

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 02-258

**FILED**  
THOMAS D. HALL

JAN 31 2002

CLERK, SUPREME COURT  
BY Duj

**LEON ADDERLY,**

Petitioner,

-vs-

**THE STATE OF FLORIDA.**

Respondent.

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

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**BRIEF OF PETITIONER ON JURISDICTION**

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BENNETT H. BRUMMER  
Public Defender  
Eleventh Judicial Circuit  
of Florida  
1320 NW 14th Street  
Miami, Florida 33125  
(305) 545-1958

ROY A. HEIMLICH  
Assistant Public Defender  
Florida Bar No. 0078905

Counsel for Petitioner

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## INTRODUCTION

Petitioner Leon Adderly (the defendant in the trial court), seeks discretionary review of a decision of the Third District Court of Appeal that expressly and directly conflicts with *Lewis v. State*, 591 So. 2d 922 (Fla. 1991), expressly construed the confrontation clause provisions of the state and federal constitutions,<sup>1</sup> and expressly and directly conflicts with decisions of this Court as to when certiorari may be granted to quash a non-appealable ruling such as the ruling that denied the State's motion in limine. The symbol "A." refers to the opinion of the lower court, as set forth in the Appendix to this brief.<sup>2</sup>

## STATEMENT OF THE CASE AND FACTS

The facts were stated as follows by District Court (A. 1-2):

Defendant-respondent Leon Adderly is charged with sexual battery on a minor by a person in familial authority, in violation of paragraph 794.011(8)(b), Florida Statutes (1999). The defendant is the stepfather of the fifteen-year-old victim, S.D. S.D. testified in deposition that while her mother was away from home for hospital treatment, the defendant came into her room, held her down, and made oral contact with her vagina. He told her that she should not tell her mother because her mother was in the hospital and telling her would only make the mother feel worse. She did not initially tell her mother.

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<sup>1</sup> See the Sixth Amendment to the Constitution of the United States and Article I, Section 16, of the Florida Constitution.

<sup>2</sup> The District Court opinion was filed on October 31, 2001. The District Court decision denying defendant's motion for rehearing, certification and rehearing en banc was rendered on January 16, 2002.

Thereafter S.D. avoided the defendant. At some interval after her mother returned home from the hospital, the mother asked S.D. why she disliked the defendant so much. S.D. told her mother what had happened and her mother called the police.

The police interviewed S.D. and scheduled an appointment at the rape treatment center. Realizing that as a result of the rape treatment center examination, her mother might learn that she had been sexually active with her boyfriend, S.D. told her mother that she had previously had sexual relations with her boyfriend.

The State filed a motion in limine under the rape shield statute, arguing that any evidence of S.D.'s prior sexual activity with her boyfriend should be excluded. See § 794.022(2), Florida Statutes (2001). The trial court denied the motion, and the State has petitioned for a writ of certiorari.

The District Court purported to recognize the authority of *Lewis v. State*, 591 So. 2d 922 (Fla. 1991), and the primacy of defendant's rights under the confrontation clause (A. 3):

The rape shield statute prohibits the introduction into evidence of specific instances of prior consensual sexual activity between the victim and any person other than the offender. *Id.* There are several statutory exceptions. *Id.* It has also been held that the statute must give way to a defendant's rights under the Confrontation Clause. *Lewis v. State*, 591 So.2d 922, 925 (Fla.1991).

The defendant in this case contends that S.D. made up the charge against the defendant so that S.D. could disclose to her mother that she had previously had sexual intercourse with her boyfriend, without the mother being angry at S.D. The logic, according to the defendant, is that if S.D. falsely charged the defendant with sexual assault, the mother would be angry with the defendant, not S.D. The defense relies on the *Lewis* decision, but that reliance is misplaced.

