexual conduct, without a preliminary showing that evidence thus elicited will be relevant to some issue in the pending case. Legislatures have decided that the victims of sexual assaults should not be subjected to psychological or emotional abuse in court as the price of their cooperation in prosecuting sex offenders.

- People v. McKenna, 585 P.2d 275, 278 (Colo. 1978)
- State ex rel. Mazurek v. District Court of Montana Fourth Judicial Dist., 922 P.2d 474 (Mont. 1996)
- Hoke v. Thompson, 852 F.Supp. 1310 (E.D. Va. 1994)

IRRELVANCE

General

Under the rape shield laws of many states, evidence of prior sexual conduct is inadmissible to show consent or credibility. The reasoning for this exclusion is such evidence is presumptively irrelevant to the charge of sexual assault.

- Lewis v. Wilkinson, 307 F.2d 413 (6th Cir. 2002)
- Kvasnikoff v. State, 674 P.2d 302 (Alaska Ct. App. 1983)

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- People v. Bryant, 94 P.3d 624, 32 Media L. Rep. 1961 (Colo. 2004)
- State v. Stellwagen, 659 P.2d 167 (Kan. 1983)
- Johnston v. State, 376 So. 2d 1343 (Miss. 1979)
- State v. Sloan, 912 S.W.2d 592 (Mo. Ct. App. 1995)
- State v. R.E.B., 895 A.2d 1224 (N.J. App. Div. 2006)
- State v. Johnson, 944 P.2d 869 (N.M. 1997)
- State v. Williams, 569 P.2d 1190 (Wash. 1977)
- State v. Green, 260 S.E.2d 257 (W. Va. 1979)

Pattern of Behavior

Courts have generally found that evidence of the prior sexual conduct of a victim is inadmissible, under the state rape shield law. Defendants will often attempt to admit evidence around the rape shield law by arguing that the prior sexual conduct of the victim fits a pattern of behavior similar to the charged offense to prove consent. However, the pattern must be distinctive and "so closely resemble the defendant's version of the encounter that it tends to prove that the complainant consented to the acts charged or behaved in such a manner as to lead the defendant to believe that that the complainant consented." Kaplan v. State, 451 So.2d 1386 (Fla. 1984). *See also—*

- Jeffries v. Nix, 912 F.2d 982 (8th Cir. 1980)
- State v. Shoffner, 302 S.E.2d 830 (N.C. 1983)
- State v. Thompson, 884 P.2d 574 (Or. Ct. App. 1994)
- State v. Sheline, 955 S.W.2d 42 (Tenn. 1997)
- State v. Hudlow, 659 P.2d 514 (Wash. 1983)
- State v. Mounsey, 643 P.2d 892 (Wash. 1982)

Credibility

Another technique of defense attorneys, to pierce the protections of the rape shield laws, is to argue that evidence of prior sexual conduct is admissible to attack the credibility of the victim witness and that such evidence is necessary to prove prior false accusations.[1] Some courts allow for such admission to show inconsistency in testimony and others categorize false accusations as protected or unprotected under the rape shield laws.

- State v. R.E.B., 895 A.2d 1224 (N.J. App. Div. 2006)
- State v. Sexton, 444 S.E.2d 879 (N.C. 1994)

[1] See section below on admissibility of prior false accusations, as evidence of prior sexual conduct.

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RELEVANCE

There are some instances, where courts have found that the probative value of a victim's sexual history outweighs the prejudice it poses to that victim. The defense will argue that the relevancy test centers on whether the sexual history of the victim, with others, indicates a likelihood of consent to the act in question with the victim. However, the practical application by the courts is less lenient in admission. The Ohio Supreme Court, for example, has said that, "while this premise may have had some validity in earlier time, it seems quite unpersuasive in today's era of more fluid morals." State v. Gardner, 391 N.E.2d 337 (Ohio 1979). *See also*—

- Marion v. State, 267 Ark. 345 (1979)
- Jackson v. State, 368 Ark. 610 (2007)
- State v. Iaukea, 62 Haw. 420, 616 P.2d 219 (1980)
- Bixler v. Commonwealth, 712 S.W.2d 366 (Ky. Ct. App. 1986)
- Johnson v. State, 632 A.2d 152 (Md. 1993)
- State v. Anderson, 902 P.2 1206 (Or. Ct. App. 1995)
- League v. Com., 385 S.E.2d 232 (Va. Ct. App. 1989)

Relationship to the Victim

There are circumstances where courts allow for the admissibility of prior or subsequent instances of sexual activity of the victim with the defendant. Some courts limit that admission to only instances of conduct between the victim and the defendant and others and do not allow for admission of sexual activity with third parties. There is the exception to federal and state rape shield laws that allows for such admission when it goes to show that the origin of injury or DNA evidence is not the defendant but a third party. However, the states below have limited evidence of prior sexual activity between the victim and a third party in certain circumstances.

SEXUAL ACTIVITY WITH THE DEFENDANT

- People v. Cornes, 399 N.E.2d 1346 (Ill. Ct. App. 1980)
- Smith v. Com., 566 S.W.2d 181 (Ky. Ct. App. 1978)

Relating to the Defendant's state of mind

- People ex rel. K.N., 977 P.2d 868 (Colo. 1999).

SEXUAL ACTIVITY WITH A THIRD PARTY

- State v. McCoy, 274 S.C. 70, 261 S.E.2d 159 (4th Cir. 1979).
- Darrow v. State, 451 So. 2d 394 (Ala. Crim. App. 1984).

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- People v. Santos, 813 N.E.2d 159 (Ill. 2004).
- State v. Potts, 118 P.3d 692 (Kan. Ct. App. 2005)
- State v. Friend, 493 N.W.2d 540 (Minn. 1992)
- State v. Lemire, 345 A.2d 906 (N.H. 1975)
- State v. Ryan, 384 A.2d 570 (N.J. App. Div. 1978)
- State v. Langley, 72 N.C. App. 368 (N.C. Ct. App. 1983)
- State v. Harris, 622 S.E.2d 615 (N.C. 2005)

Constitutional Considerations

CONFRONTATION CLAUSE CHALLENGES

The Sixth Amendment right of confrontation is not an absolute right. Rape shield laws serve a compelling state interest by preventing rape trials from becoming trials on prior sexual conduct of the victims. The Supreme Court has even gone so far as to state, in *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973), that the Sixth Amendment is not absolute, and "may bow to accommodate other legitimate interests in the criminal trial process." The compelling and legitimate state interest, that upholds rape shield laws, justifies the curtailment of the constitutional right to confront witnesses. *State v. Dist. Ct. of Mont., Fourth Judicial Dist.*, 922 P.2d 474 (Mont. 1996).

A specific issue raised with confrontation clause challenges to rape shield laws is the motive of the victim to fabricate. Often the issue at trial will be the tension between the defendant's confrontation rights and the state rape shield statute, which precludes admission of evidence of a witness' past sexual conduct under certain circumstances. *State v. Stephen F.,* 152 P.3d 842 (N.M. Ct. App. 2007).

Cornes, *supra*, 399 N.E.2d 1346: The defendant's right of confrontation does not extend to "matters which are irrelevant and have little or no probative value," and past sexual conduct does not demonstrate that she consented to sexual relations with the defendant.

See also—

- Patterson v. State, 689 P.2d 146 (Ak. App. 1984).
- Dorn v. State, 267 Ark. 365 (Ark. 1979).
- People v. LaLone, 437 N.W.2d 611 (Mich. 1989)
- People v. Thompson, 257 N.W.2d 268 (Mich. 1977)
- Com. v. Quartman, 458 A.2d 994 (Penn. 1983)
- State v. McCoy, 261 S.E.2d 159 (S.C. 1979)
- Bell v. Harrison, 670 F.2d 656 (6th Cir. 1982)
- Pilcher v. Com., 583 S.E.2d 70 (Va. 2003)
- State v. Herndon, 426 N.W.2d 347 (Wis. Ct. App. 1988)

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DUE PROCESS CHALLENGES

Challenges to the Sixth Amendment right to confrontation have also taken form in due process challenges. Defendants have attempted to subvert the rape shield laws under allegations that federal and state rape shield laws violate a defendant's right to due process. The important questions that arise in due process challenges are the whether the defendant was given the access to cross-examine the victim-witness where entitled under the confrontation clause.

- State v. Atkinson, 80 P.3d 1143 (Kan. 2003)
- State v. Higley, 621 P.2d 1043 (Mont. 1980)

SEPARATION OF POWERS CHALLENGES

Courts have held that the state's rape shield statute is constitutionally valid under separation of powers and the requirement of an in camera offer of proof is not violative of the defendant's rights against self-incrimination.

- People v. Buford, 441 N.E.2d 1235 (Ill. Ct. App. 1982)

CONSENT AS IT APPLIES TO CONFRONTATION

- People v. Blackburn, 56 Cal.App.3d 685 (1976)
- State v. Fortney, 269 S.E.2d 110 (N.C. 1980)

CREDIBILITY AS IT APPLIES TO CONFRONTATION

- State v. Lampley, 859 S.W.2d 909 (Mo. Ct. App. 1993)

PRIOR FALSE ACCUSATIONS

Evidence of victim-witness' prior false accusations of sexual assault are irrelevant to the current charge and do not implicate the defendant's right to cross-examine. The tipping point in the cases that do not allow for admission of prior false accusations is the relevancy determination.

- People v. Macleod, 176 P.3d 75 (Colo. 2008)
- Lewis v. State, 591 So.2d 922 (Fla. 1991)
- White v. State, 598 A.2d 187 (Md. 1991)
- People v. Brown, 24 A.D.3d 884 (N.Y.S.2d 2005)

Evidence of victim-witness' prior false accusations of sexual assault may be relevant to show motive or bias and will implicate sexual assault defendant's right to

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confrontation.

- Minus v. State, 901 So.2d 344 (Fla. Ct. App. 2005)
- Steward v. State, 636 N.E.2d 143 (Ind. Ct. App. 1994)
- Fugett v. State, 812 N.E.2d 846 (Ind. Ct. App. 2004)
- State v. Montgomery, 901 S.W.2d 255 (Mo. Ct. App. 1995)
- State v. R.E.B., 895 A.2d 1224 (N.J. App. Div. 2006)
- State v. Johnson, 944 P.2d 869 (N.M. 1997)
- State v. Stephen, F., 152 P.32 842 (N.M. Ct. App. 2007)
- State v. Jalo, 557 P.2d 1359 (Or. Ct. App. 1976)

Types of Behavior

There are a variety of behaviors that the courts will exclude as protected by the rape shield laws in each state. Some states provide for particular exceptions to their rape shield laws. [2] For example, Federal Rule of Evidence 412 provides the following exceptions: "(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and (C) evidence the exclusion of which would violate the constitutional rights of the defendant."

TIMING OF SEXUAL CONDUCT

- State v. Babbs, 334 Ark. 105, 971 S.W.2d 774 (1998)
- Commonwealth v. Dunn, 899 S.W.2d 492 (Ky. 1995)
- State v. Wattenbarger, 776 P.2d 1292 (Or. Ct. App. 1989)

PROTECTED BEHAVIOR/STATUS

Sexual Drive of Victim

- Anderson v. Morrow, 371 F.2d 1027 (9th Cir. 2004)
- Stephens v. Morris, 13 F.3d 998 (Ind. 1994)
- State v. Davis, 269 N.W.2d 434 (Iowa 1978)
- Thomas v. State, 483 A.2d 6 (Md. 1984)

[2] States may provide for specific kinds of evidence to be admissible at trial and during cross-examination. *See generally* AEquitas Resouce "Statutory Compilation: Rape Shield" (Mar. 2010), *contact* http://www.aequitasresource.org/taRegister.cfm or (202) 558 - 0040.

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Prostitution

- Wood v. Alaska, 957 F.2d 1544 (9th Cir. 1992)
- People v. Hughes, 121 Ill. App. 3d 992 (1984)
- State v. Blue, 592 P.2d 897 (Kan. 1979)
- State v. Fitzgerald, 776 P.2d 1222 (Mont. 1989)
- State v. Johnson, 944 P.2d 869 (N.M. 1997)
- State v. Williams, 487 N.E.2d 560 (Ohio 1986)
- State v. Morley, 730 P.2d 697 (Wash. Ct. App. 1986)

Minor Victim's Sexual Knowledge[3]

In cases of sexual assault of a child, the state may seek to admit evidence to prove that the victim possessed sexual knowledge that would be unexpected of a child of that age—and thus, the implication goes, that the child could only have gleaned from the abuse.[4] The defendant may seek to rebut this inference with evidence of another explanation for the child's knowledge. Most courts will allow the latter evidence in despite rape shield statutes.

