IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-258

LEON ADDERLY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT

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INTRODUCTION

Respondent, the State of Florida, was the prosecution in the trial court, Petitioner before the Third District Court of Appeal, and will be referred to herein as the State. Petitioner was the Defendant in the trial court, the Respondent on certiorari review to the Third District Court of Appeal, and will be referred to herein as Petitioner. The symbol "A" denotes the Appendix submitted by petitioner which contains the entire record submitted to both the Circuit Court and the Third District Court of Appeal.

STATEMENT OF THE CASE

Petitioner is being prosecuted for sexual activity with a child by a person in familial or custodial authority. A:17. As can be set forth in the deposition of S.D.[1] also annexed to the Appendix, petitioner was S.D's step father and had been living with S.D. and her mother for five years as of the time of the incident. A:17,60. On September 26, 1999, S.D.'s mother was in the hospital and the instant incident took place. App. E:62.

[1]The designation S.D. will refer to the victim throughout this Brief.

Specifically, S.D. noted that petitioner engaged in mouth and tongue oral sex upon S.D. in her bedroom at approximately 7:30 p.m. in the evening. A:64-70. After this initial incident, S.D. decided not to report it, although she did tell her then boyfriend Allen about the incident. A:71-72.

In May of 2000, S.D. was again alone in her home when petitioner brought her some medicine because she was sick. Petitioner asked if he could perform oral sex upon S.D. and she refused. Petitioner specifically asked S.D. if he could "kiss [her] pussy" and when S.D. told him to leave her alone, petitioner left the house. A:73-75. A week or two later, S.D. told her mother about the incident when her mother asked her why she disliked petitioner so much. A:75-76. S.D.'s mother reported the incident to the authorities and petitioner was eventually charged. A:75-77. S.D. also stated at her deposition that she had been sexually active (had vaginal sexual intercourse) with her then boyfriend Allen in November or December of 1999 and then told her mother about it after charges were lodged against petitioner. A:77-79. S.D. told her mother because she knew that the examination at the rape trauma center would reveal that she was not a virgin and she wanted her to find out about from her rather than someone else. A:79.

The State filed a motion in limine on or about September 17,

2001, seeking to bar petitioner from questioning S.D. about her prior sexual activity with her boyfriend. A:19-20. Argument was held before the Circuit Court on a transcribed record dated September 19, 2001. A:24-54. The Circuit Court ruled that it would permit cross examination of S.D. about her prior sexual conduct with her boyfriend finding that such evidence was "relevant to an inference of fabrication to minimize a disciplinary [matter]." A:41-42. The Circuit Court below amplified the basis for its admissibility decision when it noted that the prior sexual conduct was relevant for an "inference" that S.D. first fabricated the charge against petitioner because she knew that her prior sexual activity with her boyfriend would be coming to the forefront and, therefore, dropped the Adderly bombshell first that so her subsequent disclosure of prior acts of sex with her boyfriend would be softened. A:46-47,52.

At the motion hearing, petitioner's counsel made the following argument in support of admissibility:

"Now, I submit for a couple of reasons this comes in. First of all, I believe it comes in to show the nature of the allegation that she's making– don't forget, the allegation is made some 8 months later, after she begins to have sexual relations with her boyfriend.

I believe one, it comes in to show that she's aware of these

sexual acts, having had sexual acts with her boyfriend. But more importantly, it comes in because this period of time between the allegation. The allegation occurring in September of 1999 to the coming forth with the allegation in May.

Her behavior was such that she was now feeling and becoming more independent, going through puberty, feeling a lot more like a grown up, having sex.

Her behavior in the house changed, that she was more of a disciplinary problem. All of these things came about, in which her relationship with the defendant deteriorated. He was still seeing her as a 13 year old and 14 year old, prior to her taking on a new demeanor and persona.

Because now she was trying to become more independent, like I said. What that created was tension in the house between the defendant and her. Wherein this became, because of this tension she was now treating the defendant in a different way. This became known to her mother.

Her mother say, Leon is a good guy. What's the problem? So you think he's such a good guy, well, 8 months ago when you were in the hospital, he did this to me.

