Rape Shield Statutes and the Admissibility of Evidence Tending to Show a Motive to Fabricate 1998 John M. Manos Writing Competition on Evidence

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RAPE SHIELD STATUTES AND THE ADMISSIONIBILITY OF EVIDENCE TENDING TO SHOW A MOTIVE TO FABRICATE

REGAN KREITZER LATESTA

I. INTRODUCTION .............................................................. 490
II. THE HISTORY OF RAPE SHIELD STATUTES ...................... 491
   A. Common Law ............................................................ 491
   B. The Adoption of Rape Shield Statutes ......................... 492
III. EVIDENCE OF A VICTIM'S MOTIVE TO FABRICATE .......... 495
   A. The Supreme Court Precedent of Olden v. Kentucky ........ 495
   B. Case Law Supporting the Admission of Evidence of a Victim's Sexual History to Prove a Motive to Fabricate .......... 498
      1. Oregon ............................................................. 498
      2. Massachusetts .................................................... 499
      3. New Mexico ......................................................... 500
   C. Case Law Supporting the Exclusion of Evidence of a Victim's Sexual History to Prove a Motive to Fabricate .......... 500
      2. Stephens v. Miller ................................................. 502
      3. Criticism ............................................................ 503
   D. Case Law Applying the Maryland Rape Shield Statute's Ulterior Motive Exception ........................................... 504
      1. Case Law Excluding Ulterior Motive Evidence Under the Maryland Statute ........................................... 504
      2. Case Law Admitting Ulterior Motive Evidence Under the Maryland Statute ........................................... 505
IV. STATUTES WITHOUT A MOTIVE TO LIE EXCEPTION SHOULD BE AMENDED .............................................. 507
   A. Amending Federal Rule of Evidence 412 to Include an Exception for Evidence of an Ulterior Motive ....................... 507
      1. Safeguards ........................................................... 507

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Rape shield statutes were enacted in order to protect the rape victim from embarrassment and humiliation at the trial of the accused by restricting the admission of sexual conduct evidence. While these statutes, for the most part, succeed in protecting the victim and encouraging her to report the rape, they can have the effect of limiting the accused's ability to defend himself.

Currently, Federal Rule of Evidence 412, the federal rape shield law, excludes evidence of the victim's prior sexual activity with persons other than the defendant even if it tends to show that the victim has an ulterior motive to fabricate charges. The law excludes this evidence unless its admission is constitutionally compelled. Rule 412 allows a defendant to introduce evidence of the alleged victim's prior sexual history only if its exclusion would violate his constitutional rights.

Maryland's rape shield statute, on the other hand, contains an explicit exception for evidence that supports a claim that the victim may have a motive to fabricate the charges. The statute, however, does not admit all evidence that may show an ulterior motive. Rather, the defendant must demonstrate that the evidence is relevant and material to an issue in the case and that its probative value outweighs its prejudicial nature.

Part II of this article discusses the advent of rape shield statutes in the United States. Part III examines case law construing the statutes with regard to prior sexual conduct as evidence of a motive to fabricate. Finally, Part IV proposes to amend the Federal Rule to include an exception similar to that of the Maryland Rape Shield Statute, which permits the admission of evidence that supports a claim that the victim has an ulterior motive in accusing the defendant.

In this paper, the words "victim," "complainant," "accuser," and "alleged victim" are used interchangeably to describe the person who has accused another of rape or sexual assault. In addition, the words "accused" and "defendant" are used to describe the person on trial for the alleged crime.


See infra note 37 and accompanying text.

Federal Rule of Evidence 412 does not contain an exception that explicitly allows evidence of an ulterior motive on the part of the defendant. Therefore, the statute excludes such evidence.

FED. R. EVID. 412(b)(1)(C).

Id.

See infra note 43.

§ 461A(a)(3). See infra note 43.

Id.
II. THE HISTORY OF RAPE SHIELD STATUTES

A. Common Law

The common law rules of evidence allowed evidence of the victim's past sexual conduct to be admitted at trial. Such evidence, particularly the victim's chastity or lack thereof, was admissible as a means of proving her consent or absence of consent. A woman's lack of chastity also was admissible in order to attack her credibility, due to the belief that "promiscuity purports dishonesty." The defendant had the right to attack the credibility of the victim in this manner, while a similar attack on his credibility was considered too prejudicial.

Traditional rape laws also required testimony both to demonstrate that the victim had physically resisted her attacker and to corroborate the victim's testimony. The common law required corroboration because of the belief that a woman would fabricate charges of rape as a means of explaining pregnancy, premarital sex, and disease. Testimony also needed to be corroborated because of the belief that a woman would accuse a man of rape in order to retaliate against him. Therefore, the prosecution had to provide corroborative evidence of such essential elements as the identity of the accused, penetration, and nonconsent.


15Fisher, supra note 13, at 838.

16Estrich, supra note 12, at 52.

17Cassia Spohn & Julie Horney, Rape Law Reform: A Grassroots Revolution and Its Impact, 17 (1992). See also Estrich, supra note 12, at 31-37. The physical resistance requirement, also called "utmost resistance," was "explained as doing no more than describing the natural response of a woman, or at least a woman of any virtue, to sex that was truly unwanted." Id. The need to show resistance, under the common law, varied between jurisdictions and, in those jurisdictions that used the resistance requirement, varied among cases as well. Id. Many jurisdictions required a showing of resistance in cases where the accused was an acquaintance, an employer, and a white man; convictions of these types of accused were overturned due to lack of resistance. Id. On the other hand, where the accused was a stranger, a black man, or where the accused was armed, the victim was excused from resistance. Id.