- Oatts v. State, 899 N.E.2d 714 (Ind. Ct. App. 2009)
- Sallee v. State, 785 N.E.2d 645 (Ind. Ct. App. 2003)
- State v. Parsons, 401 N.W.2d 205 (Iowa Ct. App. 1986)
- Com. v. Costello, 635 N.E.2d 255 (Mass. App. Ct. 1994)
- People v. Makela, 383 N.W.2d 270 (Mich. 1985)
- State v. Samuels, 88 S.W.3d 71 (Mo. Ct. App. 2002)
- State v. Sales, 58 S.W.3d 554 (Mo. Ct. App. 2001)
- State v. Harvey, 641 S.W.2d 792 (Mo. Ct. App. 1982)
- State v. Budis, 593 A.2d 784 (N.J. 1991)
- State v. Marks, 2011 UT App 262, 262 P.3d 13

Prior Sexual Assaults

- Maine v. Robinson, 803 A.2d 452 (Me. 2002)
- In re Michael, 694 N.E.2d 538 (Ohio Ct. App. 1997)

Not Classified as Sexual Conduct

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[3] On multiple occasions, courts have held that the virginity of the victim is irrelevant to the defendant's case or theory. *See, e.g.*, *State v. Mitchell*, 424 N.W.2d 698 (Wis. 1988) (evidence of 11-year-old complainant's virginity prior to alleged assault was not admissible under rape shield, but error was harmless); *Thomas v. State*, 483 A.2d 6 (Md. 1984)

[4] *See generally* Christopher B. Reid, Note, *The Sexual Innocence Inference Theory as a Basis for the Admissibility of a Child Molestation Victim's Prior Sexual Conduct*, 91 MICH. L. REV. 827, 829–30 (1993).

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- U.S. v. White Buffalo, 84 F.3d 1052 (8th Cir. 1996)
- State v. Carmichael, 727 P.2d 918 (Kan. 1986)
- State v. Kobow, 466 N.W.2d 747 (Minn. Ct. App. 1991)
- People v. Wilhelm, 190 Mich. App. 574 (1991)
- State v. Miller, 870 S.W.2d 242 (Mo. Ct. App. 1994)
- Com. v. Dear, 492 A.2d 714 (Pa. 1985)

UNPROTECTED BEHAVIOR

- **Victim's diary.** Lewis v. Wilkinson, 307 F.2d 413 (6th Cir. 2002)
- **Pregnancy.** Shockley v. State, 585 S.W.2d 645 (Tenn. Crim. App. 1978)

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STATE CASE LAW

ALABAMA

Darrow v. State, 451 So. 2d 394 (Ala. Crim. App. 1984).

Courts have generally allowed evidence to be admitted that demonstrates traces of intercourse such as pregnancy, venereal disease, injuries, and the presence of semen in the vagina were caused by a third person at such a time when that intercourse with a third person could have caused the traces. For this evidence to be admissible, it would need to relate to sexual intercourse with a third person within a 72 hour time frame which a physician testified that the semen could have been present in the victim's vagina. Admissible evidence also includes that directly involving the participation of the defendant.

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ALASKA

No information found.

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Patterson v. State, 689 P.2d 146 (Ak. App. 1984).

There is no violation of the defendant's right to confront witnesses if he does not properly request to cross-examine the complaining victim regarding her sexual history outside the presence of the jury, pursuant to the statute.

Dorn v. State, 267 Ark. 365 (Ark. 1979).

A defendant's equal protection rights are not violated for restricting his ability to introduce evidence concerning the complaining victim's reputation for chastity and prior sexual activity with third persons without placing a similar restriction on the prosecution, as the prosecution was restricted by principle that it could not bolster its case by proving that the defendant had committed another rape.

Kvasnikoff v. State, 674 P.2d 302 (Ak. App. 1983).

Where evidence related to a victim's sexual history is relevant to the issue of consent, if that relevancy is outweighed by the possibility of undue prejudice, confusion of issues, or unnecessary invasion of the complaining victim's privacy, that evidence is not admissible. Precluding this evidence is not violative of the defendant's rights to confront witnesses without a showing that such evidence was not otherwise outweighed by the possibility of undue prejudice. *Id*.

Marion v. State, 267 Ark. 345 (Ark. 1979); *Jackson v. State*, 368 Ark. 610 (Ark. 2007).

The courts have also held that testimony not relevant to the central issue of whether sexual intercourse had occurred is inadmissible. Evidence of motive or bias may be admissible after an in camera hearing to determine the relevancy of the evidence and if its probative value outweighs its prejudicial nature.

State v. Babbs, 334 Ark. 105, 971 S.W.2d 774 (1998).

In *Babbs*, the court held that the trial court's admission of the victim's alleged subsequent sexual conduct with the defendant was harmless error. However, the court did make the argument that, even though the admission would stand under the principle of judicial discretion over evidence, the State's argument that the "State's reading of this court's case law, and under that precedent, Shipp's purported consensual sex with Conger, although occurring after the alleged rape took place, is 'prior sexual conduct' under the Rape-Shield Statute and *might* be ruled inadmissible for that reason." Id. at 109.[5]

[5] *See also Slater v. State*, 310 Ark. 73, 832 S.W.2d 846 (1992), *Flurry v. State*, 290 Ark. 417, 720 S.W. 2d 699 (1986)). *See also*, *State v. Sheard*, 315 Ark. 710, 820 S.W. 2d 212 (1994).

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Kemp v. State, 270 Ark. 835 (Ark. 1980).

The Courts have held that rape shield statutes are not unconstitutional, and provides an exception when the trial court determines at the pretrial hearing that the prior sexual conduct is relevant and "its probative value outweighs its inflammatory or prejudicial nature." The courts have also recognized that the statute only excludes prior sexual conduct by the complaining victim, and the defendant may testify regarding the actions of the complaining victim on the night of the alleged rape.

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CALIFORNIA

People v. Blackburn, 56 Cal.App.3d 685 (Cal.App.2.Dist. 1976).

Evidence Code section 1103 bars evidence which "does not concern the credibility of a witness so as to affect the right of confrontation" and "excludes evidence of the victim's sexual conduct only when it is offered to prove consent." Evidence Code section 1103 "does not bar evidence of sexual conduct of the victim or her cross-examination concerning that conduct to attack her credibility," and therefore, "the right of confrontation encompassed in due process is not impinged." Under Evidence Code 782, a defendant can seek to enter testimony into evidence offered to attack credibility if it is proceeded by a written motion from the defendant accompanied by an affidavit containing an offer of proof. *Id*. The court determined that section 782 is not unconstitutionally vague and does not deny the defendant his privilege against self-incrimination as the section enables the judge to accept the offer of proof as true. The judge then determines that if the evidence is as the defendant claims it is if it's relevant and if "its probative value is outweighed by the probability of undue prejudice or the undue consumption of trial time." The judge must determine each of these questions in favor of admissibility in order for the offer of proof to be found sufficient.

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COLORADO

People v. McKenna, 585 P.2d 275, 278 (Colo. 1978)

The rape shield statute is not unconstitutional as a legislative attempt to form procedural rules of the courts in violation of the separation of powers. "The basic purpose of section 18-3-407, therefore, is one of Public policy: to provide rape and sexual assault victims greater protection from humiliating and embarrassing public 'fishing expeditions' into their past sexual conduct, without a preliminary showing that evidence thus elicited will be relevant to some issue in the pending case. The statute represents one means chosen by the general assembly to overcome the reluctance of victims of sex crimes to report them for prosecution. Thus it reflects a major public policy decision by the general assembly regarding sexual assault cases. In effect the legislature has declared the state's policy to be that victims of sexual assaults should not be subjected to psychological or emotional abuse in court as the price of their cooperation in prosecuting sex offenders."

People v. Bryant, 94. P.3d 624, 32 Media L. Rep. 1961 (Colo. 2004).

The rape shield statute deems the prior or subsequent sexual conduct of any victim to be presumptively irrelevant to the criminal trial. To the extent that the court deems evidence of alleged victim's prior or subsequent sexual conduct, adduced during pretrial procedure pursuant to the Rape-Shield law, relevant to the case, the evidence will be admissible at the public trial.

People ex rel. K.N., 977 P.2d 868 (Colo. 1999).

Defendant sought to introduce evidence regarding the complainant's promiscuity and reputation in demonstrating his state of mind. The trial court ruled that witnesses could testify that: (1) they previously had consensual sexual intercourse with the complainant; and (2) alleged victim was aware of the complainant's reputation at the time of the alleged sexual assault. The Court ruled that it is not the defendant's state of mind that is at issue; that his state of mind is irrelevant, whereas it is the complainant's state of mind, which is relevant.

People v. Macleod, 176 P.3d 75 (Colo. 2008).

Even when evidence of a witness's prior sexual history is not being introduced for the truth of the matter "the rape shield statute applies to evidence of a victim's or witness's prior or subsequent sexual conduct, reputation or opinion evidence about that witness's sexual conduct, or evidence that a witness has a history of false reporting of sexual assaults, no matter the purpose for which the proponent intends to introduce the evidence at trial."

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FLORIDA

Kaplan v. State, 451 So.2d 1386 (Fla. App. 4 Dist.,1984).

The Florida Rape Shield statute states that when the consent of the victim is at issue, evidence of prior consensual sexual activity may be admitted after it has been established to the court in a proceeding in camera that the evidence tends to establish a pattern of conduct on behalf of the victim that is similar to the conduct of the case that it is relevant to the issue of consent. In order to meet the requirements of the statute, it must be shown that the victim engaged in a pattern of behavior that was extremely similar to the defendant's version of the encounter.

Appellant met victim at a bar and it was the victim that initiated conversation with the defendant. The lower court ruled inadmissible the victim's own testimony outside of the jury's presence that she had consensual sex with three men other than her boyfriend, one of whom she met at a bar. The lower court did not find that the proffered evidence constituted a "pattern of behavior"; that the victim's one prior incident of leaving with a man after meeting him at a bar did not constitute repetitive or frequent conduct. The pattern must be distinctive and "so closely resemble the defendant's version of the encounter that it tends to prove that the complainant consented to the acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented." The defendant's rights to cross-examine the witness may limit the application of the statute where the evidence is relevant to establish bias or motive to lie.

Lewis v. State, 591 So.2d 922 (Fla. 1991).

The sexual history of young victims has also been found to be relevant where a false accusation would keep the young victim from getting in trouble for consensual sexual activity.

Minus v. State, 901 So.2d 344 (Fla. App. 4 Dist.,2005).

Courts have also held that evidence of prior sexual relationships are relevant to the issue of consent and is not inadmissible under the statute. Allegations by the victim of prior rapes committed by the same defendant have also been found relevant to the issues of bias, credibility, and consent.

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HAWAII

State v. Iaukea, 62 Haw. 420, 616 P.2d 219 (1980).

The defense argued that the complaining witness' prior acts of sexual intercourse and reputation should be disclosed, where the victim had a promiscuous sexual history. The Court held, however, that even if the defense of consent were raised, there was no basis for inquiry into complainant's past history. Past sexual conduct of a victim is only admissible on the specific issue of consent. **Additionally, where there is strong evidence of force, that evidence destroys the issue of consent, sufficient to render past sexual history irrelevant.**

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ILLINOIS

People v. Cornes, 399 N.E.2d 1346 (Ill. Ct. App. 1980).

Under the statute, the defendant cannot seek to introduce into evidence "prior sexual activity and reputation of the complainant except when it concerns the past sexual conduct of complainant with the defendant."

People v. Santos, 813 N.E.2d 159 (Ill. 2004).

Court held that rape shield statute prevented defendant from introducing victim's prior inconsistent statements to emergency room personnel concerning the victim's sexual contact with a male other than defendant.

People v. Buford, 441 N.E.2d 1235 (Ill. Ct. App. 1982).

Courts have held that the state's rape shield statute is constitutionally valid under separation of powers and the requirement of an in camera offer of proof is not violative of the defendant's rights against self-incrimination.