The District Court refused to apply *Lewis* to allow defendant to confront the witness against him, held that the confrontation clause did not override the rape shield statute here, and granted certiorari to preclude defendant from presenting a defense (A. 4-5):

In this case, the defendant contends that S.D. had decided she wanted to tell her mother that she had been sexually active with her boyfriend. The defendant claims that in order to prevent the mother from being angry with S.D. about this, S.D. decided to make a false charge that the defendant had performed oral sex on her against her will, so that the mother would be angry with the defendant instead of with S.D.

This claim of the defendant is contrary both to common sense and the facts of the case. The victim did not initiate the conversation with the mother regarding the defendant's sexual assault. The victim only revealed the information after the mother pressed the daughter to explain why she disliked the defendant so much. When the daughter explained the prior sexual incident with the defendant, the mother called the police. This in turn led to the rape treatment center referral. In anticipation of the rape treatment center examination, the daughter decided to disclose to the mother that she had previously been sexually active with the boyfriend.

There is no legally sufficient reason to overcome the rape shield statute in this case. The order denying the State's motion in limine is quashed.

### **SUMMARY OF ARGUMENT**

It was error for the District Court to refuse to apply *Lewis* and defendant's rights under the confrontation clause, and to grant certiorari so as to preclude defendant from confronting the witness against him and presenting a defense.

## ARGUMENT

### **THE DISTRICT COURT IMPROPERLY GRANTED CERTIORARI TO BAR DEFENDANT FROM CONFRONTING THE WITNESS AGAINST HIM AND PRESENTING A DEFENSE**

Mr. Adderly's defense in this case is that the allegations against him were fabricated by S.D., his 15-year-old stepdaughter, to divert her mother's attention and anger from the fact that S.D. was having sexual intercourse with her boyfriend. S.D. told her mother about her sexual activities with her boyfriend immediately after telling her mother that she had been sexually battered by her mother's husband. By making these allegations, S.D. was able to portray herself as a victim, rather than as a willing participant in sexual misconduct. By accusing defendant, she was able to focus attention on his alleged wrongdoing, and divert attention from her own misconduct. The District Court's ruling excluding this evidence under the rape shield statute (Section 794.022(2), Florida Statutes) precludes defendant from showing that S.D. had a motive to lie.

The right to confront witnesses includes the right to cross-examine, and the rape shield statute can not be applied in a criminal case to exclude evidence relevant to the veracity of testimony against the defendant. *Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (exclusion of evidence of sexual relationship allegedly motivating witness to lie violated the confrontation



right); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) ("Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination") (citations omitted); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("[t]he right . . . to due process is, in essence, the right to a fair opportunity to defend").

In *Lewis v. State*, 591 So. 2d 922 (Fla. 1991), as in this case, the defendant was charged with lewd and lascivious assault upon his stepdaughter. "At trial, Lewis sought to develop as a defense theory that the victim, his stepdaughter, fabricated the charges against him in order to prevent her mother and Lewis from discovering . . . that she was sexually active with her boyfriend." *Lewis*, 591 So. 2d at 923.

"Lewis contended that the proffered testimony was relevant to his defense in that it would reveal to the jury the stepdaughter's motive to accuse him of sexual misconduct, and that it therefore must be admitted under his Sixth Amendment right to full and fair cross-examination." *Lewis*, 591 So. 2d at 923 (citations omitted). Mr. Adderly's contention here is the same.

This Court held in *Lewis* that the evidence had to be admitted because excluding it would have "effectively deprived [Lewis] of the opportunity to confront his accuser and present his defense." *Lewis*, 591 So. 2d at 925, quoting the dissenting opinion below. The Court explained:

We recognize the public policy underlying [the] rule . . . that a victim of a sexual assault should not be subjected to having her sexual history brought up in open court, but hold that where, as occurred in this case, application of this rule interferes with confrontation rights, or otherwise precludes a defendant from presenting a full and fair defense, the rule must give way to the defendant's constitutional rights.

*Lewis*, 591 So. 2d at 925 (citations omitted, emphasis added).