So, what I'm suggesting to the Court, that he can't do this in a vacuum. It's the dynamics of the relationship, how he and her dealt with each other. It's more than a teenager. There

was something going on in her life.

So, for those two reasons, I believe it is quite relevant." A:29-31.

As previously noted, the Circuit Court denied the motion in limine and permitted inquiry to be made about S.D.'s prior sexual conduct with her boyfriend on the theory that because of the victim's age and familial circumstances there was a motive to fabricate the accusation against petitioner so as to lessen the impact of the news that her mother would hear about her sexual activity. A:52. The Circuit Court memorialized its ruling in a written Order rendered on September 20, 2001. A:22.

The State filed a petition for certiorari dated October 15, 2001 in the Third District Court of Appeal seeking to quash the ruling of the Circuit Court. A:1-14. After the filing of a response and a reply (A:84-94;95-99), the Third District Court of Appeal granted the certiorari petition on October 31, 2001. A:100-104. Petitioner timely moved for rehearing on November 15, 2001. A:105-119. The motion for rehearing was denied on January 16, 2002. A:120.

Petitioner timely filed a notice to invoke jurisdiction of this Court on January 28, 2002, and this Court accepted jurisdiction on September 17, 2002.

POINTS ON APPEAL

I. WHETHER THE DISTRICT COURT OF APPEAL ERRED IN EXCLUDING EVIDENCE RELATING TO THE VICTIM'S PRIOR SEXUAL ACTIVITY WITH HER BOYFRIEND UNDER THE RAPE SHIELD STATUTE WHEN THE PROFFER BEFORE THE CIRCUIT COURT FAILED TO ARTICULATE A MOTIVE TO LIE THEORY SUFFICIENT TO OVERCOME THE RAPE SHIELD STATUTE?

II. WHETHER THE DISTRICT COURT OF APPEAL ERRED IN GRANTING CERTIORARI RELIEF WHEN A COMPELLING REASON HAD NOT BEEN ADVANCED BY THE PETITIONER SUFFICIENT TO OVERCOME THE RAPE SHIELD STATUTE?

SUMMARY OF THE ARGUMENT

There is no error flowing from the District Court of Appeal ruling excluding inquiry relating to S.D.'s prior sexual history with her boyfriend. Such inquiry was barred by the provisions of the rape shield statute. While the rape shield statute must give way to a defendant's right to confrontation in circumstances where such inquiry might establish a motive to lie, the proffer submitted to the Circuit Court in this case fell far below the threshold required to support a motive to lie theory of defense. This being the case, the District Court of Appeal properly granted the petition.

The grant of certiorari relief was entirely proper here.

Without certiorari review, the State could never seek review of such a serious evidentiary error that is protected by the rape shield statute. Additionally, the State submits that it is petitioner who has improperly utilized review of the District Court's ruling in this Court to seek the functional equivalent of an interlocutory appeal of a non-final ruling (at least for the defense) in this Court. This being the case, this Court improperly granted jurisdiction to hear this case and review should be denied on this basis alone.

ARGUMENT

I. THE DISTRICT COURT OF APPEAL DID NOT ERR IN RULING THAT THE EXCLUDED EVIDENCE RELATING TO THE VICTIM'S PRIOR SEXUAL ACTIVITY WITH HER BOYFRIEND FAILED TO ESTABLISH A MOTIVE TO LIE SUFFICIENT TO OVERCOME THE PROVISIONS OF THE RAPE SHIELD STATUTE.

Petitioner alleges that the District Court of Appeal erred in excluding the evidence of S.D.'s prior sexual history with her boyfriend. The State submits that this argument is without merit.

Initially, for the standard of review, certiorari as a remedy requires a demonstration that the court or tribunal below acts in excess or without jurisdiction or that the order departs from an essential requirement of law, causing material

irreparable injury throughout the remainder of the proceedings below, leaving no adequate remedy on appeal. See, Shands Teaching Hosp and Clinics, Inc. v. Barber, 638 So.2d 570,571 (Fla. 1st DCA 1994); see also Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla. 1987). The remedy of certiorari has been utilized by the State to review pretrial orders in criminal cases since erroneous rulings by the lower courts under these circumstances often works irreparable injury that cannot be corrected on a subsequent appeal. See, State v. Pettis, 520 So.2d 250 (Fla. 1988). See also, State v. Bradford, 658 So.2d 572,573 (Fla. 5th DCA 1995).