People v. Hughes, 121 Ill.App.3d 992 (1984).

Rape shield statute did not unconstitutionally deny defendant right to present evidence that complainant was a prostitute.

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INDIANA

Fugett v. State, 812 N.E.2d 846 (Ind. Ct. App. 2004)

Fugett contends that the trial court erred in excluding evidence that T.M. previously falsely accused another person of molesting her. The Court held:

1. Exclusion of evidence that child victim made prior false accusation of molestation was not manifest abuse of discretion;
2. exclusion of such evidence did not violate defendant's right to confrontation and due process; and
3. exclusion did not necessarily violate state constitutional right to have jury determine law and facts of case.

The court provided reasoning under the common law exception: evidence of prior false accusations may be admitted, but only if (1) the complaining witness admits he or she made a prior false accusation of rape; or (2) the accusation is demonstrably false. Williams, 779 N.E.2d at 613. Prior accusations are demonstrably false where the victim has admitted the falsity of the charges or they have been disproved. Perry v. State, 622 N.E.2d 975, 980 (Ind.Ct.App.1993). Additionally, the evidence created merely an inference that the accusation was false. We determined that the trial court did not err because there was no evidence that the victim made contrary statements about whether or not the sexual misconduct occurred. Also, while the right to determine the law and the facts is vested with the jury, it does not follow that trial courts have no authority to exclude evidence from trials. Trial courts have the inherent authority to control the conduct of trials. Trial court was within its discretion in excluding the evidence in this case.

Steward v. State, 636 N.E.2d 143 (Ind. Ct. App. 1994)

Expert testified concerning "child sexual abuse syndrome." Trial court excluded evidence which would have shown that the minor reported four other men who had molested her at around the same time she reported Steward. The issues at trial where: (1) whether the trial court erred in admitting expert testimony regarding "child sexual abuse syndrome." And (2) whether the trial court erred in precluding Steward from presenting exculpatory evidence concerning one victim's accusations of prior molestations by men other than Steward.

The Court held that on these facts that it was constitutional error to exclude evidence of prior molestations through cross-examination and to prohibit Steward from proving that there was another possible explanation for the victim's behavior, which was consistent with that of a victim of child sexual abuse. Steward was denied his Sixth Amendment right of cross-examination.

The exculpatory evidence which Steward offered to prove would have shown S.M. reported that four other men had molested her at around the same time that she reported Steward's molestation. This evidence gives rise to three possible

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inferences: (1) S.M. was molested by several men including Steward; (2) S.M. was molested only by these other men; or (3) S.M. was molested only by Steward. By the exclusion of evidence of other molestations, the jury was given the distinct impression that it was Steward who caused S.M.'s behavioral problems. In turn, Steward was prevented from presenting evidence that the improvement in S.M.'s behavior could have been caused by her reporting the abuse committed by the other men, thus raising an inference that the other men were entirely responsible for S.M.'s behavior.

Stephens v. Morris, 13 F.3d 998 (Ind. 1994.)

Defendant seeks habeas from conviction of attempted rape. His statements allegedly made during consensual sexual intercourse referring to the complaining witness liking "doggie fashion," the possibility of "partner switching," and her prior sexual history with another man were excluded at trial. He sought to testify as to making these statements to show that they angered the complaining witness and provoked her to fabricate a story that he attempted to rape her.

First, he argues that the court misapplied the Indiana Rape Shield Statute. Second, Stephens claims that the court's application of the Indiana Rape Shield Statute violated his constitutional right to testify in his own defense. Finally, Stephens argues that the excluded testimony should be admissible as the *res gestae* of the attempted rape.

The Court held that habeas corpus cannot be granted to review alleged misapplication of state law.

- The Indiana trial court properly balanced Stephens' right to testify with Indiana's interests because it allowed him to testify about what happened and that he said something that upset Wilburn. The Constitution requires no more than this. The interests served by the Indiana Rape Shield Statute justify this very minor imposition on Stephens' right to testify.
- First, we do not accept Stephens' *res gestae* argument because to do so would effectively gut rape shield statutes and violate the principle established in *Lucas.* Second, Stephens offers nothing, probably because nothing exists, to support his res gestae argument as a constitutional violation. In fact, the use of the term res gestae, for purposes of federal law, is essentially obsolete.

Oatts v. State, 899 N.E.2d 714 (Ind. Ct. App. 2009)

The Court held that evidence that child victim had viewed an allegedly pornographic videotape and had been previously molested was inadmissible under the rape-shield rule; exclusion of evidence that child victim had viewed an allegedly pornographic videotape and had been previously molested did not violate defendant's constitutional right to cross examine witnesses; and any error in trial court's response to a question asked by the jury during deliberations did not affect defendant's substantial rights.

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Sallee v. State, 785 N.E.2d 645 (Ind. Ct. App. 2003)

Facts: Pierce sought to introduce evidence to counteract alleged assertions by the State that the victim was sexually naïve and to attack her credibility. FN3 She proffered evidence that the victim first engaged in sexual intercourse at the age of fourteen. She also wished to introduce evidence that the victim stated in a pre-trial deposition that her "guess" was that she had last had intercourse with her sometimes boyfriend "a couple of months" prior to this incident, while her boyfriend stated in his deposition that sexual intercourse between the two had most likely occurred within days before the incident. This evidence does not fit into any of the exceptions listed in Evid.R. 412. Pierce contends, however, that the evidence impacted her Sixth Amendment right to present evidence.

Reasoning: In addition to the rape shield statute's enumerated exceptions, a common-law exception has survived the 1994 adoption of the Indiana Rules of Evidence. *See* Graham v. State, 736 N.E.2d 822, 825 (Ind.Ct.App.2000), *trans. denied.* This exception provides that evidence of a prior accusation of rape is admissible if: (1) the victim has admitted that her prior accusation of rape is false; or (2) the victim's prior accusation is demonstrably false. *Id.*

- Evid.R. 412(b) requires the defendant to give written notice any time the defendant proposes to offer evidence under "this rule."
- Pierce's failure to comply with Evid.R. 412(b) precluded her from presenting evidence of the victim's past sexual history. Her failure also results in waiver of this issue on appeal.
- Furthermore, even if Pierce had complied with the requirements of Evid.R. 412(b), she still would not prevail. The ***652*** offer of evidence that the victim first engaged in sexual intercourse at fourteen was premised on Pierce's contention that the State had characterized the victim as sexually naïve. In support of this contention, Pierce cites this court to a portion of the prosecutor's opening statement, which, of course, is not evidence. In the cited portion, the prosecutor makes reference to the victim's obvious youth, but she does not refer to any sexual naïvete. In fact, the victim later testified that she had cohabited with her sometimes boyfriend for a short period of time. Under these circumstances, the trial court did not abuse its discretion in prohibiting Pierce from offering the proffered evidence.

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IOWA

State v. Davis, 269 N.W.2d 434 (Iowa 1978).

Facts: On cross-examination of complaining witness, defense counsel attempted to inquire if she had had sex within a year prior to the time of the trial and if she had had sex before the night of the alleged rape. Prosecution objected to both questions, and the Judge sustained. The Court looked at the constitutionality of the rape shield statute. The Court held that it did not need to reach the issue of constitutionality because the court was correct in sustaining the objections to these two questions on relevancy grounds.

State v. Parsons, 401 N.W.2d 205 (Iowa Ct. App. 1986)

Defendant sought to introduce evidence of victim's past sexual conduct to rebut testimony suggesting that her conflicting statements made concerning the incident were a result of her sexual inexperience. He also contended that this evidence was relevant to rebut testimony contending that blood found on the victim's bed sheets was due to her virginity. The trial court denied this request to introduce this evidence due to the defendant's failure to submit an offer of proof on such matters in writing. Also, the Court found that there was no constitutional basis for admitting the evidence, and there was no impeachable testimony introduced at that point in the trial. The issue at trial was whether introduction of complaining witnesses past sexual behavior was constitutionally required in this case.

The Court held that the Constitution requires only the introduction of relevant and admissible evidence. Defense in this case rested on defendant's being home at the time the rape occurred. The complaining witness's virginity had no bearing on this defense and had no probative value as to the question of identity of the victim's attacker. The prejudice of admitting the evidence would have outweighed its probative value and would have only served to embarrass the victim.

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KANSAS

State v. Stellwagen, 659 P.2d 167 (Kan. 1983)

Holding: Court upheld that victim's prior sexual history, even with the accused, is inadmissible at trial as that activity does not of itself imply consent to the act complained of.

State v. Potts, 118 P.3d 692 (Kan. Ct. App. 2005)

Long history of domestic violence allegations between the accusing witness and the defendant. Defendant sought to introduce evidence that the complaining witness had previously been raped by her ex-husband and alleged that this incident was necessary for this theory that the witness's state of mind was relevant to her relationship with the defendant. Defendant never formally filed a rape shield motion pursuant to the Kansas rape shield statute.

The issue at trial was whether the alleged rape of the complaining witness by another individual considered "sexual history" under the rape shield statute? The Court held, yes. Defendant was allowed to introduce evidence of the complaining witness's mental state during the time leading up to defendant' arrest. During cross-examination, complaining witness admitted that her ex-husband was abusive. There is no abuse of discretion in the trial court's decision to disallow testimony about the alleged rape of the complaining witness by another individual.

State v. Atkinson, 80 P.3d 1143 (Kan. 2003)

The district court prohibited Atkinson from cross-examining the complaining witness regarding whether she had consensual intercourse with Atkinson the night before the alleged rape, which Atkinson argues explained the presence of sperm matching Atkinson's DNA; whether she and Atkinson had a prior sexual relationship; and her admitted falsehood to police regarding their relationship.

The issue at trial was whether the trial court's refusal to admit evidence concerning an alleged sexual encounter between the defendant and the complaining witness the night before the event here at issue deprive the defendant of his rights under the Due Process and Confrontation Clauses under the United States and the Kansas Constitutions?

The Court held that the district court improperly applied the Kansas rape shield statute in a manner that infringed on Atkinson's constitutional rights to confront witnesses and present a defense. The Court reasoned that "[t]he statute does not create an absolute prohibition against evidence of the victim's prior sexual misconduct or against cross-examination of the victim. Rather, evidence of prior sexual conduct may be admitted upon determination that it "is relevant and is not

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otherwise inadmissible as evidence." The physical evidence of Atkinson's DNA was a key fact at issue. Disallowing the defendant to cross-examine the witness regarding the events of the previous night severely deprived him of his right to confront the accusing witness on this key fact.[6]

State v. Blue, 592 P.2d 897 (Kan. 1979)

The trial court admitted evidence that the prosecuting witness was a prostitute, and that as such she had engaged in sexual relations with the defendant and with a codefendant some thirty days prior to November 1, 1977, the date on which the rape and aggravated sodomy were alleged to have occurred. The trial court refused to admit evidence of an oral statement made by the prosecuting witness to a police officer at the time defendant was arrested, in which she admitted acts of prostitution with other men in numerous cities over the United States.

The Court held that "[t]he threshold question for the admissibility of evidence is relevancy. The Kansas statute does not undermine the defendant's right to present relevant evidence regarding the victim's prior sexual conduct. It only requires that there be a pretrial determination of the relevancy of that evidence.... Since the statute permits the admission of the evidence when it is truly relevant, excluding it only when and to the extent that it is irrelevant, the statute is constitutional. It is well suited to protecting the defendant's constitutional rights, the victim's interest in keeping her private life private, and the state's interest in conducting rape trials without the obstruction of irrelevant and inflammatory evidence."

State v. Carmichael, 727 P.2d 918 (Kan. 1986)

Defendant, seeking to admit evidence of complaining witness's venereal disease, asserted that the rape shield statute was unconstitutionally vague because it did not define "sexual conduct." Does evidence of a venereal disease constitute "sexual conduct" under the rape shield statute, and is the statute unconstitutionally vague? The Court that no prior case law questions the constitutionality of the rape shield law based on vagueness. While the term "venereal disease" does not necessarily connote behavior, when it is used in the context of a rape trial, it indicates some evidence of sexual conduct.

[6] This case is also useful in its implications of the confrontation clause. This case could be used by the defense to support confrontation challenges and infringements on the defendant's rights.