18Estrich, supra note 12, at 31-37.

19Id.

20Id.

21Id. at 24.
These common law rules resulted in the notorious abuse of rape victims by the
development of the legal system.22 “[A]gressive defense counsel . . . essentially put the victim on
trial”23 by forcing her to answer intrusive and embarrassing questions about her
morality and sexuality that often were meant to demean and humiliate her.24 This
character assassination led to a decrease in the number of reported rapes.25

B. The Adoption of Rape Shield Statutes

As a result of the women’s movement of the 1960’s,26 as well as the support of
law enforcement agencies,27 pressure for reform of rape laws grew.28 During the
1970’s,29 Congress and state legislatures began enacting statutes in order to protect
victims of rape30 and sexual assault from being questioned about their prior sexual
conduct.31 The statutes were enacted with the intention of shielding victims from
the embarrassment and harassment caused by testifying about past sexual conduct.32
Victims were thereby encouraged to report the crime and to testify at trial33 without
being required to justify their conduct.34

Although rape shield statutes vary between jurisdictions,35 the laws are similar in
generally prohibiting the admission of all evidence pertaining to the victim’s past
sexual conduct and, then, providing exceptions to the stated rule of inadmissibility.36
The Federal Rule of Evidence 412, which is typical of such statutes, provides:

Sex Offense Cases; Relevance of Alleged Victim’s Past Sexual Behavior or
Alleged Sexual Predisposition

22See Commonwealth v. Nieves, 582 A.2d 341, 346 (Pa. 1990); Rebekah Smith,
Comment, Protecting The Victim: Rape and Sexual Harassment Shields Under Maine And

23Nieves, 582 A.2d at 346.

24Smith, supra note 22, at 445.

25Fisher, supra note 13, at 838.

26Id. at 839.

27Wallach, supra note 14, at 489.

28Id.

29The first rape shield statute was enacted in Michigan in 1974. Jason M. Price, Note,
Constitutional Law—Sex, Lies, and Rape Shield Statutes: The Constitutionality of Interpreting
Rape Shield Statutes to Exclude Evidence Relating to the Victim’s Motive to Fabricate, 18 W.
1978. Id.

30Wallach, supra note 14, at 488.

31Haxton, supra note 3, at 1219.

32Id.

33Id.

34Wallach, supra note 14, at 489.

35Fisher, supra note 13, at 840.

36Haxton, supra note 3, at 1220.
Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior; and

(2) Evidence offered to prove any alleged victim's sexual predisposition.

Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(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.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

Procedure to Determine Admissibility.

(1) A party intending to offer evidence under subdivision (b) must—

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.37

While the Federal Rule generally excludes evidence of the victim's past sexual conduct, it provides several exceptions for evidence that is considered relevant.38 These exceptions permit evidence of the victim's sexual history if it is offered to prove that someone other than the defendant was the source of semen, injury, or

37FED. R. EVID. 412.

38Wallach, supra note 14, at 495.
other physical evidence or if it is evidence of past sexual conduct between the defendant and the victim offered by the defendant to prove consent. The rule also contains a "catch-all" provision that authorizes the court to use its discretion in admitting evidence for which there is otherwise no exception. Despite falling under an exception, permissible evidence may be excluded, however, if the evidence would be excluded under another federal rule.

While the current federal rule contains several exceptions, the rule does not contain an exception that otherwise allows the accused to introduce evidence that the accuser has a reason or motive to lie or fabricate charges of rape.

39 Fed. R. Evid. 412(b)(1)(A). The physical evidence exception of Federal Rule of Evidence 412 is a remainder of the common law corroboration requirement. See supra note 19 and accompanying text.


41 Fed. R. Evid. 412(b)(1)(C).

42 Fed. R. Evid. 412(b)(1).

43 An example of a rape shield law with a specific exception for evidence of a motive to lie is, article 27, section 461A of the Maryland Code, also known as Maryland's Rape Shield Statute, which states:

461A Admissibility of evidence in rape cases.
(a) Evidence relating to victim's chastity. — Evidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity are not admissible in any prosecution for commission of a rape or sexual offense in the first or second degree, or attempted rape or attempted sexual offense in the first or second degree. Evidence of specific instances of the victim's prior sexual conduct may be admitted only if the judge finds the evidence is relevant and is material to a fact in issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value, and if the evidence is:
(1) Evidence of the victim's past sexual conduct with the defendant; or
(2) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma; or
(3) Evidence which supports a claim that the victim has an ulterior motive in accusing the defendant of the crime; or
(4) Evidence offered for the purpose of impeachment when the prosecutor puts the victim's prior sexual conduct in issue.
(b) In camera hearing. — Any evidence described in subsection (a) of this section, may not be referred to in any statements to a jury nor introduced at trial without the court holding a prior in camera hearing to determine the admissibility of the evidence. If new information is discovered during the course of the trial that may make the evidence described in subsection (a) admissible, the court may order an in camera hearing to determine the admissibility of the proposed evidence under subsection (a).