Thus the rape shield statute is "essentially an explicit statement of the rule of relevancy" (*Marr v. State*, 494 So. 2d 1139, 1142 (Fla. 1986)), and cannot be used to exclude relevant evidence needed to confront a prosecution witness and present a defense. Here, as in *Lewis*, the evidence in question is relevant to credibility, where credibility is the sole issue to be determined at trial. The principle in *Lewis* and here is that the defendant is entitled to confront and cross-examine his accuser, and defend by showing that she had a motive to lie.

*Lewis* has often been applied to vindicate confrontation rights. See *Hammond v. State*, 660 So. 2d 1152, 1157 (Fla. 2d DCA 1995) (error to exclude testimony concerning prior sexual knowledge of victims likely to be perceived as innocent, because in 'classic credibility' contest, "the defendant's right to confront his accusers takes precedence over the rape shield law"); *Teemer v. State*, 615 So. 2d 234, 236 (Fla. 3d DCA 1993) (rape shield statute codifies rule of relevancy that victim's prior sexual

history is irrelevant, but must yield to defendant's constitutional right to present "a full and fair defense"); *Dixon v. State*, 605 So. 2d 960, 962 (Fla. 2d DCA 1992) (the rape shield statute could not be applied to interfere with "confrontation rights" or to preclude a defendant from "presenting a full and fair defense"); *Castro v. State*, 591 So. 2d 1076 (Fla. 3d DCA 1991) (judge improperly excluded evidence indicating 15-year old's alleged motive to fabricate accusations against her uncle).

The District Court here ruled that there was "no legally sufficient reason to overcome the rape shield statute in this case" (A. 5) because the "claim of the defendant is contrary both to common sense and the facts of the case." (A. 4). The Court thus rejected the trial court's finding, that the evidence in question has sufficient probative value as to S.D.'s credibility that excluding it would deny defendant his rights, and found the order below reflected a departure from the essential requirements of the law. This ruling is in conflict with rulings of this Court limiting the circumstances under which certiorari may be granted to quash a non-appealable ruling. See *Haines City Community Development v. Heggs*, 658 So. 2d 523 527-28 (Fla. 1995) ("an abuse of judicial power") (citation and internal quotation omitted); accord, *Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983) ("violation of a clearly established principle of law

resulting in a miscarriage of justice").<sup>3</sup> The result of the Court's ruling that the confrontation clause did not override the rape shield statute in this case is effectively to preclude Mr. Adderly from disputing his stepdaughter's testimony where they are the only witnesses and there is no physical evidence.

The only "facts of the case" that are not in dispute are the fact that S.D. was having sex with her boyfriend and the fact that she charged Mr. Adderly with a sexual battery, allegedly committed almost two years prior to the filing of the information. The State contends that charge is true; defendant claims it is false. The State contends that S.D. truthfully told her mother that her stepfather had assaulted her because her mother asked why she didn't like him; Mr. Adderly claims that S.D. fabricated the accusation so that her mother would be angry at him, not at her.<sup>4</sup> The State claims that S.D. told her mother she had been having sex with her boyfriend only because that would be

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<sup>3</sup> See *State v. Pettis*, 520 So. 2d 250, 253-54 (Fla. 1988) (erroneous ruling did not rise to the level of a departure from the essential requirements of law); see also *Young, Stern & Tannenbaum, P.A. v. Smith*, 416 So. 2d 4, 5 (Fla. 3d DCA 1982) ("departure from the essential requirements of law"). The District Court's opinion did not articulate the basis upon which it found a departure from "the essential requirements of law" or "an abuse of judicial power."

<sup>4</sup> Events transpired in precisely this fashion. S.D. testified at her deposition that her mother's reaction to what S.D. told her about her stepfather, Leon, and her boyfriend, Allen, was that "[s]he was not so much upset at me about the sex with Allen, but she was upset with Leon and all that. She was upset with Leon, not Allen."

revealed after she made her accusation against Mr. Adderly; defendant contends that S.D. needed to tell her mother that she had been having sex with her boyfriend, and made a false accusation in order to divert her mother's anticipated wrath.