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KENTUCKY

Bixler v. Commonwealth, 712 S.W.2d 366 (Ky. Ct. App. 1986)

Consolidated appeal. Both defendants appeal trial court's decision to exclude their testimony concerning complaining witness's prior sexual conduct with one of the defendants.

The issue at trial was whether the trial court erred in excluding evidence of a prior sexual relationship between the victim and a defendant. The Court held that under the clear language of the statute, it is evident to this Court that such evidence should be admissible if its probative value outweighs its inflammatory or prejudicial nature, and if it is material to an issue of fact. Clearly, the testimony was material and relevant to the question of consent. And, this Court finds that its probative value outweighed any resulting prejudice.

Smith v. Com., 566 S.W.2d 181 (Ky. Ct. App. 1978)

Defendant sought to testify and include other witnesses' testimony regarding prior sexual misconduct of the complaining witness. This testimony was not allowed, and the defendant appealed. The Court maintained that the only evidence concerning prior sexual conduct of the complaining witness that could be admissible would be that involving both the complaining witness and the defendant.

Commonwealth v. Dunn, 899 S.W.2d 492 (Ky. 1995)

Trial court convicted defendant of first-degree rape after excluding evidence of a previous relationship between the complaining witness and the defendant. The victim alleges that the defendant came to her home, which she shared with her husband and infant child, with a woman he had met at a bar. The victim was babysitting for this woman. The defendant and victim had a longstanding friendship, which she testified to, and had a previous relationship. During his visit to the apartment, the victim and defendant had sexual intercourse twice, which she testified was compelled by physical force and threats made on her and her child. The Court of Appeals reversed his conviction, and the Kentucky Supreme Court reinstated the conviction.

Did trial court err in excluding evidence regarding a previous sexual relationship between the defendant and the complaining witness? No time reference was provided to the jury regarding the prior relationship. Given all the circumstances, including the passage of about seven years since the alleged sexual relationship when Dunn and the prosecuting witness were single and allegedly dating, the circuit court clearly was well within his discretion in the KRE 412(c)(3) ruling.

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MAINE

Maine v. Robinson, 803 A.2d 452 (Me. 2002)

Defendant appeals from a trial court decision to exclude evidence that the victim had been sexually assaulted by another man prior to the sexual assault for which defendant was charged. Defendant alleged that the evidence of a sexual assault prior to his encounter with the victim would be relevant to her state of mind at the time. DNA was collected from the defendant and the victim's ex-boyfriend, who defendant alleged previously sexually assaulted the victim. The DNA sample matched the defendant. Did trial court err in excluding testimony concerning a previous sexual assault? No. DNA was collected from both men, and the nature of the previous sexual encounter that took place before the one at issue was irrelevant to the instant case.

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MARYLAND

Johnson v. State, 632 A.2d 152 (Md. 1993)

In the case *sub judice,* the parties agree, unlike in *White,* 598 A.3d 187, that sexual contact occurred. The petitioner avers that the victim was freaking for cocaine, of which he was a beneficiary, but became angry when neither Jackson, Galloway, nor the petitioner gave her the drugs she had been promised. On the other hand, although she has admitted freaking for drugs in the past, and as recently as within one week prior to the alleged rape, the victim, says that she was raped. This Court has to decide, therefore, whether the victim's admission has special relevance to this critical issue. In the event that we conclude that it does, then the Court must determine whether the trial court abused its discretion when it determined that its probative value was outweighed by its prejudicial effect. The evidence was improperly excluded that the victim traded sex for drugs.

White v. State, 598 A.2d 187 (Md. 1991)

Defendants charged with kidnapping a woman, raping her, and then stealing four dollars from her sought to admit testimony into evidence from a man alleging the victim had previously offered or exchanged sex for drugs. Defense told the court that the evidence was being offered under the exception of the rape shield statute covering evidence supporting a claim that the victim has an ulterior motive in accusing the defendant of a crime.

Testimony would have been extremely prejudicial in addition to being largely irrelevant. In order for defendants to succeed in getting this evidence to the jury, however, they must convince the trial judge first that it "is relevant and is material to a fact in issue," and second "that its inflammatory or prejudicial nature does not outweigh its probative value." The defendants allege that victim was angry with them for not obtaining more cocaine for her, not their declining her offer for sex in exchange for drugs. Any prior sexual acts or prior sexual solicitations by victim could have little, if any, relevance to her alleged anger at the defendants. In addition, the fact that victim may have successfully offered or traded sex for drugs in the past does not tend to show that she would become enraged with the defendants for failing to supply her with drugs and declining her alleged sexual solicitation. Testimony sought here would have dubious relevance to establishing that victim had an ulterior motive to lie, whereas its prejudice to victim and the State would be extreme.

Thomas v. State, 483 A.2d 6 (Md. 1984)

On appeal, defendant sought to introduce testimony concerning the victim's medical history, including whether she was a virgin and if she used a birth control device, into evidence. Appellant claimed that the medical history was relevant to and probative of his contention that Ms. Wilkins consented to intercourse with him and

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that she "liked sex with black men." Appellant claims that the exclusion of this evidence deprived him of the ability to present an effective defense and that consequently he is entitled to a new trial.

Evidence concerning victim's virginity or use of a birth control device does not tend to prove or disprove that she liked sex with black men and consented to intercourse with the appellant. This evidence was irrelevant and properly excluded. The Court also noted that rape shield laws may not be used to exclude probative evidence in violation of a defendant's constitutional rights of confrontation and due process, but a defendant does not have a constitutional right to introduce irrelevant evidence at trial.

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MASSACHUSETTS

Com. v. Costello, 635 N.E.2d 255 (Mass. App. Ct. 1994)

Defense counsel sought to elicit from complaining witness and her therapist evidence of her knowledge of sex gained from sexual activity with a man other than Defendant, allegedly occurring in January of 1986. The Court held that the trial court did not err in restricting the defendant's cross-examination of the complaining witness regarding her sexual knowledge.

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MICHIGAN

People v. LaLone, 437 N.W.2d 611 (Mich. 1989)

The issues in this case were 1) whether the proposed testimony and cross-examination concerning the complainant's sexual contact with a third person were properly excluded under the rape-shield statute, M.C.L. § 750.520j(1); M.S.A. § 28.788(10)(1); 2) whether the proposed testimony and cross-examination concerning the complainant's sexual contact with a third person were properly excluded under MRE 404(a)(3) and whether MRE 404(a)(3) supersedes the rape-shield statute.

The Court held that the exclusion of evidence of complainant's sexual history did not violate either the rape-shield statute or the defendant's Sixth Amendment right of confrontation. The Court did not, however, address whether MRE 404(a)(3) supersedes the statute or whether the exclusion of the evidence of complainant's sexual history violates that rule. Rather, Court determined that leave was improvidently granted as to those issues. At trial, defense counsel did not argue that admission was proper under the rule, and the trial judge did not base his rulings in limine on such a conflict. Moreover, the Court of Appeals did not address the claim, having not been asked to do so. While the issues are of significance, Court concluded that it should not address them without a full record having been developed below.

People v. Thompson, 257 N.W.2d 268 (Mich. 1977)

"The right of confrontation protected by the Sixth Amendment secures principally the right to cross-examine witnesses. Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). Cross-examination is principally a means by which the credibility and veracity of a witness is tested. Being based upon the Sixth Amendment, defendant's challenge to the statute thus may be stated: prohibiting the testing of the rape victim's credibility and veracity by asking the victim about his or her sexual conduct with third persons infringes upon the fundamental right of confrontation. The problem is, however, that there is no fundamental right to ask a witness questions that are irrelevant. Inquiry on cross-examination into the rape victim's sexual behavior with third persons is not relevant. Evidence is relevant when it is sufficiently probative of a fact in issue to offset the prejudice its admission produces. Jarecki v. Ford Motor Co., 65 Mich.App. 78, 83, 237 N.W.2d 191 (1975). The rape victim's sexual activity with third persons is in no way probative of the victim's credibility or veracity. If it were, the relevancy would be so minimal it would not meet the test of prejudice." People v. Thompson (1977), 76 Mich.App. 705, 257 N.W.2d 268, 272.

People v. Makela, 383 N.W.2d 270 (Mich. 1985)

Court found that victim's past sexual experience and possible pregnancy at

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preliminary examination held more than one year after the alleged incident were irrelevant.

People v. Wilhelm, 190 Mich. App. 574 (1991).

Where the victim exposed her breasts to others at a bar and then allowed one of the bar patrons to touch her does not constitute sexual conduct. Also, the defendant's presence and viewing of this action does not constitute sexual conduct with him. Also, exclusion of this behavior does not violate the defendant's confrontation rights.[7]

[7] *See State v. Colbath*, 130 N.H. 316 (1988)(In weighing the prejudicial and probative force of the evidence, the Court found that the public character of the complainant's behavior was significant and probative. The Court reasoned that sexually suggestive conduct on the presence of patrons is far less damaging than revealing what the person may have done privately behind closed doors).

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MINNESOTA

State v. Friend, 493 N.W.2d 540 (Minn. 1992)

The Court held that evidence that victim had consensual sexual intercourse with third party two weeks prior to her death was not admissible under rape shield law.

State v. Kobow, 466 N.W.2d 747 (Minn. Ct. App. 1991)

Appellant alleges the trial court abused its discretion in excluding evidence that T.L.H. had made allegations that individuals other than appellant had sexually abused her. The Court held that evidence of allegations of sexual misconduct made by victim against others was "sexual conduct" for purposes of rape shield law, and the defendant was not deprived of his right to a fair trial by exclusion of this evidence.

State v. Kobow, 466 N.W.2d 747 (Minn. Ct. App. 1991)

Appellant implies that "sexual conduct" only covers prior consensual acts of the complainant. However, the statute does not draw this distinction. In addition, Minnesota courts have applied the term "sexual conduct" to exclude evidence of cohabitation, State v. Hill, 309 Minn. 206, 211, 244 N.W.2d 728, 731 (1976), *cert. denied* 429 U.S. 1065, 97 S.Ct. 794, 50 L.Ed.2d 782 (1977) and sexual preference. State v. Mar, 291 N.W.2d 223, 225 (Minn.1980).

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MISSISSIPPI

Johnston v. State, 376 So.2d 1343 (Miss. 1979)

The appellant was granted an in-chambers hearing to determine if testimony from the prosecutrix concerning her sexual conduct would be competent, relevant and material. Her testimony was positive and unequivocal that she had not had sexual intercourse with anyone during the month prior to the alleged rape. The defendant produced no evidence to the contrary and any evidence of her sexual conduct a month prior would be too remote and, therefore, incompetent, irrelevant and immaterial. The court was correct in excluding such evidence.

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MISSOURI

State v. Sloan, 912 S.W.2d 592 (Mo. Ct. App. 1995)

The defendant was convicted of sexual abuse and sodomy. The trial court sustained the State's motion in limine to exclude evidence, pursuant to the rape shield statute-§ 491.015, discussed *infra*-of any prior sexual conduct by the child victim. Sloan, 912 S.W.2d at 598. On appeal, the defendant argued that the trial court erred in prohibiting the victim's grandmother from testifying about the victim's sexual behavior in the year preceding the charged offenses. Id. The court upheld the trial court's ruling, citing Lampley and Harvey and finding that the defendant failed to show why the testimony qualified under the § 491.015.1(1)-(4) exceptions. *Id.* The court further stated that "the testimony of [the victim] was simple, child-like recollections of unlawful touching which was probative without reference to any prior sexual experience or knowledge of any sexual connotation in the conduct attributed to defendant." Id. at 599.

State v. Lampley, 859 S.W.2d 909 (Mo. Ct. App. 1993)

The defendant was convicted of sodomy. On appeal, the defendant argued that the trial court erred by refusing to allow him to cross-examine the complaining child witness about a previous complaint of sexual abuse involving someone else. The defendant contended that the child did not like him and she realized from previous experience that accusing him of sexual molestation would get him out of the home-the same manner in which she benefited from the prior complaint. The court stated that the complaining witness may have had a motive to falsely accuse the defendant, and that because of the previous molestation and the subsequent conviction and removal of the offender from her home, evidence regarding the prior abuse was relevant to the witness's credibility. Id. at 911. The court held that exclusion of the evidence violated the defendant's right to a fair trial.