Oregon, Texas, and Virginia rape shield statutes also contain an ulterior motive exception: Or. R. Evid. 412(2)(b)(A) (excepts from exclusion evidence that "relates to the motive or bias of the alleged victim . . ."); Tex. R. Crim. Evid. 412(b)(2)(C) (seemle); Va. Code Ann. § 18.2-67.7(B) (Michie 1988):

Nothing contained in this section shall prohibit the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused. If such evidence relates to the past sexual conduct of the complaining witness with a person other than the accused, it shall not be admitted and may not be referred to at any preliminary hearing or trial unless the party offering the same files a written notice generally describing the evidence prior to the introduction.
III. EVIDENCE OF A VICTIM'S MOTIVE TO FABRICATE

Rape shield laws may preclude a defendant accused of sexual misconduct from presenting a plausible explanation as to why his accuser would falsely accuse him. Because of the exclusionary aspect of the federal rule and its lack of a specific exception for a motive to fabricate, a defendant is forced to use the "catch-all" exception— that a constitutional violation will occur due to the exclusion of such evidence. The defendant primarily argues that his Sixth Amendment right has been violated as a result of the exclusion.

A. The Supreme Court Precedent of Olden v. Kentucky

The United States Supreme Court had an opportunity to address the issue of a criminal defendant's constitutional right to "[expose] . . . a witness's motivation in testifying" in a rape case in Olden v. Kentucky. In Olden, the defendant, an African-American, was indicted on kidnapping, rape, and forcible sodomy charges. The victim was a young white woman named Matthews. At trial, she testified that she was at a bar with a friend, and after having an argument with the friend, left with the defendant. Matthews then testified that the defendant drove her to another location, threatened her at knifepoint, raped, and sodomized her. She also claimed that he raped her a second time. Matthews testified that, afterwards, at her request, the defendant dropped her off near Bill Russell's house.

At the time of the alleged rape, Matthews and Russell were married to and living with other people but were having an extramarital affair. By the time the case came to trial, Matthews and Russell, who was also an African-American, were separated from their spouses and living together. The defendant argued at trial that Matthews concocted the rape story to protect her relationship with Russell, who would have grown suspicious upon seeing her disembark from the car. In order to demonstrate

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44Stephens v. Miller, 13 F.3d 998 (7th Cir. 1994) (the defendant stated that his constitutional rights were violated as a result of the exclusion of evidence of the victim's motive to fabricate).


46Olden, 488 U.S. at 227, 231.

47Id.

48Id. at 228.

49Id.

50Id.

51Olden, 488 U.S. at 228.

52Id.

53Id. at 229.

54Id. at 230.

55Id.
Matthews' motive to lie, the defendant sought to introduce evidence of Matthews and Russell's current cohabitation, but the trial court, in ruling on a motion in limine, decided to keep that information from the jury.

On appeal, the Kentucky Court of Appeals held that Kentucky's rape shield law did not absolutely bar evidence of Matthews and Russell's living arrangement. The court found, however, that while the proffered evidence was relevant to the defendant's theory of the case, the potential prejudice of the evidence outweighed its probative value, and held, therefore, that the trial court properly excluded it. The court reasoned that the admission of testimony that Matthews and Russell were living together at the time of the trial "may have created extreme prejudice against Matthews."

The Supreme Court of the United States reversed the Kentucky Court of Appeals' decision and remanded the case for an assessment of whether the trial court impermissibly infringed upon the defendant's Sixth Amendment right "to be confronted with the witnesses against him," including the right to conduct reasonable cross-examination. The Court held that the relevant factors in making this assessment included "the importance of the [victim's] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating ... the [victim's testimony] ... the extent of cross-examination otherwise permitted, and ... the overall strength of the prosecution's case." In considering these factors, the Supreme Court could not conclude that the

56 Most rape shield statutes contain a provision stating that evidence relating to the victim's sexual history must be heard at an in camera hearing to determine its admissibility. See FED. R. EVID. 412(c).

57 Olden, 488 U.S. at 230.


59 Olden, 488 U.S. at 230.

60 Id.

61 Id.

62 Id. The Kentucky statute restricts the admissibility of evidence of the victim's sexual history to that which is admissible under "any other provision of law." KY. ST. REV. RULE 412(b). The Court of Appeals applied this restriction in determining that the evidence was properly excluded.

63 Olden, 488 U.S. at 231.

64 U.S. CONST. amend. VI. The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to ... be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

65 Id.


restriction on the defendant’s right to confrontation was harmless “beyond a reasonable doubt.”

Relying on its decision in *Davis v. Alaska*, the Supreme Court stated that “cross-examination [is] designed to show a prototypical form of bias on the part of the witness, and thereby . . . expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.” The Court held that a “reasonable jury might have received a significantly different impression of [the victim’s] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.”

In recognizing a defendant’s right to present evidence of the victim’s motive, the Supreme Court realized that the trial court may impose limits on the defense’s inquiry into the complainant’s potential bias. The Court concluded that the limitations should be applied to take into account such factors as “harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that [would be] repetitive or only marginally relevant.” In essence, the Court held that Federal Rule of Evidence 403 dictated the limitation on a defense counsel’s inquiry. However, in applying these limitations to *Olden*, the Court concluded that the limitations imposed on the inquiry “[were] beyond reason.”

In *Olden*, the Supreme Court recognized that it was a violation of the Sixth Amendment Confrontation Clause to prevent a defendant from presenting testimony that tends to show a victim’s motive to fabricate, even if the testimony is of the victim’s prior sexual conduct.

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68Id. The Court relied on the standard of review set by the *Van Arsdall* Court. See *Van Arsdall*, 475 U.S. at 684.

