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IN THE SUPREME COURT OF FLORIDA

CORNELIUS RAY LEWIS,

Petitioner,

v. CASE NO. 77,120

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GYPSY BAILEY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0797200

WENDY S. MORRIS
LEGAL INTERN

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Respondent, Cornelius Ray Lewis, the defendant in the trial court and appellant below, will be referred to in this brief as respondent. References to the appendix will be noted by the symbol "A" and followed by the appropriate page number(s) in parentheses.

STATEMENT OF JURISDICTION

The Supreme Court of Florida has discretionary jurisdiction to review a decision of a district court of appeal that passes upon a question certified to be of great public importance. **Fla.Const.** Art. V, §3(b)(3), Fla.R.App.P. 9.030(a)(2)(A)(v).

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as reasonably accurate.

SUMMARY OF ARGUMENT

A victim's prior sexual activity with a third person is irrelevant for determining the Petitioner's guilt, under the Sixth Amendment to the United States Constitution and Marr v. State, infra.

Although the Sixth Amendment guarantees the accused a right to confront the witnesses against him, this right is not absolute and may bow to accommodate other interests in the trial process.

The Florida Legislature in enacting our rape shield statute has recognized society's interest in encouraging victim's of sexual assault to come forward and report the crimes. The statute bars the admission of a victim's prior sexual history in every trial, except where the evidence tends to show that the accused is not the perpetrator of the crime or where the defense is consent of the victim.

Noting that the rape shield statute is an explicit statement of the rule of relevancy in sexual assault cases, the Marr Court held that a victim's sexual activity with third persons is irrelevant to the ultimate issue of the defendant's guilt. Like the defendant in Marr, the Petitioner did not fall within an exception to the statute, attempted to develop a fabrication theory at trial, and demonstrated possible victim bias without delving into the victim's prior sexual activity. Thus, the instant victim's

prior sexual history likewise is irrelevant to determining the Petitioner's guilt.

ARGUMENT

UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND MARR V. STATE, 494 SO.2D 1139 (FLA. 1986), IS AN ALLEGED VICTIM'S PRIOR SEXUAL ACTIVITY WITH A THIRD PERSON IRRELEVANT FOR DETERMINING THE GUILT OF THE ACCUSED, WHERE THE DEFENDANT SOUGHT TO DEVELOP AS A DEFENSE THEORY THAT THE VICTIM ACCUSED THE DEFENDANT IN ORDER TO PREVENT THE VICTIM'S MOTHER FROM DISCOVERING THAT THE VICTIM HAD BEEN SEXUALLY ACTIVE WITH THE THIRD PERSON?

The victim in this case is Petitioner's stepdaughter (R 42). The victim testified on direct examination that she began living with her mother and stepfather in August 1986 (R 42). In December 1987, when the victim was only 15 years old, Petitioner first approached the victim indicating that he wanted to have sexual relations with her (R 43). The victim refused his advances (R 43). On June 29, 1988, the Petitioner again approached the victim, this time forcing her to have sexual intercourse with him in her bedroom while her mother was at work (R 45). The victim did not report Petitioner's actions to her mother, fearing that her mother would not believe her (R 47). Eventually realizing that the sexual abuse would continue if she did not report it, the victim turned to her grandmother for help, telephoning her from school and reporting the sexual abuse on October 24, 1988 (R 47).

On cross-examination of the victim, defense counsel elicited information that the victim started to go out with a young man in January 1988; that the victim's mother and

Petitioner came across letters the victim wrote to her boyfriend; that the victim was "talked to" about the letters; that the victim was restricted from seeing her boyfriend due to the content of the letters; that the victim disliked being on restriction; and, that the victim wanted a car when she turned 16, but was told she would not receive one (R 53-54).

Defense counsel also made a proffer outside the presence of the jury during the victim's cross-examination (R 58). The testimony indicated that the victim first engaged in sexual intercourse with her boyfriend in May 1988; that the victim wrote a letter to her boyfriend which stated that she wanted to "fuck" him; that Petitioner wanted the victim to see a doctor to be placed on oral contraceptives; that the victim was not bothered about going to see a doctor; and, that the victim was not concerned whether her mother knew she was sexually active, although the victim did deny being sexually active when questioned by her mother (R 59-61; 205).