State v. Montgomery, 901 S.W.2d 255 (Mo. Ct. App. 1995)

The defendant was convicted of sodomy. On appeal, he claimed the trial court erred in sustaining the State's motion in limine precluding him from adducing testimony regarding the complaining child witness's prior accusations of abuse against other people. Id. at 256. Within a four-year period, the child had accused five different persons, not including defendant, of inappropriately touching her. Id. at 257. The eastern district stated that the complaining witness may have had a motive to falsely accuse the defendant, reasoning that the witness testified that she wanted her mother's attention, and the prior allegations of abuse could demonstrate a motive to fabricate by illustrating a pattern of the witness's attempts to get her mother's attention by making allegations of sexual abuse. Id. The court concluded that the witness's prior allegations of sexual abuse were relevant to her credibility.

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State v. Harvey, 641 S.W.2d 792 (Mo. Ct. App. 1982)

The defendant was convicted of attempted rape. On appeal, he argued that the trial court erred in prohibiting any reference to a prior unrelated sexual assault on the child victim because absent such evidence the jury was left with the assumption that the defendant's alleged actions were the source of her sexual knowledge. Harvey, 641 S.W.2d at 798. This court rejected the defendant's argument, finding that the defendant's intent in seeking to introduce evidence relating to the victim's past sexual experience was to attack her credibility by implying that when she described certain acts allegedly performed by the defendant, she actually described events which she learned about at that earlier time. Id. We further stated that the victim's sister had fully corroborated the victim's version of events and therefore the defendant was not prejudiced by the trial court not admitting the evidence of the victim's past sexual experience. Id.

State v. Sales, 58 S.W.3d 554 (Mo. Ct. App. 2001)

The defendant was convicted of two counts of sodomy. On appeal, he contended that the trial court erred in excluding evidence that one of the victims had previously been sexually victimized in an unrelated attack. The defendant argued that he had a constitutional right to introduce evidence of the prior abuse because it was relevant to show how the victim, a young boy, could have acquired a precocious sexual knowledge. We stated that it was necessary to consider both the defendant's constitutional rights and the prohibitions of the rape shield statute. We found that if the State did this, then the defendant was constitutionally entitled to put on a defense showing an alternative source of the knowledge. However, we found that the State never presented evidence claiming or suggesting that the child's precocious sexual knowledge was acquired from an encounter with the defendant. Id. at 559.[8] Our conclusion was that the trial court correctly excluded evidence of the victim's previous abuse because 1) it did not fall within any of the four exceptions in the rape shield statute, and it was not relevant or material to any issue in the case; and 2) the defendant's constitutional rights were not violated in that the State did not attempt to use evidence of the victim's unusual sexual knowledge to establish the defendant's guilt.

State v. Samuels, 88 S.W.3d 71 (Mo. Ct. App. 2002)

Defendant appeals from convictions of three counts of statutory rape in the first degree, § 566.032, four counts of statutory sodomy in the first degree, § 566.062, and one count of statutory rape in the second degree, § 566.034. The sole point on appeal is that the trial court erred in sustaining the State's motion in limine and

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[8] The Court distinguished cases where the testimony about the absence of a hymen had only a purpose to support the victim's testimony that the defendant had intercourse with her. We also distinguished cases where the State attempted to introduce so-called general profile testimony describing behaviors and other characteristics commonly observed in sexual abuse victims.

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precluding him from presenting evidence that the victims, A.S. and A.B., alleged that men other than him had sexually abused them.

The Court held that evidence of the victim's precocious sexual knowledge should have been admissible where the state presented evidence to show that the defendant had abused the victim. The defendant has a constitutional right to present evidence to defend himself and to assert that the victim's knowledge originated from a different source.[9]

State v. Miller, 870 S.W.2d 242 (Mo. Ct. App. S.D. 1994)

Defendant sought to cross-examine complaining witness under the exception of the state rape shield statute that allows "evidence of specific instances of sexual activity showing alternative source or origin of semen, pregnancy or disease." Complaining witness was 14 and pregnant. Defendant was 22 and allegedly the father of the complaining witness's unborn child. In a hearing away from the jury, the judge told defense counsel "the mere fact that she went out on a date is not evidence. It has to be an evidence of a specific incidence of sexual activity."

Was defendant's Sixth Amendment right to confrontation violated when he was prohibited from asking questions relating to complaining witness's dating relationships because evidence of these "dating relationships" with men other than Defendant "could have raised doubt in the minds of the jurors that [Defendant] was the source of her pregnancy?"

Defendant wrongfully equates "date" with an occasion for sexual activity. Defendant may not disregard the offer of proof requirement of § 491.015.3 and then prevail in a claim that the trial court's rejection of the evidence violated his right to confront the witnesses against him. In this appeal, the offer of proof is specific only with respect to the time frame. It must provide a relevant time frame, relevant sexual activity, and an identifiable sexual partner.

[9] *Samuels* is a cautionary tale to prosecutors to be careful what evidence they introduce on direct of the victim. Be cautious to not open up a line of questioning that would invite the defendant to cross-examine your victim on an issue otherwise protected under your state's rape shield law.

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MONTANA

State ex rel. Mazurek v. District Court of Montana Fourth Judicial Dist., 922 P.2d 474 (Mont. 1996).

Defendant sought to admit evidence of the past sexual behavior of the victim's, including their actions the night of the alleged rape and prior to that incident. Defendant also sought to admit testimony concerning one of the victim's making false accusations of sexual assault prior to the incident at issue. The lower court sought to include all of this evidence, and the State sought a writ of supervisory control, arguing that there would be no adequate remedy at the appellate level for the victim's if this evidence was admitted.

None of the evidence the lower court intended to admit fell within the two exceptions of the rape shield statute: victim's past sexual conduct with the offender or victim's sexual activity to show the origin of semen, pregnancy, or disease, which is at issue in the prosecution. The Sixth Amendment right of confrontation is not absolute and that the Rape Shield Law serves a compelling state interest in preventing rape trials from becoming trials on the prior sexual conduct of the victims. Howell, 839 P.2d at 91; Fitzgerald, 776 P.2d at 1223-24. In balancing the rights of victims and the rights of the defendant we have stated that:

"The Sixth Amendment is not absolute, and 'may bow to accommodate other legitimate interests in the criminal trial process.' [Chambers v. Mississippi (1973), 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297, 309.] The rape shield statute has been upheld as a legitimate interest justifying curtailment of the constitutional right to confront witnesses."

State v. Fitzgerald, 776 P.2d 1222 (Mont. 1989).

Defendant sought to introduce testimony into evidence alleging that the complaining witness was actually a prostitute who had consented to the sexual conduct, but did not want to return to her pimp without nightly earnings. In the present case, although the defense argues that the testimony about prostitution would go toward the victim's veracity and motivation to fabricate a rape story, we conclude that the District Court did not err in ruling that the prejudicial effect of that testimony on the credibility of the victim would outweigh its probative value. As the State points out in its brief, the defense did not offer any witnesses, other than possibly the defendant, who could testify that the victim and Collette were prostitutes. It did not offer testimony that the victim had solicited defendant to engage in sexual intercourse for money. Further, even if it were proven that the victim was a prostitute, that would not have proven consent. We hold that the District Court did not violate the defendant's right of confrontation by refusing to allow the desired cross-examination.

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State v. Higley, 621 P.2d 1043 (Mont. 1980)

Defendant appealed alleging that the rape shield statute denied him his right to confrontation. He sought to introduce evidence that the victim laughed about the incident and evidence concerning her manner of dress at the time.

The court noted that rules limiting inquiry into the sexual conduct of the victim of a sex crime do not deny a defendant his constitutional right to confront witnesses. It affirmed the defendant's conviction but vacated his sentence on other grounds.

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NEW HAMPSHIRE

State v. Lemire, 345 A.2d 906 (N.H. 1975)

Defendant was limited to cross-examination of a victim only as to general reputation for unchaste acts with third parties and no violation of Sixth Amendment was found.

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NEW JERSEY

State v. Budis, 593 A.2d 784 (1991)

At trial, defendant sought to cross-examine both T.D. and the investigating detective about the sexual abuse of T.D. by her stepfather in 1987. T.D. gave virtually identical descriptions of her stepfather's conduct and of defendant's acts. The purpose of the cross-examination was to show that T.D. had acquired knowledge of oral and vaginal sex from a source other than defendant. He argues that in the absence of such testimony, the jury would conclude that the infant must have obtained her knowledge from her encounters with him. The trial court admitted evidence of T.D.'s accusation against her stepfather and of the ensuing police investigation, but excluded the details of the stepfather's abuse. Appellate Division reversed, and the New Jersey Supreme Court affirmed.

The probative value of the evidence outweighed its possible prejudicial effect. The evidence, however, is relevant, and therefore admissible, only to show an alternative source for the infant's sexual knowledge, not to prove that she was likely to or actually did initiate sexual conduct with defendant.

The statute prescribes the circumstances under which the trial court may consider the evidence to be relevant. The court may find evidence of prior sexual conduct relevant only if "it is material to negating the element of force or coercion or to proving that the source of semen, pregnancy or disease is a person other than defendant." N.J.S.A. 2C:14-7(c). For all other purposes, the statute declares evidence of prior sexual conduct irrelevant. To this extent, the statute differs from Federal Rule of Evidence 412, which, in addition to permitting evidence of past sexual behavior to show the source of semen or injury, permits such evidence if "constitutionally required." Fed.R.Evid. 412(b)(1), (2).

- When evidence is offered to show a child's knowledge of sexual acts, its relevance also depends on whether the prior abuse closely resembles the acts in question.
- The reason for requiring similarity between the acts is that prior acts are more likely to affect the child's ability to describe the acts in question if they closely resemble the previous ones.
- Prejudice may be diminished if the evidence can be adduced from sources other than the child. In the present case, as the Appellate Division suggested, the evidence could have been elicited from another witness, the official documents involving the convictions arising out of the prior abuse, or by stipulation. 243 N.J.Super. at 513, 580 A.2d 283.

State v. R.E.B., 895 A.2d 1224 (N.J. App. Div. 2006)

Facts: To attack J.B.'s credibility, defendant offered evidence that J.B. had told her paternal grandmother and "many family members" that she had been sexually

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assaulted by her coworkers at Burger King and that they had been fired. After the family spoke to her supervisor at the restaurant and the supervisor indicated that J.B. had never made any such reports, J.B. admitted to her family that she had lied. The court ruled the evidence inadmissible. In addition, the court in this case denied defendant's request to introduce evidence of J.B.'s virginity and lack of sexual knowledge after the alleged onset of abuse. Without complying with the procedural requirements of the Rape Shield Law, *N.J.S.A.* 2C:14-7a, defense counsel indicated on the morning of the first trial date that J.B.'s aunt would testify that J.B. "confided to her that she had lost her virginity to a boy named [C.] in 1999 and began practicing birth control during that time period." The trial court appropriately held such evidence "completely inadmissible. Defense counsel then indicated he would present J.B.'s ex-boyfriend to testify that she had told him she was a virgin during the relevant time period. The court abruptly precluded this testimony as well, obviously viewing defendant's last minute machinations as a "gigantic stall." On the third day of trial, the defense again attempted to present evidence of J.B.'s chastity through a different witness. This time, defense counsel indicated that J.B.'s aunt would testify that "somewhere between 1999 and 2001" J.B. told her she was a virgin and asked her "what sexual intercourse feels like." Lower court didn't allow admission.

Holdings:

1. New Jersey Supreme Court's *Guenther* decision, holding that a defendant can challenge a victim-witness's credibility by introducing evidence that the victim has made prior false criminal accusations, would be applied retroactively on appellate review of defendant's convictions;
2. evidence of when and with whom victim lost her virginity was not admissible under Rape Shield Law;
3. Rape Shield Law did not bar admission of evidence that victim claimed to be a virgin after the alleged attacks by defendant began; and
4. trial court's failure to instruct jury on proper use of evidence of victim's complaint of sexual abuse constituted plain error.

Reasoning: Normally, except for prior convictions, "a trait of character cannot be proved by specific instances of conduct." N.J.R.E. 608. However, two years after defendant's trial and while defendant's appeal was pending, our Supreme Court established "a narrow exception to N.J.R.E. 608," that permits a defendant to challenge a victim-witness' credibility by introducing evidence that the victim has made prior false criminal accusations. State v. Guenther, 181 N.J. 129, 154, 854 A.2d 308 (2004). Although the Rape Shield Law restricts a defendant's ability to introduce evidence of the victim's "previous sexual conduct," N.J.S.A. 2C:14-7, a prior false allegation is not subject to the Law because the false allegation does not constitute "previous sexual conduct." State v. Bray, 356 N.J.Super. 485, 496, 813 A.2d 571 (App.Div.2003).