The District Court's opinion indicates that the defendant's claim is contrary to "common sense." (A. 4). But the Court cannot take judicial notice that 15-year old girls always act in accordance with "common sense." Defendant's right to a jury trial encompasses the right to have a jury determine whether there is a reasonable doubt that S.D.'s account is true. Jurors may think, and the prosecution will likely argue, that S.D. has no reason to lie about a matter such as this. The Court's opinion, precluding defendant from showing that she does, deprives him of the right to have a jury determine whether there is a reasonable doubt.

Exploration of the mental process that may have led S.D. to make a false accusation is virtually impossible; making a false accusation of sexual battery is not likely ever to accord with "common sense." Nonetheless, a jury could rationally find a reasonable doubt about the veracity of S.D.'s accusation against Mr. Adderly without determining why S.D. wanted or needed to tell her mother that she was having sex with her boyfriend.

Possible reasons for S.D.'s disclosure of her sexual activity with her boyfriend are readily apparent. S.D. might have

feared that her mother might find out. S.D. might have feared that she was pregnant or had a sexually transmitted disease, and that she could not further conceal the situation from her mother. By telling her mother, S.D. would diffuse her mother's anger, and by falsely accusing Adderly, S.D. would divert it.

Defendant need not prove what circumstances led S.D. to confess her sexual activities to her mother in order to argue that S.D. had a motive to make a false accusation against defendant in order to divert her mother's attention. The District Court's order precluding defendant from proving the undisputed fact that S.D. was secretly having sex with her boyfriend, and arguing S.D.'s motive to lie, effectively precludes defendant from meaningfully disputing the testimony against him. The Court may not, under the guise of a ruling upon the admissibility of evidence, preclude defendant from seeking a jury determination as to the truth of the accusation against him.

### CONCLUSION

The Court should grant discretionary review.

Respectfully submitted

BENNETT H. BRUMMER  
Public Defender  
Eleventh Judicial Circuit of Florida  
1320 Northwest 14th Street  
Miami, Florida 33125

By: ROY A. HEIMLICH  
ROY A. HEIMLICH  
Assistant Public Defender

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Frank J. Ingrassia, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 110 S.E. 6th Street, Fort Lauderdale, FL 33301 and the Honorable Cecilia Altonoga, Circuit Judge, Richard E. Gerstein Justice Building, 1351 Northwest 12th Street, Miami, Florida 33125, on the 28th day of January, 2002.

  
\_\_\_\_\_  
ROY A. HEIMLICH  
Assistant Public Defender

## CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point, except that the headings are in 14 point proportionately spaced Times New Roman.

  
\_\_\_\_\_  
ROY A. HEIMLICH  
Assistant Public Defender

# APPENDIX



IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
THIRD DISTRICT  
JANUARY TERM, A.D. 2002  
JANUARY 16, 2002

THE STATE OF FLORIDA,

CASE NO.: 3D01-2847

Appellant(s)/Petitioner(s),

vs.

LEON ADDERLY,

LOWER

TRIBUNAL NO. 00-16349

Appellee(s)/Respondent(s).

Upon consideration, respondent's motion for rehearing or, in the alternative, for certification is hereby denied. COPE, GODERICH and SHEVIN, JJ., concur. Respondent's motion for rehearing en banc is denied.



CC:  
Frank J. Ingrassia  
Roy A. Heimlich

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NOT FINAL UNTIL TIME EXPIRES  
TO FILE REHEARING MOTION  
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
THIRD DISTRICT  
JULY TERM, A.D. 2001

THE STATE OF FLORIDA,

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Petitioner,

\*\*

vs.

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CASE NO. 3D01-2847

LEON ADDERLY,

\*\*

Respondent.

\*\*

LOWER

TRIBUNAL NO. 01-16349

Opinion filed October 31, 2001.

A Writ of Certiorari to the Circuit Court for Dade County,  
Cecilia M. Altonaga, Judge.

Robert A. Butterworth, Attorney General, and Frank J.  
Ingrassia, Assistant Attorney General, for petitioner.