69415 U.S. 308 (1974). In *Davis*, the key witness in a trial for burglary and grand larceny was a juvenile who was on probation for a previous burglary. *Id* at 320-21. The prosecutor sought a protective order to prevent the juvenile’s record from being admitted at trial. The defendant objected, stating that he only intended to introduce the juvenile’s record to demonstrate that he identified the defendant out of fear that his probation would be revoked. *Id* at 311. The trial court issued the protective order in accordance with the state’s statute that prohibited the admission of a juvenile’s record in court. *Id*.

The United States Supreme Court reversed the trial court’s decision on the grounds that the trial judge had violated the defendant’s Sixth Amendment right to confront adverse witnesses. *Id* at 320-21. The Court found that the state’s interests in protecting the privacy of a juvenile are not outweighed by the constitutional right of a defendant to effectively cross-examine adverse witnesses with regard to bias or improper motive. *Davis*, 415 U.S. at 350.


72Id.

73Id., quoting, *Van Arsdall*, 475 U.S. at 679.

74Federal Rule of Evidence 403 provides: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

75*Olden*, 488 U.S. at 232.
Many courts, including those in Oregon, Massachusetts, and New Mexico, have followed the precedent set by the Supreme Court in *Olden* by admitting evidence of a victim’s prior sexual conduct to prove her motive to fabricate charges against the defendant.

1. Oregon

In an Oregon case, the defendant was indicted for three counts of first degree sodomy. After a mistrial, the forty-year-old defendant was retried on charges that he had engaged in and attempted a variety of sexual acts with a ten-year-old girl. The defendant denied the charges, contending that the girl falsely accused him after he learned that she had been sexually active with his thirteen-year-old son, and two other people. He claimed that the girl accused him after he had informed her that he was going to tell her parents.

During the first trial, defense counsel had alluded to the defendant’s claims in his opening statement. This led to a mistrial because the state argued, and the trial court agreed, that the statements were in violation of Oregon’s rape shield statute. During the second trial, the defendant was found guilty. He appealed, arguing that the second trial was barred due to double jeopardy. In deciding this issue, the Oregon Court of Appeals had to decide whether the evidence the defendant sought to introduce was properly excluded. The court held that the evidence was offered to establish an “inference, not inherently unreasonable, that the complainant had a motive to and did falsely accuse” the defendant of sexual assault.

The Oregon statute prohibited the evidence from being admitted at trial. When the court of appeals applied the holding of *Davis v. Alaska*, however, it found that the Oregon law violated the defendant’s right to confrontation by prohibiting evidence of the victim’s ulterior motive. As a result, the court held that the trial

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77 *Jalo*, 557 P.2d at 1360.

78 Id.

79 Id. The defendant alleged that, in addition to his son, the girl had been sexually active with a young boy and one of her uncles.

80 Id.


82 *Jalo*, 557 P.2d at 1361.


85 *Jalo*, 557 P.2d at 1362.
court erred in declaring that a mistrial occurred at the first trial. Therefore, the second trial was barred by the constitutional prohibition against double jeopardy.

2. Massachusetts

In a Massachusetts case, the police had found the defendant and the complainant naked outside of the defendant’s car in a vacant parking lot. At trial, the defendant claimed that the sexual intercourse was consensual and sought to introduce evidence that the alleged victim had been found in similar situations on two prior occasions and, subsequently, was charged with prostitution each time. The accused wanted to introduce this evidence to show that the victim may have been motivated to accuse him of rape in order to avoid any further prosecution.

In reversing the trial court’s ruling that the proffered evidence was barred by the Massachusetts rape shield statute, the Supreme Judicial Court of Massachusetts held that, in certain circumstances, evidence of prior acts or statements may be relevant to show a complainant’s motive to falsely accuse the defendant. The Court held that the rape shield statute cannot abridge the defendant’s right to a reasonable cross-examination to show the victim’s motive.

The Massachusetts court also addressed the relevancy of the testimony proffered by the defendant, stating that relevancy “depends on whether [the evidence] has a rational tendency to prove an issue in the case.” The court found that the evidence the defendant wanted to introduce was so similar to the circumstances surrounding the alleged rape that it could not say that the evidence had no rational tendency to prove that the alleged victim was motivated to fabricate rape charges against the defendant in order to avoid further prosecution. Therefore, the trial court’s exclusion of the evidence was reversible error.

86 Id.
87 Id.
89 Id. at 183.
90 Id. The alleged rape occurred on December 2, 1977. Id. The two prior arrests for prostitution that the accused wanted to introduce at trial occurred in May and September of 1977. Id. While the Massachusetts court does not address the proximity of the three dates, the closeness in time of the three occasions doubtless had an effect on the court’s decision that the evidence had great probative value.
91 Joyce, 415 N.E.2d at 184.
93 Joyce, 415 N.E.2d at 186. The court did not find it necessary to address the constitutional issues raised by the defendant and the Commonwealth, because it found that the trial judge had misapplied the rape shield statute. Id. at 184.
94 Id.
95 Id. at 187.
96 Id.
97 Joyce, 415 N.E.2d at 183.
3. New Mexico

The Supreme Court of New Mexico has held similarly that the New Mexico rape shield law\(^9\) permits the introduction of evidence of the victim's prior sexual conduct when the evidence tends to prove that the alleged victim acted as a prostitute on the occasion, consented to sex, and subsequently fabricated a claim of rape.\(^99\) But the Court also concluded that a defendant must make a showing that there is evidence to support a theory of fabrication before being allowed to introduce evidence of prior acts of prostitution.\(^100\)