- In this instance, the court should have separated the evidence of the victim's sexual conduct from the evidence alluding to her lack of sexual experience. "[E]vidence that the victim of a sexual assault is not a virgin is the precise

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kind of evidence which the Rape Shield Law was intended to ordinarily exclude." State v. Ogburne, 235 N.J.Super. 113, 121, 561 A.2d 667 (App.Div.1989). When and with whom the victim lost her virginity was subject to the Rape Shield Law and, given the late proffer, was correctly excluded by the trial court. Cuni, supra, 159 N.J. at 598, 733 A.2d 414.

- However, the evidence that the victim claimed to be a virgin after the alleged attacks by her father began in 1998 does ***88** not implicate the Rape Shield Law, because it is not evidence of prior sexual conduct but is evidence of the lack of any prior sexual conduct. State v. Burke, 354 N.J.Super. 97, 102-03, 804 A.2d 617 (Law Div.2002). The alleged disclosure to J.B.'s aunt directly contradicts J.B.'s charge that defendant raped her beginning sometime in 1998, and would have been probative of her credibility. The evidence was ruled inadmissible without the court properly determining its precise nature and whether the probative value of the evidence would be substantially outweighed by any countervailing factors. N.J.R.E. 403. This was error.

State v. Ryan, 384 A.2d 570 (App. Div. 1978)

Facts: Defendant claims that he was improperly precluded from cross-examining the victim about a specific instance of sexual intercourse in which she had engaged with an unknown man other than defendant, presumably consensually, the night before the night of the incident giving rise to this charge.

Issues:

1. Did the trial judge abuse his discretion in failing to permit introduction of the complaining witness's statement of a recent act of intercourse and in summarily barring cross-examination with respect thereto?
2. Did the rape shield statute, construed to bar cross-examination as to the complaining witness's statement of intercourse with another individual shortly before the alleged rape, deny defendant his constitutional right to confront witnesses?
3. Was it prejudicial error to excluded defendant's statement indicating consent when made within a brief period of time after the alleged rape?

Holding: In the present case any prior consensual intercourse with others or another man was neither relevant nor material to the issue of whether the victim had consented to intercourse with defendant. Moreover, the evidence sought to be adduced by defendant was of such low probative value as to justify its exclusion, in the exercise of sound discretion by the trial judge, under the foregoing rules of evidence, Evid.R. 4, and N.J.S.A. 2A:84A-32.1.

Reasoning:

- Evidence of specific instances of a rape victim's consensual sexual intercourse with a person other than the accused is not admissible for the purpose of drawing an inference of consent in another instance.
- N.J.S.A. 2A:84A-32.1 was not intended to, nor does it, change the law in this

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respect, at least on the present record. The rules of evidence to which we have referred and the statute, as applied to the facts of this case, do not violate defendant's confrontation or due process rights.

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NEW MEXICO

State v. Johnson, 944 P.2d 869 (1997)

Facts: At an in camera hearing, the defendant elicited from a Detective who had worked on the case that one of the women told him she had not been working as a prostitute the night she got into the car with the defendant, but she had engaged in acts of prostitution in the past to pay her rent. Defendant argued that this admission when "to a central issue" and also " to her credibility." The trial court denied the defendant's request. Defense counsel also attempted to cross-examine one of the victim's at trial by asking her if she had stopped entering cars with strangers. The trial court sustained the State's objection to this question.

Holdings: (1) evidence of prior sexual conduct of victim of sexual assault must be admitted if defendant shows that evidence implicates constitutional right of confrontation; (2) motive to fabricate is theory of relevance that implicates sexual assault defendant's constitutional right of confrontation; (3) defendant seeking admission of evidence of victim's prior sexual history must show sufficient facts to support particular theory of relevance; (4) evidence of victim's prior acts of prostitution is not material and probative merely because defendant characterizes act with which he is charged as act of prostitution; and (5) allegation that victims engaged in prior acts of prostitution with others who were not identified was insufficient to implicate defendant's constitutional right of confrontation.

State v. Stephen F., 152 P.3d 842 (N.M. Ct. App. 2007)

Facts: Stephen F. (Child) appeals his convictions for two counts of criminal sexual penetration and argues that the trial court erred in excluding evidence of the State's main witness's past sexual activities, which according to Child, showed the witness's motive to fabricate.

Issue: Tension between an accused's confrontation rights and state rape shield statute, which precludes admission of evidence of a witness's past sexual conduct under certain circumstances.

Holding: Child made the requisite showing under State v. Johnson, "establish[ing] a constitutional right to present evidence otherwise excluded by our [rape shield] statute." 1997-NMSC-036, ¶ 28, 123 N.M. 640, 944 P.2d 869. Therefore, the Court held that the trial court abused its discretion in excluding testimony that tended to prove the complaining witness's motive to lie, and the Court reversed Child's convictions and remanded for a new trial.

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NEW YORK

People v. Brown, 24 A.D.3d 884 (2005).

- In prosecution arising out of abduction and physical and sexual assault of 15-year-old girl, cross-examination regarding victim's counseling sessions was precluded given absence of any factual basis that victim suffered from hallucinations or fantasies or had previously made any false claims of sexual assault.

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NORTH CAROLINA

State v. Fortney, 269 S.E.2d 110 (1980).

Defendant in a sexual assault case was asserting the defense of consent. Prior to trial, the Defendant attempted to determine the admissibility of evidence that the victim had engaged in sexual intercourse with third parties. The court ruled that the defense could question the victim on her prior sexual activity with third parties but that DNA evidence found on the victim was irrelevant inadmissible. On appeal, the Defendant challenges the ruling on the basis that the North Carolina rape shield statute, G.S. 8-58.6 is unconstitutional. The Appellate Court held that there is no constitutional right to ask a witness questions that are irrelevant. Also, in its impact and application, this statute is primarily procedural and does not alter any of defendant's substantive rights. And third, there are valid policy reasons, aside from relevance questions, which support this statute.

State v. Langley, 72 N.C. App. 368 (1983).

The trial court excluded evidence of another man's semen stains on clothing pursuant to rape shield statute. Defense maintained that the evidence was needed to show that the acts charged were not committed by the defendant. Where trial court excluded evidence of another man's semen stains on clothing pursuant to rape shield statute, this Court affirmed, holding that victim's sexual behavior was irrelevant to the rape prosecution. Court reasoned that the evidence was not probative of consent, but only raised inference that she had sex with another individual some time prior to the night of the rape.

State v. Sexton, 444 S.E.2d 879 (N.C. 1994).

Holding: In the limited circumstance where the rape victim is deceased and the defendant's own testimony brings into question the victim's sexual behavior, the prosecution may present rebuttal evidence relating to the victim's prior sexual conduct to challenge the credibility of defendant's testimony.

State v. Harris, 622 S.E.2d 615 (N.C. 2005).

The trial court did not permit questioning of the victim's sexual or attempted sex with her boyfriend prior to the alleged rape by the defendant. Appellant argued that exception to Rule 412 is that the proffered evidence is of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the appellant. The appellate court reversed the lower court decision and held that the probative value of the consensual sexual encounter with the victim's boyfriend did not substantially outweigh danger and unfair prejudice to the State and victim.

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State v. Shoffner, 62 N.C. App. 245, 302 S.E.2d 830 (1983).

Appellant argued that trial court erred in excluding testimony by one witness who had observed alleged victim seated on a "soda crate" with two men, one who was unzippering his pants; testimony by another witness that many times at a club, the victim would be "attracting" men and fondling them; and testimony by another witness that alleged victim had been seen or known to have had sexual intercourse with other various men, one in the back of a car, another coming out of a motel room.

The Court held that the trial court erred in excluding evidence where that the victim's past sexual conduct was no different form a pattern of behavior, and that such evidence suggested that the alleged victim's "modus operandi" was to accost men at clubs and make sexual advances.

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NORTH DAKOTA

State v. Piper, 261 N.W.2d 650 (N.D. 1977)

Facts: Defendant challenged the refusal of the trial court to allow inquiry into the complainant's sexual relationship with her boyfriend, when the defense was mistaken identity for her boyfriend.

Holding: The defendant did not comply with the procedures outlined in s 12.1-20-15, NDCC. The record contains no written motion or affidavit. In the absence of such a record demonstrating defendant's compliance with s 12.1-20-15, NDCC, we reject defendant's contention on this evidentiary issue.

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OHIO

Michael, In re, 694 N.E.2d 538 (2d Dist. Montgomery County 1997)

Court held that the application of the rape shield statute to exclude witness testimony and Children Services records concerning prior sexual abuse of child victim did not unconstitutionally deprive juvenile of right to confront witnesses or present defense.

State v. Gardner, 391 N.E.2d 337 (1979)

"In determining whether R.C. 2907.-02(D) was unconstitutionally applied in this instance, we must thus balance the state interest which the statute is designed to protect against the probative value of the excluded evidence.

Several legitimate state interests are advanced by the shield law. First, by guarding the complainant's sexual privacy and protecting her from undue harassment, the law discourages the tendency in rape cases to try the victim rather than the defendant. In line with this, the law may encourage the reporting of rape, thus aiding crime prevention. Finally, by excluding evidence that is unduly inflammatory and prejudicial, while only marginally probative, the statute is intended to aid in the truth-finding process.

The key to assessing the probative value of the excluded evidence is its relevancy to the matters as proof of which it is offered. Appellants contend that evidence of complainant's reputation as a prostitute is relevant to the issue of consent, which was Ogletree's defense to the rape charge. The supposed***75** relevancy here rests on an assumption that prior unchastity with other individuals indicates a likelihood of consent to the act in question with the defendant. While this premise may have had some validity in an earlier time, it seems quite unpersuasive in today's era of more fluid morals. 'As critical thought and analysis have been brought to bear on these issues, it has become apparent that in many instances a rape victim's past sexual conduct may have no bearing at all on either her credibility or the issue of consent.' (citation omitted)" State v. Gardner 59 Ohio St.2d 14, 391 N.E.2d 337, 340-341 (1979).

State v. Williams, 487 N.E.2d 560 (1986)

Holding: Court held that neither rape shield law nor evidence rule precluding proof by extrinsic evidence of specific instances of witness' conduct barred admission of evidence, as to alleged rape victim's reputation in the community as a prostitute, or as to witness' prior sexual relations with victim, where victim, to establish lack of consent, testified on direct examination that she never consented to sex with men because she was a lesbian, so that more than victim's credibility was being

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impeached.

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OREGON

State v. Jalo, 557 P.2d 1359 (1976)

involved a precisely focused confrontation claim that collided with the state's perceived categorical prohibition against evidence of prior sexual conduct. The only evidence against the defendant came from the complainant herself and the court characterized defendant's proffered evidence:

In response the defendant sought to place before the jury evidence, not inherently incredible, that he had discovered the young complainant's sexual misconduct and had threatened to tell her parents. This was offered to attempt to establish the inference, not inherently unreasonable, that the complainant had a motive to and did falsely accuse defendant of the offenses in question. (557 P.2d at 1361)

The court said that "(t)he only difference between Davis and this case is that the policy of . . . (the Oregon law) is to protect a sex-crime complainant." (Id., 557 P.2d at 1362) The court found that Davis compelled the conclusion that the Oregon statute "infringes upon defendant's constitutional right to confrontation as here applied to prohibit evidence of the complainant's ulterior motive for making a false charge." (Id.)

State v. Wattenbarger, 97 Or. App. 414, 776 P.2d 1292 (1989).

Evidence of "past sexual behavior" which generally was inadmissible under rape shield rule included evidence of sexual behavior occurring subsequent to crime, but before trial.

State v. Thompson, 131 Ore. App. 230 (1994)

Appellant argued that the court erred in excluding testimony proving that other two individuals had allegedly offered drugs to the complainant in the past in return for sex. Appellant argues that for four reasons, such evidence should be admissible: Firstly, that such previous acts by complainant of engaging in sex for drugs made it more likely that she did so with the defendant, supporting defendant's theory that complainant consented. Secondly, the evidence demonstrated defendant's state of mind. That he believe that complainant consented to sex. Thirdly, that such evidence was relevant to prove a pattern of distinctive sexual behavior.