The prosecutor objected to this line of questioning, pointing out that the proffered testimony:

> [was] not relevant because [defense counsel] already brought out the fact that there was a boyfriend and [the victim's mother and appellant] didn't approve of the boyfriend, and they put her on restriction, and she wrote a letter. She wanted a car, and they wouldn't let her have a car. We wasn't getting along [with them]. She already

has all this motive to fabricate and all this opportunity and all this has already been brought out and, therefore, this will not establish motive. It's just an attack on her character.

And then the emphasis on the word she used -- because she used the F word, what's that got to do with anything? That's just a further attack on her character to try to make her appear to be a girl of ill repute who uses filthy language. That's just another attack on her character. It's already been brought out about the boyfriend, the fact [her mother and appellant] didn't want her to see him. They put her on restriction and she couldn't get a car. They already have a motive.

* * *

So, therefore, even if it were relevant, it's outweighed by the prejudicial effect. It's just an attack on her character to try to make her look bad. . . .

* * *

So I think it's nothing but to try to portray this little girl as a loose girl who uses dirty language and who sleeps with her boyfriend. They already have their motive well established. They don't need this further testimony. I would object. (R 63-64).

The trial court responded:

[I]t does appear that there has been adequate opportunity for the defendant to establish any motive for bias on the part of the complaining witness in this matter by simply showing that there has been a relationship with a friend. There has been established a fact that the family was galvanized against her and her activities. The family had chastised her, if you will, for writing letters to her friend. And even in the Marr case I believe when the Court was

> fixed with the confrontation clause and the rape shield statute, I believe that even in that matter that the Court found [the] proper balance between establishing the bias and motive on the part of [the] complaining witness without having to go into the complexities of sexual intimacies with the third person.
>
> So based on the fact that [defense counsel] already established . . . reasons for bias and motive on the part of the complaining witness, the Court will not allow this particular proffered testimony to go to the jury this morning. (R 68-69).

In its opinion, the First District affirmed the trial court's decision to exclude the proffered testimony and denial of Petitioner's motion for a new trial. The District Court concluded that the trial court struck the proper balance between protecting Petitioner's right to show the bias of the complaining witness and pertinent caselaw holding that a sexual battery victim should be able to come forward and testify against the alleged perpetrator without having her private sexual life become the focus of the trial.

In his brief, Petitioner concedes that the permitted cross-examination can be interpreted as providing a basis for arguing that the victim fabricated the charged against Petitioner in response to being placed on restriction. Petitioner states, though, the actual defense theory was that the victim fabricated her accusations in order to conceal and preserve the sexual relationship she had already

initiated with her boyfriend which she feared would be revealed by the gynecological examination. Petitioner asserts that the proffered testimony of the victim was relevant in proving this theory. The State, however, contends that the victim's prior sexual activity with a third person is irrelevant for determining the guilt of the accused, under both the Sixth Amendment to the United States Constitution and Marr v. State, 494 So.2d 1139 (Fla. 1986).

Although the Sixth Amendment to the federal constitution guarantees the right of an accused in a criminal trial to be confronted with the witnesses against him, Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, ____, 39 L.Ed.2d 347, 353 (1974), this right is not inviolate. Alford v. United States, 282 U.S. 687, 694, 51 S.Ct. 218, 220, 75 L.Ed. 624, 629 (1931). The Sixth Amendment right to confrontation requires only that the accused be permitted to introduce all relevant and admissible evidence. U.S. v. Nixon, 418 U.S. 683, 711, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish. Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435 (1986). The right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legal interests in the criminal trial process. Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297, ____ (1973).