Two women accused the defendant of raping them on different occasions.\(^101\) He alleged that the sexual acts were consensual, that both women were engaged in prostitution on the nights of the alleged rapes, and that during the course of "these acts for which [the defendant] was paying money, he did things which annoyed, angered, and in some ways, frightened these women."\(^102\) The trial court denied the defendant's motion to offer such testimony and he was convicted.\(^103\)

On appeal, the Supreme Court of New Mexico recognized that an accusation of fabrication on the part of the victim necessarily implicates the defendant's Sixth Amendment right of confrontation\(^104\) but affirmed the trial court's ruling excluding the proffered evidence\(^105\) because the defendant never mentioned in his motion that he wished to show that the victims had a motive to fabricate.\(^106\)

C. Case Law Supporting the Exclusion of Evidence of a Victim's Sexual History to Prove a Motive to Fabricate

Despite the Supreme Court's holding in \textit{Olden}, many courts have excluded evidence similar to that in \textit{Olden}. In applying the balancing test proscribed by Federal Rule of Evidence 403,\(^107\) these courts have determined that the probative value that would be added by the introduction of such evidence would be substantially outweighed by the danger of unfair prejudice or confusion of the issues.\(^108\) These courts have decided that the victim would be harmed by the


\(^100\) Id.

\(^101\) Id. at 871.

\(^102\) Id.

\(^103\) Id.

\(^104\) U.S. CONST. amend. VI.

\(^105\) Johnson, 944 P.2d at 881.

\(^106\) Id. at 879. At the in camera hearing, the defendant stated that the proffered evidence should be admitted because it was relevant to his defense of consent. Id. at 880.

\(^107\) In order for evidence to be admitted at trial, it must fall under one of the exceptions enumerated in Federal Rule of Evidence 412 and it must also satisfy the "other requirements for admissibility specified in the Federal Rules of Evidence, including Rule 403." Advisory Committee Notes of Federal Rule Evidence 412.

admission of evidence of her prior sexual behavior as it relates to her motive to lie. Therefore, they exclude or carefully limit the evidence. Courts justify such exclusions by determining that the exclusion is mandated by the policy behind rape shield statutes and the fact that defendants can usually establish the victim’s motive without evidence of the victim’s sexual history.

1. *Commonwealth v. Berkowitz*112

In *Commonwealth v. Berkowitz*, the Supreme Court of Pennsylvania affirmed the trial court’s decision to exclude evidence that the complainant’s boyfriend was of a jealous nature. The victim, a college student, had gone to visit her boyfriend after class but he was not home. She then went to visit another friend who also was not home, but was invited into the room by his roommate, the defendant. After the victim decided to stay, the defendant asked for a backrub but she declined. The victim also declined to sit on the bed with him. The defendant then sat on the floor next to her, lifted up her shirt, and massaged her breasts. After a while, Berkowitz pushed the victim on the bed and ultimately had sexual intercourse with her.

At trial, the defense sought to introduce evidence that the victim and her boyfriend were having problems because he believed her to be unfaithful. The defendant wished to use the evidence to prove that it was the victim’s fear of her boyfriend’s jealousy that motivated her to accuse Berkowitz of rape. The trial court allowed evidence of frequent arguments between the victim and her boyfriend but excluded any mention of the content of the arguments or of the victim’s alleged infidelity.

On appeal, the defendant argued that the evidence was not offered to prove that the victim was unfaithful, but rather that she and her boyfriend had argued over

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109 Id.
110 Id.
112 641 A.2d 1161 (Pa. 1994).
113 Id.
114 Id. at 1163.
115 Id.
116 Id.
117 Berkowitz, 641 A.2d at 1163.
118 Id.
119 Id.
120 Id.
121 Id. at 1165.
122 Berkowitz, 641 A.2d at 1165.
123 Id.
whether she had been unfaithful. The Pennsylvania Supreme Court reviewed the trial court's decision under the abuse of discretion standard dictated by Federal Rule of Evidence 403. In affirming the trial court, the Pennsylvania Supreme Court, held that the argument "over the issue of her infidelity is so closely tied to the issue of the victim's fidelity itself that, for the purposes of the Rape Shield Law, they are one and the same."

2. Stephens v. Miller

Evidence was excluded for similar reasons in Stephens v. Miller. The United States Court of Appeals for the Seventh Circuit, sitting en banc, divided sharply on whether the trial court improperly balanced the evidence under Federal Rule 403, and therefore, abused its discretion in excluding evidence related to the victim's motive to fabricate. In Stephens, the defendant was charged with attempted rape. The defendant and the victim told two different stories.

Stephens admitted that he and the victim engaged in consensual intercourse. Stephens offered, by way of explanation to the victim's charges, that he had made comments during intercourse that angered her. Specifically, the defendant sought to testify that he said to the victim, while they were "doing it doggy fashion," "don't you like it like this. . . . Tim Hall said you did." He also asserted that he made a statement about the victim's enjoyment of "switching partners." Stephens stated that, after he made the statements, the victim became angry and ordered him to leave her trailer. The trial court allowed the defendant to testify only that he said "something" that made the victim angry.

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124 Id.

125 This is the standard of review in determining whether a trial court erred in excluding or admitting evidence.

126 Berkowitz, 641 A.2d at 1165.

127 13 F.3d 998 (7th Cir. 1994) (en banc), cert. denied, 513 U.S. 808 (1994).