The Court found firstly, that there was no logical nexus between complainant's past behavior and a motive to accuse the defendant. Secondly, that defendant's allegations that his "sex for drugs" theory illustrated his state of mind was not suffice where defendant did not show sufficient similarity between prior events and present event as to impact his state of mind. Thirdly, that there was no pattern of

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behavior where such incident occurred on only two undated times; that there was no "habit" as defined by ORE 406.

State v. Andersen, 137 Ore. App. 36 (1995)

Defendant argued that the trial court erred in excluding evidence of statements that defendant heard regarding the victim's reputation, which included that: (1) in early 1989, two friends told defendant to "go get some" from the victim as she was a "free whore;" (2) in early 1989, defendant's former girlfriend said that the victim would "screw anybody;" (3) in mid-1989, another former girlfriend said that the victim was "the easiest lay in town;" (4) in 1990, defendant's former roommate told him that the victim was a "tramp" and a "whore." Defendant argued that such statements went to defendant's state of mind.

However, it is important to note that the court did allow evidence of specific instances of the victim's past sexual relations with two other men and that she frequently went to the bar and acted "suggestively" towards men. The court additionally allowed defendant's testimony that he had seen the victim dancing with five or six men at the tavern, that he had often seen her dancing suggestively on a street corner, that he repeatedly saw her dance close to different men and act suggestively towards them, and that, on a previous occasion, he had left a bar with her and had had a sexual encounter with her in which she was the initiator. The Court affirmed the lower court ruling in excluding the evidence of the victim's alleged promiscuity in that such evidence was immaterial and affirmed the conviction.

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PENNSYLVANIA

Com. v. Dear, 492 A.2d 714 (1985)

Court held that evidence of victim's prior criminal record, was inadmissible, under rape shield statute, to show victim consented to having sexual intercourse with defendant.

Com. v. Quartman, 458 A.2d 994 (1983)

Court held that defendant was not denied his constitutional right to confront witnesses when trial court applied rape shield law to prohibit him from introducing evidence of victim's prior sexual relations, and the trial court properly refused to charge jury that defendant was prohibited from introducing such evidence.

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SOUTH CAROLINA

State v. McCoy, 261 S.E.2d 159 (1979)

Facts: Appellant was convicted of criminal sexual conduct in the first degree. His defense was consent. Appellant challenged the constitutionality of section 16-3-659.1 of the Code of South Carolina arguing that the statute limited his right to confront witnesses and deprived him of a fair trial in violation of the Sixth and Fourteenth Amendments and their South Carolina equivalents.

Holding: The rape shield statute does not unduly restrict the constitutional right to cross-examination and confrontation. The legislature has used a balancing test to consider the interests of the public and prosecuting witnesses as well as the defendant's constitutional rights.

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SOUTH DAKOTA

U.S. v. White Buffalo, 84.F.3d 1052, C.A.8 (S.D.) (1996). Laboratory tests suggesting that the victim, contrary to her assertion, had engaged in consensual sexual intercourse within 72 hours of a rape were inadmissible under the rape shield rule to impeach the victim's truthfulness or to show her capability to fabricate a story about the rape; neither purpose was a recognized exception to the rule.

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TENNESSEE

Shockley v. State, 585 S.W.2d 645 (Tenn. Crim. App. 1978)

Appellant appeals his conviction for rape contending that the trial court improperly applied T.C.A. s 40-2445 restricting his right to cross-examine and to produce witnesses in his own behalf. Appellant denied any sexual relations with the defendant, and consent was not at issue. Prosecutrix alleges that she became pregnant due to the alleged rape. The Court addressed whether T.C.A. s 40-2445 may be applied where evidence of the prosecutrix's previous sexual activity is relevant to contest issues other than consent or credibility?

The court properly admitted evidence of the prosecutrix's pregnancy, but erred in not allowing the appellant to present evidence that he was not the one responsible for the pregnancy. Under the rape shield statute, previous sexual activity with any one other than the defendant is not admissible unless 1) consent is raised as a defense and 2) a judge decides that the evidence is relevant outside of the presence of spectators and the jury.

Bell v. Harrison, 670 F.2d 656 (6th Cir. 1982)

Appellant convicted of rape and assault with intent to rape. He appealed, contending that the state's rape shield statute was unconstitutional on its face and as it was applied to his case.

"We conclude that T.C.A. 40-2445 on its face and as construed by the Tennessee courts does not violate a criminal defendant's Sixth Amendment rights. It merely requires that the defendant demonstrate the relevance of such evidence before the victim of an alleged sexual assault is subjected to embarrassing and humiliating exposure of, or questioning about, his or her social life or sexual history."

The statute was also constitutional in its application to the appellant's case. The line of questioning used by the defense was a "general fishing expedition" and was not supported by any offer of proof. Asking the complaining witness general questions like "what men she has gone out with and how long she has gone with them" does not rise to the level of an offer of proof as required under the statute.

State v. Sheline, 955 S.W.2d 42 (Tenn. 1997).

The victim and defendant were college students who met at a bar. On appeal, defendant attempted to introduce testimony of one witness that he (witness) had met the victim at a bar that they drank heavily. And then engaged in oral sex and sexual intercourse. Defendant also attempted to introduce evidence of another witness who stated that the very evening that the defendant and the victim met in the bar, the victim had kissed him and asked him to go home with her. The Court of

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Appeals held that the evidence should not have been excluded in that it should have been admitted under the exception to Rule 412, that such proffered evidence demonstrated a pattern of behavior. The Court reversed the appellate court's decision and reinstated the defendant's conviction. The Court did not find that the victim's prior conduct was so distinctive and similar to the defendant's version that it was relevant to the issue of consent.

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UTAH

State v. Marks, 2011 UT App 262, 262 P.3d 13

The defendant was convicted of sodomy upon a child. On appeal he asserted that his right to confrontation was violated by the trial court's excluding evidence that the victim was caught with pornography, or that he had simulated sex with his sister, before he made the accusation. The defendant asserted that this evidence was relevant because, *inter alia*, it proved an alternate source of the victim's sexual knowledge.

The court here cites prior Utah cases for the proposition that the average juror in a child sex offense case would presume that the victim was sexually naïve as of the alleged abuse—especially a very young child—and that the defendant must perforce have the opportunity to rebut this with prior-act evidence of his own. Relevance is still required, so the prior sexual experience of the child's that the defendant adduces must be similar to the incident charged.

The court rules that although the simulated-sex evidence may have been relevant for impeachment, its exclusion was warranted under Rule 412. Likewise for the pornography evidence, although it touches the animating principles of the rule less directly. Therefore, the defendant's due process right to confront his accuser was not violated.

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VIRGINIA

Hoke v. Thompson, 852 F. Supp. 1310 (E.D. Va. 1994)

Facts: Petitioner filed writ of habeas corpus. One ground he challenged was that his right to confront witnesses in his own defense had been violated by the application of the Virginia Rape Shield Statute, Va. Code § 18.2-67.7.

Holding: The right to cross-examine is not, however, absolute in that it "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Chambers, 410 U.S 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973), *see* Michigan v. Lucas, 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991); Stevens v. Miller, 13 F.3d 998 (7th Cir.1994). Given that the Confrontation Clause's cross-examination guarantee is not absolute, and considering trial counsel's representation to the trial court as to the admittedly minimal nature of proffered testimony barred by the rape shield statute, the Court is of the opinion that the application of Va.Code § 18.2-67.7 in this instance did not deprive petitioner of his right to due process.

Pilcher v. Com., 583 S.E.2d 70 (2003)

Facts: At trial, Pilcher's attorney argued that the "rape shield" law was an *ex post facto* prohibition against his use of impeachment evidence. He also argued that the statutory requirements-that the party offering evidence file a written notice describing the evidence and that the judge conduct an evidentiary hearing-change the rules of evidence. Thus, Pilcher contends that application of the rape shield law in this prosecution was *ex post facto* because it changed the rules of evidence in effect in 1969.FN2 He also contends that, were it not for the rape shield law, he could have proved his daughter did not have sexual intercourse until she was sixteen and, thus, lied at trial.

Holding:

As the Supreme Court of Virginia has noted, the "rape shield" law was adopted to "limit or prohibit the admission of general reputation evidence as to the prior unchastity of the complaining witness, but ... [to] permit the introduction of evidence of specific acts of sexual conduct between the complaining witness and third persons in carefully limited circumstances." Winfield, 225 Va. at 218, 301 S.E.2d at 19. Indeed, the Court further observed that the "law gives a defendant access for the first time to far more probative evidence: specific prior sexual conduct with third persons, if it is relevant for the purposes set forth in Code § 18.2-67.7." Winfield, 225 Va. at 220, 301 S.E.2d at 20. Thus, to the extent that Pilcher contends the statutory change affects the rules of evidence, we note that the United States Supreme Court also has held that "the prescribing of different modes or procedure

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..., leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition." Duncan v. Missouri, 152 U.S. 377, 382-83, 14 S.Ct. 570, 572, 38 L.Ed. 485 (1894). Likewise, "[s]o far as mere modes of procedure ***75** are concerned a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place." Mallett v. North Carolina, 181 U.S. 589, 596-97, 21 S.Ct. 730, 733, 45 L.Ed. 1015 (1901) (citation omitted).

[5] Applying these *ex post facto* principles to this case, we hold that Pilcher has not demonstrated that the statute affected his substantive rights, and we further hold that it is not an *ex post facto* law as applied in this case. In so holding, we note that courts of other jurisdictions, when confronted with similar *ex post facto* arguments regarding rape shield statutes, have reached the same result. *See* Turley v. State, 356 So.2d 1238, 1243-44 (Ala.App.1978) (holding that a rape shield statute was not *ex post facto* when it barred evidence of a prior sexual relationship that was admissible before enactment of the statute); People v. Dorff, 77 Ill.App.3d 882, 885-86, 33 Ill.Dec. 300, 396 N.E.2d 827 (1979) (holding that a statute is not *ex post facto* when it created an "alteration in rules of evidence ... [, which] served only to prevent use of certain evidence relating to the alleged victim's credibility, and had no bearing upon evidence relating to the crime itself"); Finney v. State, 179 Ind.App. 316, 385 N.E.2d 477, 480-81 (1979) (holding that the "rape shield statute affects the use of character evidence to impeach witnesses ... and is therefore procedural in nature").

We further note that in response to Pilcher's pretrial argument, the prosecutor suggested "that the rape shield statute ... does not preclude ... the admission of that evidence ... [if] he has [made] a showing of relevance in a hearing prior to the case." Recognizing that Pilcher's attorney and the prosecutor voiced "opposite positions on this matter," the trial judge ruled that after the witness testified on direct examination, he would consider at "a recess ... what [Pilcher's attorney is] going to ask her, and then ... will rule on whether [Pilcher's ***169** attorney] can ask her" that line of questions. The record reflects that Pilcher did not request a recess and did not make the requisite showing of relevance.

We explicitly do not decide whether the evidence Pilcher wanted to introduce was barred by Code § 18.2-67.7 or fell within the rules announced in Dotson. That issue is not before us. Although it is unclear whether the trial judge would have admitted the evidence had Pilcher requested a preliminary hearing, the absence of such a hearing is the most direct cause of the exclusion. Indeed, Pilcher specifically notes in his brief that, "[w]hile an argument can be made that the sustaining of the objection on cross-examining the prosecutrix denied Pilcher the constitutional right to present evidence in his own behalf, the Court need not consider that issue." Thus, despite Pilcher's suggestion that Code § 18.2-67.7 barred the evidence, the real cause of the exclusion in this case was his failure to follow the statute's procedures.

In summary, we hold that the procedural change wrought by Code § 18.2-67.7 does

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not implicate the prohibition on *ex post facto* laws. As the Supreme Court held long ago,

alterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt ... *relate to modes of procedure only,* in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure.

Hopt, 110 U.S. at 590, 4 S.Ct. at 210 (emphasis added).

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VIRGINIA

League v. Com., 9 Va. App. 199, 385 S.E.2d 232 (1989), Determination of whether prior sexual conduct between prosecutrix and defendant is "reasonably proximate to the offense charged". The Court held the evidence should have been admitted.