One example of Sixth Amendment accommodation of other legal interests in the criminal trial process comes in the form of rape shield statutes. In response to criticism of rape evidence laws, the United States Congress and most state legislatures have enacted rape shield laws to restrict a criminal defendant's ability to admit evidence of a sexual assault victim's past sexual history. See Tanford & Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 **U. Pa. L. Rev.** 544, 551 (1980). In Bell v. Harrison, 670 F.2d 656, 658 (6th Cir. 1982), the Court wrote:

> The rationale behind these statutes is that evidence of a rape victim's prior sexual activity is of dubious probative value and relevance and is highly embarrassing and prejudicial. Often such evidence has been used to harass the prosecuting victim. Sponsors of these statutes assert that they encourage victims of sexual assault to report the crimes without fear of having their past sexual history exposed to the public.

There can be little doubt that Florida's rape shield statute, Fla.Stat. §794.022 (1987), represents an explicit legislative decision to eliminate trial practices which may have frustrated society's vital interest in the prosecution of sexual crimes.

In Marr v. State, supra, this Court held that a victim's prior sexual activity was inadmissible under Florida's Rape Shield Statute to bolster a defense theory that the victim fabricated her accusations of sexual battery against the defendant because of personal animosity between

the defendant and the victim's boyfriend. The State presented only the testimony of the victim in support of its case. Id. at 1139. At trial, the defendant denied any sexual contact with the victim, and proffered testimony relating to the sexual intimacy of the victim and her boyfriend to show the victim's bias. Id. at 1143. The trial court excluded the proffered evidence. Id. at 1142.

Interpreting Florida's rape shield statute, the Marr Court held that the depth of the victim's relationship with her boyfriend was irrelevant to the ultimate issue of the defendant's guilt or innocence. Id. at 1143. The Marr Court noted several reasons supporting its decision. First, the court stated that the rape shield statute was an explicit statement of the rule of relevancy and that under the statute a victim's sexual activity with anyone other than the accused was generally irrelevant for determining the guilt of the accused. Id. at 1142. The court observed that the victim's prior sexual activity with a third person was relevant only when such evidence tended to show that the accused was not the perpetrator of the crime, or when the defense was consent of the victim. Id. The Court noted the policy reasons supporting the statute, stating:

> It appears that these sections' underpinnings are based on the idea that a sexual battery victim should be able to come forward and testify against the alleged perpetrator without having the victim's prior sexual activities become the focal point of the trial, rather than the guilt or innocence of the accused.

Id. at 1142-43.

Second, the court pointed out that the defendant's cross-examination was not completely foreclosed: The defendant, in fact, was able to show that the victim and her boyfriend were in love, thereby demonstrating possible bias of the victim without delving into the couple's sexual relations. Id. at 1143. Third, the court stated that the defense fully explored the incidents leading to the animosity between the defendant and the victim's boyfriend. Id. Fourth, the court stated that the defendant's Sixth Amendment rights under Davis, supra, were not violated by the limitation of his cross-examination. Id. The Marr Court acknowledged that the right to show a witness's bias is constitutionally mandated, under Davis, supra. Id. However, the Marr Court indicated that Davis was clearly distinguishable, as the defense counsel in that case was barred from using the only method available to show a witness's bias, i.e., protected juvenile criminal records. Id.

In Floyd v. State, 503 So.2d 956, 957 (Fla. 1st DCA 1987), the First District held a victim's sexual activity with her boyfriend inadmissible. The defendant sought to develop as a defense theory that the victim fabricated sexual battery charges against her father because she was angry at her parents for punishing her. Id. The defendant proffered evidence about a specific instance of consensual

sexual activity between the victim and her boyfriend for which she was whipped. Id. The Floyd Court held the trial court properly excluded the evidence relating to sexual activity. Id. Citing Marr, supra, in support of its decision, the Floyd Court noted that the trial court did not foreclose cross-examination altogether, because it permitted the defendant to introduce evidence that the victim had been whipped by her mother for having her boyfriend in the house on the day she brought the charges of sexual battery against her father. Id.