Bennett H. Brummer, Public Defender, and Roy A. Heimlich,  
Assistant Public Defender, for respondent.

Before COPE, GODERICH and SHEVIN, JJ.

COPE, J.

The State petitions for a writ of certiorari, challenging a  
ruling under the rape shield law. We grant the petition.

Defendant-respondent Leon Adderly is charged with sexual  
battery on a minor by a person in familial authority, in violation

of paragraph 794.011(8)(b), Florida Statutes (1999). The defendant is the stepfather of the fifteen-year-old victim, S.D. S.D. testified in deposition that while her mother was away from home for hospital treatment, the defendant came into her room, held her down, and made oral contact with her vagina. He told her that she should not tell her mother because her mother was in the hospital and telling her would only make the mother feel worse. She did not initially tell her mother.

Thereafter S.D. avoided the defendant. At some interval after her mother returned home from the hospital, the mother asked S.D. why she disliked the defendant so much. S.D. told her mother what had happened and her mother called the police.

The police interviewed S.D. and scheduled an appointment at the rape treatment center. Realizing that as a result of the rape treatment center examination, her mother might learn that she had been sexually active with her boyfriend, S.D. told her mother that she had previously had sexual relations with her boyfriend.

The State filed a motion in limine under the rape shield statute, arguing that any evidence of S.D.'s prior sexual activity with her boyfriend should be excluded. See § 794.022(2), Florida Statutes (2001). The trial court denied the motion, and the State has petitioned for a writ of certiorari.

The rape shield statute prohibits the introduction into evidence of specific instances of prior consensual sexual activity between the victim and any person other than the offender. Id. There are several statutory exceptions. Id. It has also been held that the statute must give way to a defendant's rights under the Confrontation Clause. Lewis v. State, 591 So. 2d 922, 925 (Fla. 1991).

The defendant in this case contends that S.D. made up the charge against the defendant so that S.D. could disclose to her mother that she had previously had sexual intercourse with her boyfriend, without the mother being angry at S.D. The logic, according to the defendant, is that if S.D. falsely charged the defendant with sexual assault, the mother would be angry with the defendant, not S.D. The defense relies on the Lewis decision, but that reliance is misplaced.

In Lewis, the defendant was the stepfather of the victim, a teenager. According to the testimony in that case, the victim was sexually active with her boyfriend. The mother and defendant suspected this, but the victim had denied it.

The mother and the defendant had scheduled an appointment for the victim to see a gynecologist. The victim was apparently concerned that the gynecologist would discover, and disclose to her mother, that she had been sexually active. Seven days before the appointment, the victim made the charge that the defendant had

engaged in sexual activity with her. The defendant claimed that this was a false charge made by the victim in order to explain the anticipated results of the gynecological examination and thus prevent the mother and defendant from confirming that she was sexually active with the boyfriend. The Florida Supreme Court held that on these facts, the defendant's rights under the Confrontation Clause overcame the terms of the rape shield statute, and that the evidence of the stepdaughter's prior sexual activity was admissible.

In this case, the defendant contends that S.D. had decided she wanted to tell her mother that she had been sexually active with her boyfriend. The defendant claims that in order to prevent the mother from being angry with S.D. about this, S.D. decided to make a false charge that the defendant had performed oral sex on her against her will, so that the mother would be angry with the defendant instead of with S.D.

This claim of the defendant is contrary both to common sense and the facts of the case. The victim did not initiate the conversation with the mother regarding the defendant's sexual assault. The victim only revealed the information after the mother pressed the daughter to explain why she disliked the defendant so much. When the daughter explained the prior sexual incident with the defendant, the mother called the police. This in turn led to the rape treatment center referral. In anticipation of the rape

treatment center examination, the daughter decided to disclose to the mother that she had previously been sexually active with the boyfriend.

There is no legally sufficient reason to overcome the rape shield statute in this case. The order denying the State's motion in limine is quashed.

Certiorari granted.