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IN THE SUPREME COURT OF FLORIDA

CORNELIUS RAY LEWIS,
Petitioner,

vs.

CASE NO. 77,120

STATE OF FLORIDA,
Respondent.

_____ /

PETITIONER'S REPLY BRIEF ON MERITS

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FLORIDA STATUTES:

Section 794.022

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Petitioner has previously made his Statement of the Case and Statement of the Facts in his Initial Brief and shall rely on the same as though fully set forth herein.

POINT ON APPEAL

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?

SUMMARY OF REPLY ARGUMENT

Petitioner asserts that the Trial Court improperly precluded presentation of Petitioner's relevant theory of defense by limiting the cross-examination of the Complainant. It was Petitioner's theory of defense that the Complainant fabricated the charges against Petitioner because she feared exposure of an illicit sexual relationship with her boyfriend would be revealed by a gynecological examination.

It is Petitioner's position that the Marr decision should be expanded to include situations such as the one at bar, where the bias of the victim cannot be fully established without disclosure of the victim's sexual relationship with a third party. Where, as here, the credibility of the Complainant is of crucial significance, the rights of individual Defendants supercede the protections afforded by Florida's Rape Shield Statute.

Petitioner asserts that the certified question should be answered in the negative and this cause remanded for a new trial.

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?

Petitioner asserts that the Marr decision should be expanded to include situations such as the one at bar, where the bias of the victim cannot be fully established without disclosure of the victim's sexual relationship with a third party. Marr holds that under the statute the victim's sexual activity with anyone other than the accused is generally irrelevant, but not always. It is important to note in Marr that:

"...Petitioner was able to show the depth of the relationship between the victim and Young, informing the jury during his opening statement that the two 'were lovers', and eliciting testimony from both parties that they had an intimate relationship and were in love. Petitioner's questioning of Young fully explored the details of the incidents leading to the animosity between Young and the Petitioner. In short, Petitioner was afforded an adequate and fair opportunity to show the bias and motive of the victim and Young without delving into the sexual nature of their relationship." Marr at 1143.

Additionally, this Court indicated in Marr that if in a particular case there is a complete foreclosure of cross-examination seeking to disclose the bias of a key witness, serious constitutional problems may be presented. The testimony in this case presented to the jury was extremely limited, consisting of information that

the Complainant had a boyfriend of which Petitioner and her mother disapproved, that she had written letters of an inappropriate nature, and that she had been placed on restriction. Petitioner's ability to adequately defend himself was completely precluded.

Similarly, Roberts v. State, 510 So.2d 885 (Fla. 1981) cited by Respondent, is distinguishable in that the alleged Complainant was a prostitute and the Court held that her activities were properly excluded under 794.022 on the basis that that type of evidence was exactly that which Florida's Rape Shield Law was designed to cover. Such is not the case with Petitioner, and the Complainant's sexual activity with the boyfriend, which was the only testimony concerning the Complainant's prior sexual history which was sought to be introduced, was highly relevant to a motive on the part of the Complainant to fabricate her accusations against Petitioner.

Respondent asserts that the victim's prior sexual activity with a third person is relevant only when such testimony tends to show that the accused was not the perpetrator of the crime or when the accused's defense is consent. However, in a case such as the one at bar, policy reasons supporting the statute, i.e. that a sexual battery victim should be able to come forth and testify concerning sexual misconduct without fear of revealing her prior sexual activity or that activity becoming the focal point of the trial, is not the case before this Court as the relationship between MS. B and her boyfriend was highly relevant as to why she would make the accusation against Petitioner. The Rape Shield

Statute is designed to protect Complainants from harassment and embarrassment, and also from the admission of irrelevant sexual activity on the part of the Complainant with third parties. In the case before this Court, Petitioner's entire defense was that the accusations were false and were instigated by the Complainant as a means to explain what she feared the gynecological examination would reveal, thereby allowing her to continue her sexual relationship with her boyfriend.

Respondent further cites Floyd v. State, 503 So.2d 956 (Fla. 1st DCA 1987), in support of its position. In Floyd, the First District held a victim's sexual activity with her boyfriend inadmissible because the Trial Court did not foreclose cross-examination altogether, in that it permitted the Defendant to introduce evidence that the victim had been whipped by her mother for having her boyfriend in her home the day she alleged inappropriate sexual behavior on the part of the Defendant. Floyd is distinguishable from the case at bar in that although Petitioner was able to introduce testimony to the effect that MS. I had a boyfriend of which her mother and Petitioner did not approve, and that she had been placed on restriction concerning some letters she had written to her boyfriend, Petitioner was never allowed to present to the jury the fact that the Complainant's parents suspected her sexual activity with her boyfriend, made an appointment with a gynecologist, and that the victim feared discovery of the results of the gynecological examination. This

testimony is highly relevant to Petitioner's defense, and is not designed to embarrass the Complainant.