Other jurisdictions have considered a defendant's Sixth Amendment rights in conjunction with a State Rape Shield Statute, and have held the victim's prior sexual activity with a third person irrelevant for determining the guilt of the accused, where the defense sought to show victim bias. In Commonwealth v. Elder, 389 Mass. 743, ____, 452 N.E.2d 1104, 1109 (1983), the Massachusetts Supreme Court held that the trial judge properly excluded evidence of the victim's prior sexual conduct. The defendant sought to introduce evidence supporting the defense theory that the victim fabricated rape charges against him to prevent the defendant from interfering with her intimate relations with her boyfriend. Id. The trial court allowed testimony indicating that the victim and her boyfriend were in love and permitted evidence of the closeness of their relationship, but excluded testimony regarding the couple's sexual relations. Id. As the defendant was able to establish bias without

testimony relating to the victim's sexual history, the court concluded that exclusion of the evidence properly balanced the policies underlying the rape shield statute as well as the confrontation clause. Id. at 1110. The Court stated, where evidence of bias is available by other means, the exclusion of prior sexual history relevant to a showing of the victim's bias does not raise serious constitutional problems. Id.

In State v. Lalone, 437 N.W.2d 611, 612 (Mich. 1989), the Supreme Court of Michigan held that the trial court properly excluded evidence of a victim's sexual history. The defendant was convicted of criminal sexual conduct against his fourteen-year-old stepdaughter. Id. at 617. The defendant maintained that the victim fabricated the assault charges in retaliation for the defendant's punishment of her alleged sexual misconduct with neighborhood youths. Id.

The defendant proffered testimony relating to three incidents of sexual misconduct by the victim. Id. The first incident consisted of the victim's sexually explicit telephone calls to several neighborhood youths asking if they wanted "blow jobs." Id. The second incident involved the victim being scantily clad in the family barn with a juvenile. Id. The third incident consisted of the victim and a juvenile being discovered nude from the waist down and kissing in the victim's bedroom. Id. The defendant

allegedly meted out severe punishment for the above incidents. Id.

The Supreme Court of Michigan held the trial court properly excluded the sexual history evidence. Id. at 612. The court noted the victim's sexual history was irrelevant, stating:

> The Michigan rape-shield statute reflects the Legislature's determination that in the overwhelming majority of prosecutions, the introduction of the complainant's sexual conduct with parties other than the defendant is neither an accurate measure of the complainant's veracity nor determinative of the likelihood of consensual sexual relations with the defendant.

Id. at 620. The court also stated the defendant's Sixth Amendment rights were not violated by exclusion of the victim's prior sexual history, as the Sixth Amendment does not prohibit a trial court from limiting the means by which a witness's bias is determined on cross-examination. Id. at 621 (citing Van Arsdall, supra). Noting accord with Marr, supra, Floyd, supra, and Elder, supra, the Lalone Court also pointed out that the defendant was able to introduce compelling nonsexual evidence of the complainant's bias and motive to fabricate, thus preserving the defendant's right of cross-examination. Id. at 622.

In Kelly v. State, 452 N.E.2d 907, 909 (Ind. 1983), the Supreme Court of Indiana held references to rape victims' past sexual conduct were properly prohibited in accordance

with Indiana's Rape Shield Statute. The defendant's teenage daughters had accused him of sexual battery, and he sought to develop a defense theory that the victims and their mother fabricated charges against him because he had threatened to report them to juvenile authorities for delinquency and neglect. Id. The defendant proffered testimony and a letter describing the living conditions in the mother's home and the use of alcohol by and the sexual promiscuity of both daughters. Id.

The Kelly Court held that the defendant's Sixth Amendment rights were not violated by the trial court's exclusion of the proffered evidence. Id. The court noted that the defendant's cross-examination was not completely foreclosed, as he was allowed to question the victims regarding acts of delinquency other than sexual conduct. Id.

Petitioner's reliance on Davis, supra, is misplaced. In Davis, the State's witness was on probation while assisting the police by identifying the defendant at trial. Id. at 311-313. This witness also testified that he had never been questioned by law enforcement officers. Id. at 313. The defendant wanted to elicit testimony concerning the witness's probationary status to show that the witness may have been under pressure from the police to cooperate at trial. Id. at 311. The trial court refused to admit testimony regarding the witness's prior criminal history, as

juvenile records were protected under state law. Id. The United States Supreme Court held that, under the facts presented, the defendant's right to cross-examine the witness, whose testimony obviously was suspect, outweighed the state's interest in protecting juveniles. Id. at 318.