128 Id.

129 Id. The Court was split six to five in favor of affirming the district court's ruling denying admission of the proffered evidence. Id.

130 Id. at 1000-1. The victim claimed that she awoke to find Stephens standing in the front door of her trailer. Id. She said he sat down next to her and tried to kiss her. Id. After a few moments, she claimed he threw her down on the sofa, covered her mouth, and ripped her shirt. Id. When he reached down to undo his pants, the victim testified that she was able to get away from the victim and ran into her sister and brother-in-law's bedroom; Stephens fled. Id.

131 Miller, 13 F.3d at 998, 1000-1.

132 Id.

133 Id. The evidence was introduced at an in camera hearing.

134 Id.

135 Stephens, 13 F.3d at 1001.

136 Id. at 1002.
In affirming the trial court's ruling, the Seventh Circuit found no constitutional violation. The Court justified its holding by reasoning that the defendant was allowed to tell his version of the facts, except for the excluded evidence.\textsuperscript{137} Stephens was able to testify in front of the jury that he said something that angered the victim and that the statements subsequently motivated her to fabricate the attempted rape charge.\textsuperscript{118} The court held that the trial court properly balanced Stephens' right to testify against the State of Indiana's interests because it allowed him to testify about what happened during the alleged rape without causing embarrassment and humiliation to the victim, and therefore, Stephens was not deprived of his constitutional right to testify.\textsuperscript{139}

Five judges dissented from the plurality opinion. In his dissent, Judge Cummings stated:

The plausibility of Stephens' defense turned in substantial part on whether the jury could be persuaded that something Stephens had said to the complainant could have so enraged her that she would have responded in the manner alleged. Central to Stephens' case then are the words he claims to have said that night, words the jury never heard . . . The jury might well have disbelieved Stephens' testimony even if he had testified fully; however, it is hard to imagine his story being believed absent this evidence.\textsuperscript{140}

But the majority stated that the rape shield statute was enacted to prevent "just this kind of generalized inquiry into the reputation or past sexual conduct of the victim in order to avoid embarrassing her and subjecting her to possible public denigration."\textsuperscript{141} The plurality failed to differentiate reputation evidence from evidence that would support a claim that the victim had a motive to fabricate the charges. As stated by the dissent:

The testimony Stephens sought to offer, however, neither sought to prove the victim's character nor was intended to address the question of consent. Rather than attempting to prove the truth of any matter about [the victim's] character, Stephens . . . wanted to offer his story to show its effect on the listener . . . [I]t is evidence of a motive to fabricate.\textsuperscript{142}

3. Criticism

Stephens and Berkowitz are examples of a court's willingness to protect the victim and her credibility at the cost of the defendant's ability to present relevant evidence. The respective courts only admitted a portion of the evidence proffered by the defendants. As a result, the juries were not exposed to the real reasons why the

\textsuperscript{137}Id.

\textsuperscript{138}Id.

\textsuperscript{139}Id. at 1002-03.

\textsuperscript{140}Stephens, 13 F.3d at 1010 (Cummings, J., dissenting).

\textsuperscript{141}Id. at 1002.

\textsuperscript{142}Id. at 1012 (Cudahy, J., dissenting).
defendants argued that the victims fabricated the charges. Rather, each jury had a part of the defendant's story with which to determine the victim's credibility. In both cases, the court determined that the proffered testimony went to the victim's character and the reputation of her chastity, rather than to prove her motive.143

The courts erred in their holdings, because the evidence the defendants sought to introduce was not offered to prove character; nor was the evidence "one and the same" for the purposes of determining fidelity in Berkowitz144 and the victim's enjoyment of sex in a particular position in Stephens.145 Had the defendants been allowed to offer the particularity of the evidence they wished to present, the questioning would have been more limited and less prejudicial to the victims than if they were forced to answer questions about their fidelity or sexual preferences. Furthermore, the trial judge could have given the jury instructions explaining how they should and should not use the evidence.146

D. Case Law Applying the Maryland Rape Shield Statute's Ulterior Motive Exception

The constitutional rights of a defendant to confrontation and to present effective evidence147 have been implemented by a specific exception under the Maryland rape shield law148 that permits the court to admit evidence of ulterior motive showing other sexual conduct if it is relevant and material, and its prejudicial nature does not outweigh its probative value. In the two cases that have been decided by the Maryland Court of Appeals concerning a defendant's right to present evidence of the victim's sexual history as it relates to her motive to fabricate, the court reached opposing decisions.

1. Case Law Excluding Ulterior Motive Evidence Under the Maryland Statute

In White v. State,149 the alleged victim stated that she was using a public telephone when the defendants pulled up beside her in their van, kidnapped her, and repeatedly raped her.150 The defendants insisted that they had purchased and smoked crack cocaine with the victim but ignored her "suggestive moves" and rejected her offers to trade her body for drugs.151

At trial, the defendants claimed that they never had sexual intercourse with the complainant. They sought to introduce the testimony of a third person, who would testify that the complainant previously had offered to trade sex for cocaine with other

144See supra notes 113-26 and accompanying text.
145See supra notes 128-42 and accompanying text.
146FED. R. EVID. 105.
148Id.
150Id. at 189.
151Id. at 190.
RAPE SHIELD STATUTES

individuals in order to prove that she falsely accused them out of anger that they had failed to procure more drugs for her and refused her sexual advances. The trial court excluded the proffered evidence and the defendants were convicted.