The facts in this record amply call for application of the writ of certiorari to quash the Order of the court below. The basis for the evidence sought to be established on cross-examination, according to petitioner's argument below, was that S.D. did not like him and she had knowledge about sexual practices from her boyfriend. That is a fair reading of the argument from the detailed proffer appearing in the hearing transcript and quoted previously in the factual section of this brief verbatim. There was never an argument that the evidence was needed because it was relevant to establish a basis that S.D. had a motive to lie, meaning that she falsely accused petitioner to avoid having her mother find out about her sexual

activity with her boyfriend. The State recognizes, of course, that the Circuit Court made this conclusion in an inferential way with its conclusion that petitioner was accused because S.D. desired to soften the impact of her mother finding out about S.D. and her boyfriend's sexual activity. This conclusion, however, has no factual basis in the record and it is clearly unsupported by applicable case law and the purpose of the rape shield statute itself.

Analysis must begin with the rape shield statute itself. Section 794.022(2), Fla. Stat.(2002) provides that "[s]pecific instances of prior consensual sexual activity between the victim and any person other than the offender shall not be admitted into evidence in a prosecution under s. 794.011." The statute, however, does give way when a defense is raised and the defendant seeks to establish that such inquiry is relevant to prove a motive to fabricate on the part of the victim. See, Lewis v. State, 591 So.2d 922 (Fla. 1991); Castro v. State, 591 So.2d 1076 (Fla. 3d DCA 1991). Both cases were presented to the Circuit Court below, but the Court below misconstrued their application in assessing the purpose of the evidence here. In contrast, the District Court properly applied these cases to the factual record.

Lewis expressly noted that it was error to bar exclusion of

testimony of prior sexual activity between the victim and her boyfriend. In Lewis, however, the victim's mother had scheduled a gynecology exam for the victim and this exam concerned the victim inasmuch as she feared that the exam would reveal sexual activity between herself and her boyfriend. It was only after the exam was scheduled that the victim then accused her step father of a prior sexual assault. This Court noted the application of the rape shield statute, but ruled that the evidence was admissible by balancing the Sixth Amendment's right to Confrontation (as proof of the victim's motive to fabricate to avoid being discovered about potential sexual activity with her boyfriend) against the rape shield's protections. The facts here, however, are totally different and support application of the rape shield statute. First, here, from both the hearing on the motion and S.D.'s deposition (A:24-54,56-83), it is unequivocally clear that S.D. accused petitioner of acts of oral sex, and then told her mother of her prior sexual activity (and a different type of sexual activity at that, to wit, sexual intercourse and not oral sex) with her boyfriend hours later so that her mother would hear the news from her and not someone else. It was not S.D.'s mother who was insisting upon a gynecology exam that was the triggering event. The accusation made by S.D. about petitioner's prior sexual battery triggered

the exam and then S.D. openly told her mother about her prior sexual activity with her boyfriend. These facts completely destroy any contention that S.D. fabricated the accusation against petitioner to soften the blow about her mother finding out about the prior sexual activity with her boyfriend. If S.D. did not want her mother to find out about the sexual activity, she could have just as easily said nothing at all about the assault by petitioner and there would never have been a medical examination that would have been scheduled. In essence, S.D. was telling both her mother and the authorities about her prior sexual activity with her boyfriend to alert them that they would not find any forensic evidence of the abuse by petitioner because she had been active sexually with her boyfriend. A:43-45. Nor would they have likely discovered any real forensic evidence anyway given the fact that petitioner had engaged in oral sex with S.D. months before the allegations surfaced. Nothing in either the proffer or S.D.'s deposition, however, established that S.D. accused petitioner to avoid the prior sexual activity with her boyfriend from surfacing.