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WASHINGTON

State v. Williams, 569 P.2d 1190 (Div. 2 1977)

Defendant tried to introduce testimony of a witness who claimed to have had intercourse with the complaining witness prior to the alleged rape. The defendant filed a post-trial motion for new trial, attaching thereto a statement signed by a woman who detailed personal knowledge of several episodes of group sex activity in which the prosecuting witness allegedly displayed initiative and aggressive roles. The statement included a recitation that early in November 1975 this newly found witness, at the suggestion of the prosecuting witness, had solicited the defendant's attendance, together with some of his friends, at "one of these group sex deals" at the home of the prosecuting witness on the night of November 11, but the defendant had expressed no interest in such a party.

Evidence of sex acts performed on November 8, with no attempt to link them causally to subsequent physical evidence, would have no probative value toward explaining the physical findings of November 13 in the face of the acknowledged activity of November 11. This motion for a new trial was properly denied for at least two reasons: (1) the defendant's knowledge of a "party" at the victim's home November 11 was neither "newly discovered" nor was it the reason to which he ascribed his visit to the victim's home; (2) the victim's prior sex activity, no matter how lascivious or bawdy it may be painted, is simply not admissible for impeachment purposes, and is not admissible for purposes of proving "consent" unless the procedures outlined in RCW 9.79.150 have been followed and the court, after weighing it, concludes that the danger of injecting undue prejudice against the prosecuting witness created by its admission is overbalanced by its probative value toward proving the victim's consent.

State v. Hudlow, 99 Wn. 2d 1, 659 P.2d 514 (1983)

The victims claim that the defendants raped them while the victims were hitchhiking. The appellate court ruled that the trial court abused its discretion in excluding evidence relevant to victim's sexual history, which included testimony from a sailor that victim had on more than one occasion had intercourse with him and other sailors, engaged in group and oral sex. In reaching its conclusion, the Court considered the relevance of prior sexual conduct, the probative value versus prejudice, and the defendant's right to substantial justice.

The Supreme Court reversed the order of the appellate court, ruling that the probative value was outweighed by the prejudicial effect. The Court noted that the events of this incident were not so similar and particular to the sexual episodes that the testifying witness had claimed of. While the testimony indicated that victim engaged in oral sex with sailors that she knew, the testimony in no way indicated that alleged victim had ever agreed to have sex while hitchhiking with two men they

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had never met before. Evidence of victims' promiscuity was properly excluded under the rape shield statute and the trial court's ruling excluding evidence of victims' promiscuity did not deny defendants the ability to effectively cross-examine and impeach prosecuting witnesses in regard to their testimony about the actual rape incident.

Important to Note: The Court stated that there can be instances where factual similarities b/w victim's consensual sex acts and the questioned sex act can meet the minimum relevancy test. The Court gives an example, for instance, that if the victim frequently engages in sexual acts with men shortly after meeting them at a bar, and the defendant alleges similar circumstances, then this fact may be taken into account.

State v. Mounsey, 31 Wn. App. 511, 643 P.2d 892 (1982).

Appellant, who was visiting another person living in the same apartment complex as the victim, allegedly entered victim's apartment intoxicated, after 2 a.m., while victim was sleeping and allegedly raped her. Appellant argued that his friend, who lived in the same complex as the victim, told him to enter the victim's apartment and that she didn't mind male visitors. Appellant sought to introduce a psychologist's report relating to complainant's past sexual activity which suggested that when the complainant drank she became more "freely available to men and engaged in rape fantasies." *Mounsey* at 520. It also suggested that she frequently had sex with men and felt remorseful afterwards. The Court ruled that the lower court did not abuse its discretion where such evidence was not relevant in that there was ***no substantial similarity to the present conduct.***

State v. Morley, 730 P.2d 687 (Wash. Ct. App. 1986).

Testimony by Defendant's fiancé that victim was prostituting herself for money to follow her boyfriend around the country was held to be inadmissible. The appellate court ruled that the refusal to permit testimony that the complainant engaged in prostitution was proper. Such testimony, the Court held, was at best minimally relevant, compared to the State's compelling interest in barring inflammatory and distracting evidence, preventing an acquittal based on prejudice against complainant's past sex life, and encouraging rape victims to report crimes.

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WEST VIRGINIA

State v. Green, 260 S.E.2d 257 (1979)

Issue: Is the portion of West Virginia sexual assault law which limits defendants from presenting evidence of a victim's previous sexual conduct, constitutional?

Holding: A rape victim's previous sexual conduct with other persons has very little probative value about her consent to intercourse with a particular person at a particular time. That portion of the law which prohibits such evidence is constitutional.

We therefore recommend to our legislature that provision be made for In camera trial court determination whereby a judge may decide whether evidence of a victim's past sexual behavior is clearly relevant and material to an accused's "consent" defense.

We would suggest that evidence of consensual sexual activities with others, not specifically and directly related to the act of which a victim complains, should never be admissible; and that such evidence, that is specifically, directly related to the act for which a defendant stands charged, must be of a quality that its admission is necessary to prevent manifest injustice and therefore outweigh the State's interest in protecting persons who have been sexually abused, from attempts at besmirchment of their character by ones who have trespassed upon their bodies.

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WISCONSIN

State v. Herndon, 426 N.W.2d 347 (Ct. App. 1988)

Facts: Defendant appeals from conviction of third-degree sexual assault claiming that his right to confront witnesses was denied based on the trial court's refusal of his opportunity to cross-examine the complaining witness regarding her prior arrests for prostitution. Defendant argues that cross-examination was necessary to test the witness's credibility and to demonstrate her motive to fabricate the charge.

Holding: Defendant was denied his constitutional right to confrontation and right to present witnesses on his own behalf.

Rationale: The balancing test enunciated in *Davis* and analyzed and applied in many jurisdictions, only a few of which we have previously discussed, requires that where the evidence to be admitted is probative of the complainant's bias or prejudice, shows that she has a motive to fabricate, or shows a continuing pattern of conduct, the trial court must balance the probativeness of the evidence against its prejudicial nature. A refusal to allow this evidence in all cases based solely upon an evidentiary rule is a violation of the defendant's sixth amendment rights to confront adverse witnesses and present witnesses in his own behalf.

Applying the *Davis* balancing test to the present case, we hold that whatever temporary embarrassment might be caused to M.L.P. or her mother by disclosure of her past prostitution arrests is outweighed by Herndon's right to probe into the influence of possible bias or motive to lie in the testimony of the complaining witness.

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Federal

FOURTH CIRCUIT

State v. McCoy, 274 S.C. 70, 261 S.E.2d 159 (4th Cir. 1979).

Calvin McCoy was convicted of first degree criminal sexual conduct. McCoy's defense was consent but the jury found his account of the events to be more bizarre than credible. He sought to introduce evidence of the victim's prior sexual conduct and was denied by the trial court under the rape shield statute. McCoy challenges on appeal the relevancy of the law as it prevents admission of evidence of the victim's sexual relations with third parties. The court held, however, that evidence of instances of the victim's sexual conduct, in the form of opinion evidence, is not admissible unless the evidence is of the victim's sexual behavior with the defendant or that the evidence involves specific instances with third parties to show sources of origin of semen, pregnancy, or disease.

Doe v. United States, 66 F.2d 43 (4th Cir. 1981).

The Appellant in *Doe* was the rape victim who filed a civil action seeking permanent sealing of the record of the 412 hearing and for other relief. The court heard the appeal and stated, generally, that the right to immediate appeal is essential to prevent manifest injustice to rape victims.

The district court admitted the following evidence, #1-7:
(1) Victim's general reputation around army post where appellant resided
(2) Victim's habit of calling to barracks to speak to various soldiers
(3) Victim's habit of coming to post to meet people
(4) Victim's former landlord regarding alleged promiscuous behavior
(5) What the social worker learned of victim
(6) Telephone conversations that appellant had with victim
(7) Appellant's state of mind as a result of what he knew of her reputation and what she said to him.

On Appeal, the Court denied in part, affirmed in part, holding that #6 and #7 were admissible. The evidence in #6 and #7 was found to be admissible in that appellant's conversations with the alleged victim were relevant, and that his knowledge of her reputation was relevant as to the defendant's intent.[10] The Court denied in part, by finding that #1-5 fell within the proscription of Rule 412 (a), relating to past opinion and reputation.

[10] Important to note that as to the relevance of #7, the Court stated that while evidence of past behavior was excluded b/c Congress considered it irrelevant as to issues of the victim's consent, there is no indication that the evidence was intended to be excluded when offered solely to show the accused's state of mind.

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SIXTH CIRCUIT

Lewis v. Wilkinson, 307 F.2d 413 (6th Cir. 2002).

The trial court excluded the portion of the victim's diary which stated: " . . . and I'm sick of myself for giving in to *them*. I'm not a nympho like all those guys think. I'm just not strong enough to say no to *them*. I'm tired of being a whore. This is where it ends." The trial court reasoned that such evidence would elicit opinion evidence and would be prejudicial. Furthermore, the fact that terms such as "those guys" and "them" were used were viewed by the trial court as generic terms, as opposed to the specific references to the defendant used in other portions of the diary.

The Court found that the trial court erred in excluding the evidence for such evidence went towards motive and consent, as argued by the appellant. This statement as well as other admitted sentences, when taken together, can illustrate that the victim consented to have sex with defendant.[11]

EIGHT CIRCUIT

Jeffries v. Nix, 912 F.2d 982 (8th Cir. 1980).

The psychiatrists' report included the fact that victim had sex with strangers in the past year to get drugs and money. Defendant claimed that victim had sex with him for marijuana and wine, and so psychiatrist's testimony should be included. Appellant argued that evidence would have: (1) rebutted the character evidence presented by the state; (2) proved consent by showing that Crawford was a prostitute; and (3) proved consent by showing that Crawford had engaged in a similar *pattern of prior* sexual acts. In regard to (1) and (2) respectively, the Court ruled that firstly, a woman's "unchastity" cannot go to character evidence; and that secondly, there was no reported evidence that victim was a prostitute. Additionally, the Court held that in regards to (3), a pattern of behavior that there was no evidence of any type of compromise between the two parties; and therefore any prior acts were irrelevant.

NINTH CIRCUIT

Anderson v. Morrow, 371 F.2d 1027 (9th Cir. 2004)

The trial court admitted evidence of alleged victim's sexual activity with at least two other men, a previous sexual encounter with Anderson, and testimony of witnesses

[11] Important Note: This case has been distinguished by *People v. Lorentzen*, 2003 WL 887596 (providing for the exclusion of the diary in this case).

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who described her "public acts of seductive behavior" (not specific as to what "public acts" included). The court excluded the following: testimony that alleged victim was a "cat in heat"; reports from a counselor who worked with alleged victim "to try to resolve problems with her sexuality"; testimony from her former boyfriend who described her sexual drive as "excessive"; testimony from two community members recounting how they witnessed alleged victim rubbing her body against men, grabbing their crotches, and picking up men on street corners. 371 F.3d at 1030. The Court ruled that the statute was neither unconstitutionally vague nor did the trial court err in excluding the evidence.

Wood v. Alaska, 957 F.2d 1544 (9th Cir. 1992).

Appellant argued that the facts that the complainant was a Penthouse model and had been in some X-rated films should be admitted. Other facts that appellant argued for admission included the fact that complainant allegedly communicated her "career choices" and showed the pictures to the defendant.

While the Court ruled that the complainant's modeling and acting in and of themselves were not relevant, the fact that complainant communicated this was relevant in that it showed a relationship b/w the two. However, the Court found that the prejudicial effect far outweighed the probative value.[12]

Supra Buford, 441 N.E.2d 1235: Precluding the introduction of a prostitution charge is valid under the statute and does not deprive the defendant of his right to confront witnesses. "Prior false accusations of sexual assault do not constitute "prior sexual activity" under the rape shield statute."[13]

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12 Note, however, that *Wood* is not followed by *Shand v. State*, 103 Md. App. 465, 635 A.2d 1000 (1995), limiting the admissibility of specific instances of sexual contact to such contact with the accused, not the community.

13 *People v. Davis*, 787 N.E.2d 212 (Ill.App. 1 Dist.,2003); People v. Grano, 286 Ill.App.3d 278, 288, 221 Ill.Dec. 727, 676 N.E.2d 248 (1996); Redmond v. Kingston, 240 F.3d 590, 592 (7th Cir.2001).

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