The Maryland Court of Appeals affirmed the ruling of the lower court. The court held that the proffered testimony might have some relevance but that any probative value that existed was far outweighed by its prejudicial effect. The court reasoned that admitting the testimony "would have invited the jurors to stray into collateral matters that would have obscured the issues before them," defeating the purpose of the statute to keep jurors focused on the specific issues in the case.

2. Case Law Admitting Ulterior Motive Evidence Under the Maryland Statute

In a later case, however, the court reversed the lower court's decision excluding evidence that the victim had exchanged sex for drugs one week prior to the alleged rape. In Johnson v. State, the complainant admitted at an in camera hearing that she had "freaked" for crack cocaine for a period of six months prior to the occasion in question. She stated that when she wanted to get high, she would engage in sex for crack cocaine at any time of the day or night. The victim denied "freaking" on the night of the alleged rape, even though she admitted to having binged on crack cocaine for most of that evening and night.

At trial, the defendant raised consent as a defense and alleged that the complainant had accused him of rape as a result of his failure to "pay" her after sexual intercourse. The trial court refused to admit the evidence of her prior "freaking" stating, "just because she had done it in the past, doesn't show... any

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152 Id. Defense counsel later expanded the proffered testimony to include evidence that Luther Moore, on several occasions, participated in trading sex for drugs with the complainant. Id.

153 White, 598 A.2d at 192. The defendants also suggested that she might have fabricated the rape story so that her fiancé would not get mad because she had been smoking cocaine with two men. Id. at 193.

154 Id. at 190. The jury found the defendants guilty of first and second degree rape, assault with intent to rape, assault, kidnapping, and theft. Id.

155 Id. at 193.

156 Id.


158 Id.

159 "Freaking" means the act of exchanging sex for drugs. Id. at 153.

160 Id. at 153-54.

161 Id.

162 Johnson, 632 A.2d at 153-54.

163 Id at 153.

164 Id. at 154.
ulterior motive or [that] it's going to make it safe for her in the community.\textsuperscript{165} ... [T]he prejudicial factor is greater than any probative fact.\textsuperscript{166}

In holding that it was reversible error to preclude the defendant from cross-examining the complainant about her freaking, the Maryland Court of Appeals stated:

As we have seen, the critical issue in this case is whether, on this occasion, the victim was freaking for cocaine or was raped. And, because these are the only possible explanations for what occurred, evidence that she freaked for cocaine in the past and, particularly, the very recent past, has special relevance to that issue; such evidence transcends mere evidence of bad character or, in the context of this case, sexual promiscuity. In turn, it is relevant to, and probative of, the victim's motive. From a finding that on this occasion she was freaking for cocaine but did not receive the bargained for cocaine, the jury could then infer that the victim had an ulterior motive for making a false accusation of rape against the [defendant].\textsuperscript{167}

In so holding, the court recognized that, in some circumstances, evidence of the complainant's sexual history must be admitted in order to allow the defendant to properly defend himself against rape charges that he alleges are fabricated. In distinguishing \textit{White}, the \textit{Johnson} court observed,

[I]n \textit{White}, the issue was not whether the victim had exchanged sex for drugs, but rather, whether she had been raped at all.\textsuperscript{168} Under the circumstances, there could be no direct relationship between the proffered testimony of the witness who would have testified to the victim's previously having engaged in sex for drugs with him and the ulterior motives the defendant[s] offered in defense.\textsuperscript{169}

As evidenced by \textit{Johnson} and \textit{White}, the Maryland statute may not be used to exclude probative evidence, unless its probative value is outweighed by the State's interest in protecting the rape victim from harassment and humiliation at trial. In that situation, its exclusion does not violate the defendant's constitutional right of confrontation, or his right to present an effective defense.\textsuperscript{170}

\textsuperscript{165}The trial judge's statement referred to the defendant's argument that her motive to fabricate the charges of rape may have been to protect her reputation in the community. \textit{Id.} at 154, n.4. The defendant proffered that the complainant may have believed that accusing a "customer" of rape who did not pay for sex would preclude other customers from attempting to rip her off. \textit{Id.}

\textsuperscript{166}\textit{Id.} at 154.

\textsuperscript{167}\textit{Id.} at 159-60.

\textsuperscript{168}The court would have been more correct had it said "whether she had sexual intercourse at all" because the defendants denied having any sexual contact with the victim.

\textsuperscript{169}\textit{Johnson}, 632 A.2d at 160.

IV. STATUTES WITHOUT A MOTIVE TO LIE EXCEPTION SHOULD BE AMENDED

Courts do not have a uniform approach as to when evidence of a victim's motive to fabricate should be admissible at trial. As the federal and most state statutes are now written, courts must determine if an exclusion of evidence relating to the victim's motive to fabricate is in violation of the defendant's Sixth Amendment right to conduct a reasonable cross-examination and to present testimony in his own defense.

Since the Supreme Court's decision in Olden, many courts have looked to its holding to determine whether the evidence proffered in the case before them would violate the defendant's constitutional rights if it was excluded. These courts tend to focus on the harassment and safety of the victim.

Rape shield statutes, like Federal Rule of Evidence 412, must set forth specific guidelines and requirements for courts to follow in determining whether a defendant may introduce evidence of the victim's prior sexual conduct to prove her motive for fabricating the rape or sexual assault charges against him.