Respondent next cites other jurisdictions' consideration of Sixth Amendment rights in conjunction with State Rape Shield Statutes. Respondent cites Commonwealth v. Elder, 389 Mass. 743, 452 N.E.2d 1104 (1983), in support of its position. In Elder, the Massachusetts Supreme Court held that the Trial Judge properly excluded evidence of the victim's prior sexual conduct. A closer view of Elder reveals that the Defendant was allowed to introduce evidence of hostility between the Complainant and the Defendant which increased when the Defendant took steps to terminate the Complainant's relationship with her boyfriend. The Defendant was allowed to inquire in depth through cross-examination as to the relationship between the Defendant and the Complainant, due to the Complainant's involvement with her boyfriend. Elder at 1109. The Court noted that because the Defendant was able to establish bias without the proffered evidence, that case differed markedly from other cases wherein there was no other way in which the bias of those witnesses could be elicited. In Elder, the Court stated there was no lack of evidence on the issue of bias, and that where evidence of bias is available by other means no evidence of the Complainant's prior sexual history should be admitted.

In the case before this Court, although Petitioner was able to establish that Complainant had a boyfriend, that her parents had talked to her about some letters she had written to him, that she had been placed on restriction, and that she was

unhappy about that, Petitioner was never allowed to question MS. B sufficiently to establish that she had fabricated her accusations in order to conceal and preserve her sexual activity with her boyfriend. This information was crucial to Petitioner's defense and should have been presented to the jury to test the Complainant's credibility, as the Complainant's testimony was the sole evidence against Petitioner as to sexual misconduct between the two parties.

The Respondent further cites State v. Lalone, 437 N.W.2d 611 (Mich. 1989), in support of its position that the Trial Court in this case properly excluded the proffered testimony. The Lalone Court noted, however, that the exclusion of evidence outside the exceptions provided in the Rape Shield Statute may violate the Sixth Amendment with regard to an individual Defendant as evidentiary rules and policy are secondary to the protection of individual freedoms. The Court stated:

"We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a Defendant's constitutional right to confrontation. For example, where the Defendant proffers evidence of a Complainant's prior sexual conduct for the narrow purpose of showing the complaining witness's bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a Complainant's sexual conduct may also be probative of a Complainant's ulterior motive for making a false charge." People v. Hackett, 421 Mich. 338, 365 N.W. 2d 120 (1984).

The Lalone Court stated that on the facts of its case (emphasis added) the Trial Court did not preclude the Defendant from introducing significant nonsexual evidence from which the

Complainant's bias could be inferred. The Lalone Court distinguished Davis v. Alaska, 415 U.S. 308, 94 S.Ct 1105, 39 L.Ed.2d 347 (1974), stating that the Defendant in Davis had no other avenues with which to explore the Complainant's bias or motive to fabricate other than the testimony that was excluded. The Lalone Court also noted that its holding would not preclude a future Defendant from establishing constitutional error requiring reversal where the Defendant is barred from introducing a Complainant's sexual history for the purpose of inferring bias or motive for fabrication. Similarly, in Kelly v. State, 452 N.E.2d 907 (Ind. 1983), cited by Respondent, the Defendant was provided with alternative means of cross-examination, and was thereby not prohibited from impeaching the Complainant's credibility by means other than prior sexual conduct. In the case before this Court, the cross-examination allowed Petitioner by the Trial Court was insufficient to adequately establish the Complainant's bias or motive for fabrication.

Respondent alleges that Davis v. Alaska, supra, does not control the present case for a variety of reasons. First, Respondent alleges that the record contains no evidence that the victim's testimony was suspect, citing Johnson v. Pittman, 731 F.2d 1231 (5th Cir. 1984), in support of its position. To the contrary, the Complainant's testimony was suspect on the basis that she contradicted herself between the time of her deposition and her testimony at trial (R-46, 48); the fact that although she testified she and Petitioner had engaged in sexual intercourse on

approximately ten occasions she could relate no specific times, dates or places in regard to these activities (R-45, 46); and the fact that although according to the Complainant this activity began some months prior to her revealing it she did not so tell persons in whom she could reasonably be expected to confide that this activity had occurred until she got in trouble with her boyfriend. (R-46) Respondent further argues that the Complainant had no clear motive for biased testimony in wishing to conceal her relationship with her boyfriend. In fact, the Complainant would have been highly motivated to prevent the gynecological examination or otherwise provide an explanation for the feared results of that examination. Third, the State argues that the prejudicial effect of the Complainant's "sexual history" outweighed the relevance that evidence might have had to the victim's veracity. This is not a case where the Petitioner sought to introduce totally nonrelated testimony concerning a rape victim's sexual habits. This is a situation where the Petitioner's defense was that his accuser had fabricated her allegations in an effort to conceal her sexual practices. That being so, the Complainant's sexual practices become highly relevant as they pertain to the accusations against Petitioner, and the Complainant's protections under the Rape Shield Statute become secondary to the individual rights of Petitioner to confront his accuser and fully cross-examine a witness, thereby presenting his relevant theory of defense. Respondent also alleges that the Trial Court did not exclude the only evidence by which the defense could attack the Complainant's credibility. The allowed

cross-examination was so restrictive as to provide Petitioner with no effective cross-examination whatsoever as to the credibility of the only witness against him.