Davis does not control the present case for several reasons. First, the record in this case contains no evidence that the victim's testimony was suspect. See Johnson v. Pittman, 731 F.2d 1231, 1236 (5th Cir. 1984), cert.denied, 469 U.S. 1110 (1984). Second, any pressure the victim may have felt to conceal her intimate relationship from her mother does not supply the clear motive for biased testimony that was the court's concern in Davis. The victim hardly could have thought that her mother would be less upset by learning that her husband raped her daughter, than by discovering that her teenage daughter was having sexual relations with a long-standing boyfriend of her own age. Third, the prejudical effect of dragging the victim's sexual history before the jury certainly outweighed the marginal relevance that evidence might have had to the victim's veracity. See id. Fourth, the trial court did not exclude the only evidence by which the defense could have established the witness's alleged lack of credibility. See Marr, supra at 1143; Lalone, supra at 622. Fifth, Davis did not involve balancing a defendant's Sixth Amendment rights with the countervailing policies of a rape shield statute.

Similarly, the other cases cited in Petitioner's brief are not controlling. In Olden v. Kentucky, 488 U.S. 227, 230, 109 S.Ct. 480, ___, 102 L.Ed.2d 513, 519 (1988), the defendant asserted a defense of consent; thus, evidence of the victim's sexual history fell within one of the exceptions to the rape shield statute. Petitioner's other cases do not involve balancing a defendant's Sixth Amendment Rights with the countervailing policies of a rape shield statute.

In the present case, the victim's prior sexual activity with her boyfriend was irrelevant for determining the Petitioner's guilt, under Marr, supra. First, the Marr Court held that the Sixth Amendment right to confrontation bows to accommodate the interests expressed in Florida's rape shield statute. Like the defendant in Marr, petitioner did not assert a defense of consent, nor did he assert that the proffered evidence tended to show that it was not he who committed the rape. See Roberts v. State, 510 So.2d 885, 892 (Fla. 1982). As this case does not come within these two exceptions to the rape shield statute's bar of sexual history evidence, the rape shield statute applies in this case. Second, Petitioner demonstrated that the victim had a long-standing boyfriend at the time of the rape charges; that the victim was "talked to" about the content of letters she wrote to him; that the victim was restricted from seeing her boyfriend because of the letters; and that the victim disliked being on restriction. Thus, Petitioner, like the

defendant in Marr, was able to demonstrate victim bias, without delving into the victim's prior sexual history. Third, Petitioner's Sixth Amendment rights under Davis were not violated, as indicated above.

In cases such as this one, where the sexual abuser resides in the same household as his young victim, the victim finds it most difficult to point the finger at her abuser. To do so, she must overcome fears of tearing apart the family home and of not being believed by her mother. If this Court answers the certified question in the negative, the Court in effect will except the victims of familiar sexual abuse from the protections of Florida's rape shield statute. A defendant who has requested that his daughter or stepdaughter be placed on oral contraceptives - ostensibly for the girl's benefit - would be able to use his request as a tool to pry open his daughter's sexual history in front of a jury. The State requests this Court to further the policies of Florida's rape shield statute by protecting the victims who most need protection, i.e., the victim of familiar sexual abuse, based on their clear right to be protected under Florida's rape shield statute.

Finally, the state alternatively suggests that it is unnecessary for this court to exercise its discretionary jurisdiction and answer the certified question in this case. While the issue clearly is one of great public importance, it is also one which has been fully addressed by this Court in Marr.

CONCLUSION

Based on the above cited legal authorities and arguments, the State respectfully requests this Honorable Court to decline to answer the certified question or to affirm the decision below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GYPSY BAILEY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0797200

WENDY S. MORRIS
LEGAL INTERN

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to Laura Keene, Esquire, of Beroset & Keene, 417 East Zaragoza Street, Pensacola, Florida 32501, this 26th day of February, 1991.

Gypsy Bailey
Assistant Attorney General