A. Amending Federal Rule of Evidence 412 to Include an Exception for Evidence of an Ulterior Motive

A defendant in a rape or sexual assault case who is prohibited from introducing evidence that he was falsely accused may be unable to defend himself against the charges. An innocent man may be convicted, because the trial court was unsure whether the evidence was admissible. Federal Rule of Evidence 412 should be amended to include an exception that specifically admits sexual history evidence of a motive to fabricate. Courts deciding the admissibility of such evidence would not have to base their decision on constitutional grounds under the "catch-all" exception of the rule.

1. Safeguards

Proponents of the current federal rape shield law may argue that creating an exception for evidence that supports a claim that a victim has an ulterior motive in accusing the defendant would allow criminal defendants to introduce potentially embarrassing and humiliating evidence of the victim's sexual history. This should not be the result, however, because courts would still have the discretion to preclude evidence of little or no probative value or that could result in serious misuse.

172 See Part IV.A.
173 "[A]n exception to [the rape shield statute] should not be carved out liberally. Nonetheless, the desire to shield rape victims from harassment must yield in certain cases to another vital goal, the accused's right to present his defense." Stephens v. Miller, 13 F.3d 998, 1010 (7th Cir. 1994) (en banc) (6-5 decision) (Cummings, J., dissenting).
174 The amendment this paper is suggesting is similar to article 27, section 461(a)(3) of the Maryland Code.
175 See FED. R. EVID. 412(b)(1)(C).
176 Price, supra note 29, at 573.
First, courts are bound by Federal Rule of Evidence 402 to exclude evidence that is irrelevant to the facts at issue in the case. 177 Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence ... more probable or less probable than ... without the evidence." 178 Therefore, courts would be able to exclude evidence that does not pertain to any issue in the case.

While relevance may be an easy standard to meet, 179 courts can use Federal Rule of Evidence 403 to determine if the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ..." 180 If a trial court determines the proffered testimony to be too prejudicial, it may be excluded. On the other hand, if the evidence of the complainant's sexual conduct is determined to have strong probative value that she may have lied about being raped, the court may allow the defendant to put forth the evidence in his defense.

As Federal Rule of Evidence 412 is currently written, it does not expressly mention that a court should consider the relevancy and probative value versus prejudicial nature of the evidence sought to be introduced. 181 Rather, the rule states, "the following evidence is admissible, if otherwise admissible under these rules ..." 182 By merely referring to the "rules" in general, the statute is not stressing the importance that rules 401-403 have on any evidence that is admissible under the exceptions of the statute. Instead, Congress should amend the federal rule to state expressly that evidence falling under the motive to fabricate exception, as well as the current exceptions to the general exclusion, must be relevant and more probative than prejudicial.

Amending the rule to include an ulterior motive exception as well as guidelines with which to apply the exception would help trial courts to better understand when sexual history evidence should be admissible. In addition, the guidelines would encourage a balancing of the policy reasons behind rape shield laws, including public denigration and embarrassment of the victim, with the defendant's right to present testimony in his defense and the necessity of the evidence to the defense. 183

2. Proposed Language

In order to avoid confusion, Federal Rule of Evidence Rule 412 should expressly provide for the admission of evidence that tends to prove that a complainant has a motive to fabricate rape or sexual assault charges against the accused. In addition, the rule should provide that evidence may be admitted only if it is relevant to an issue in the case and its probative value outweighs its prejudicial nature. To clarify

177 Fed. R. Evid. 402.
178 Fed. R. Evid. 401.
179 Price, supra note 29, at 573.
180 Fed. R. Evid. 403.
181 See Fed. R. Evid. 412(b).
182 Id. Emphasis added.
the ambiguities in the federal rape shield law, Federal Rule of Evidence 412 should be amended to read as follows:

**RULE 412. SEX OFFENSE CASES; RELEVANCE OF ALLEGED VICTIM’S PAST SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION**

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

1. Evidence offered to prove that any alleged victim engaged in other sexual behavior.
2. Evidence offered to prove any alleged victim’s sexual predisposition.

(b) Exceptions.

1. In a criminal case, the following evidence is admissible, if otherwise admissible under these rules: evidence of specific instances of the victim’s prior sexual conduct is admissible only if the judge finds that the evidence is relevant in the case and that its inflammatory or prejudicial nature does not outweigh its probative value, and if the evidence is:
   
   (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 that supports a claim that the victim has an ulterior motive in accusing the defendant of the crime; or
   
   (D) evidence the exclusion of which would violate the constitutional rights of the defendant. 184

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V. CONCLUSION

Rape shield laws were enacted to protect the victim from embarrassment and humiliation at the trial of the accused and to encourage victims to report the rape or sexual assault. By creating a shield to protect the victim, however, Congress and state legislatures also succeeded in shielding the victim from facing examination of her motive for making the accusation. Thus, the criminal defendant’s rights to conduct a reasonable cross-examination and to present an effective defense became restricted.

The United States Supreme Court’s rulings in *Davis v. Alaska* and *Olden v. Kentucky* hold that an absolute restriction on a defendant’s right to examine a victim’s motive to fabricate cannot be justified by the interests protected by rape shield statutes. Currently, courts face difficulty in determining whether such evidence should be admissible. Therefore, Federal Rule of Evidence 412 should be amended to include an ulterior motive exception to permit the admission of relevant

184 The underlining indicates new language, and the crossed out language indicates deleted language.
sexual history evidence when its probative value is not outweighed by its inflammatory or prejudicial nature.