In State v. Howard, 426 Atlantic 2d 457 (New Hampshire 1981), the Supreme Court of New Hampshire held that the constitutional right to confront adverse witnesses is fundamental and of such importance that the State's interest in protecting a certain class of witnesses from embarrassment must fall before the right of the accused to seek out the truth in the process of defending himself. The Court noted that automatic and total exclusion of a Complainant's sexual activity in all rape cases is improper because it may preempt a Defendant's right to confront a witness against him. In Howard, the Defendant was afforded an opportunity to show by specific incidents of sexual conduct that the Complainant had sufficient experience and ability to contrive a statutory rape charge against him.

In State v. Oulette, 459 Atlantic 2d 1005 (Conn. 1983), the Supreme Court of Connecticut held that the Defendant had been barred from cross-examining the victim at all on a matter of substantial relation to her credibility in a case where credibility was crucial. The Court held that the prevention of all inquiry in fields where cross-examination is appropriate, in particular in circumstances where the excluded questions have a bearing on credibility and on the commission by the accused of the acts relied upon for conviction, passes the proper limits of discretion and is prejudicial err. Oulette at 1015.

In Woods v. State, 657 Pacific 2d 180 (Oklahoma 1983), the Court of Criminal Appeals of Oklahoma held that in a prosecution for incest the issue of consent and the purpose of establishing motive or bias to falsify are distinct, and thus a statute making evidence of the complaining witness's previous sexual conduct with persons other than the accused inadmissible to prove consent in rape cases does not preclude evidence bearing upon motive or bias. In Woods, the defense sought to establish that the 15 year old Complainant's testimony was motivated by the fact that the Defendant had refused to give consent to the Complainant's marriage to her 24 year old fiance, and further in retaliation for the Defendant's threats to have the boyfriend arrested for statutory rape. The Defendant further sought to elicit on cross-examination that the Complainant had made prior allegations of sexual abuse, and that on those prior occasions those accusations had been provoked by threats to have her fiance arrested. Similarly, in the case at bar, Petitioner sought to establish that the allegations were made by the Complainant to preserve her relationship with her boyfriend, which she feared would be revealed by the gynecological examination.

In Commonwealth v. Black, 487 Atlantic 2d 396 (Penn. Superior 1985), the Superior Court of Pennsylvania held that insofar as the Rape Shield Law purports to prohibit the admission of evidence which may logically demonstrate a witness's bias, interest or prejudice, or which properly attacks the witness's credibility, it unconstitutionally infringes upon an accused's

right of confrontation under the Sixth Amendment to the United States Constitution. In Black, the Defendant sought introduction of evidence to the effect that his 13 year old daughter, the Complainant, had engaged in prior sexual conduct with one of her brothers. The Court noted that the evidence of prior sexual conduct was not offered merely to show any general moral turpitude or defect of the Complainant, but rather to reveal a specific bias against and hostility toward the Defendant and a motive to seek retribution. In reaching its decision, the Black Court cited Davis v. Alaska, supra, noting that the juvenile statutes in Davis and the Rape Shield Law in Black were strikingly similar. Both laws are designed to protect designated classes of persons by shielding them from the public humiliation and opprobrium which would naturally flow from disclosure of the suppressed evidence, in that both laws seek to afford the designated classes an opportunity to start anew. Being unable to distinguish the facts in Black from Davis v. Alaska, the Black Court reversed and remanded for a new trial. See also State v. Jalo, 557 Pacific 2d 1359 (Oreg. Appellate 1976), and State v. DeLawder, 344 Atlantic 2d 446 (Maryland 1975), wherein the Court of Special Appeals of Maryland held that evidence that the 14 year old Complainant had sexual intercourse with other men on other occasions was admissible in support of the Defendant's theory that the witness thought that she was pregnant by someone else and claimed that the Defendant raped her because she was afraid to tell her mother that she had voluntarily had sexual relations with others.

Respondent asserts that answering the certified question in the negative will except the victims of familial sexual abuse from the protections of Florida's Rape Shield Statute. To the contrary, answering the certified question in the negative will further secure the individual rights of Defendants forced to attack the credibility of their only accuser by inadequate means. Additionally, Respondent suggests that the Court need not answer the certified question as it has been fully addressed in Marr. As discussed above, the facts of Marr are easily distinguishable from those before this Court. The certified question is of extreme importance in cases such as this one, where there is no physical evidence, there are no other witnesses, and the credibility of the Complainant is crucial. Petitioner's right to present his relevant theory of defense was precluded by the Trial Court's refusal to allow him full and effective cross-examination. The certified question should be answered in the negative.

CONCLUSION

Petitioner prays that this Court will answer the certified question in the negative and reverse and remand this cause for a new trial.

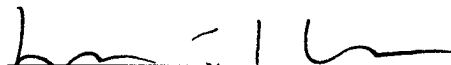
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Gypsy Bailey, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 20 day of March, 1991.



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