The facts here, are more closely aligned with those in Marr v. State, 494 So.2d 1139 (Fla. 1986). Marr is even cited in the Lewis opinion. In Marr, this Court ruled that evidence regarding a victim's prior sexual activity with her boyfriend

was not admissible to establish that an alleged sexual battery was fabricated by the victim solely because of personal animosity between the boyfriend and the defendant. This Court noted that other avenues could be utilized to support the defense including cross examination of both the boyfriend and the victim about the existence of the relationship and any animosity existing between the two of them and the defendant. The exact same analysis can be applied here. Petitioner never proffered a motive to fabricate by S.D. to avoid the prior sexual activity with her boyfriend from being uncovered. The proffer was more akin to the fact that S.D. did not really like petitioner at the time. This being the case, S.D. can simply be asked questions on cross examination about the nature of her relationship with petitioner to establish bias (whether they got along, etc) rather than going into a barrage of questions about her prior sexual activity with a former boyfriend. To hold otherwise, would totally make the protections of the rape shield statute a nullity, and, more significantly, render its statutory protections virtually meaningless.

Petitioner now raises a host of arguments in an effort to establish a basis to overcome the rape shield statute. Among the arguments are that S.D. might have feared that she was pregnant or had some type of sexual disease, or that someone

else had threatened to tell S.D.'s mother about the prior sexual conduct. The problem with this argument is that it was never proffered to the Circuit Court in this form and both the transcript hearing on the proffer and the deposition of S.D. herself fail to establish any type of good faith basis to support the admissibility of the evidence under such theories. The motive to lie argument simply cannot be based upon a potential fishing expedition into grounds supporting the admission of prior sexual history of a crime victim as otherwise, the rape shield statute would be rendered meaningless.

II. THE DISTRICT COURT OF APPEAL DID NOT ERR IN GRANTING CERTIORARI RELIEF.

Petitioner also contends that the District Court erred in granting the certiorari petition because there was no departure from the essential requirements of the law by the Circuit Court. The State submits that this argument is without merit.

Here, petitioner is arguing that there was no basis for the District Court of Appeal to rule upon a pretrial evidentiary ruling. State v. Pettis, 520 So.2d 250 (Fla. 1988) clearly provides the District Court of Appeal with the authority to entertain a certiorari petition to review a pretrial evidentiary ruling. True, not every pretrial ruling may constitute grounds

for certiorari review, but the State submits that application of whether or not the rape shield statute should be applied is certainly one that would fall under the certiorari review umbrella. If such review were precluded here, the State would never have the opportunity to challenge what it now alleges was an erroneous ruling infringing upon S.D.'s rights under the rape shield statute.

In fact, the State submits that petitioner has improperly sought to review the District Court's ruling in this Court as there is no right to interlocutory appellate review by a Defendant under the Florida Rules of Appellate Procedure. Additionally, the use of any type of special writ jurisdiction should likewise not apply since petitioner will eventually have the opportunity to seek appellate review if and when he is convicted under the Information at issue.

In light of these facts, this Court should re-examine the jurisdictional issue, and based upon the facts in the record, conclude that review was either improvidently granted, or alternatively, that the Third District Court of Appeal properly issued the writ of certiorari in this case.

CONCLUSION

WHEREFORE, based upon the foregoing argument and citations of authority, the State respectfully requests that this Court

decline to exercise jurisdiction and conclude that review was improvidently granted, or alternatively, that the ruling of the Third District Court of Appeal be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the

foregoing **BRIEF OF RESPONDENT** was mailed to **BENNETT H. BRUMMER,** Public Defender, 11th Judicial Circuit, 1320 NW 14th Street, Miami, FL., 33125, Attn., ROY A. HEIMLICH, ESQ., on this ___ day of December, 2002.

_____
FRANK J. INGRASSIA
Assistant Attorney General

CERTIFICATE OF TYPE SIZE

I HEREBY CERTIFY that 12 point Courier New type size was utilized to prepare this Brief and is in compliance with Fla. R. App. P. 9.210.

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FRANK J. INGRASSIA