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Criminal Procedure--Right of Cross-Examination--Sexual Assault Statute

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Recently, the West Virginia legislature passed a sexual assault statute which contains provisions limiting a defendant's ability to cross-examine the victim of a forcible rape about her prior sexual conduct. Traditionally, the prior sexual conduct of the victim, with the defendant or with others, has been admitted into evidence for many reasons. Under the new statute, only "evidence of specific instances of the victim's prior sexual conduct with the defendant shall be admissible on the issue of consent . . . ." This limitation on the scope of the defendant's cross-examination raises the possibility that the defendant's constitutional right to cross-examine his adverse witnesses is violated by the statutory provisions. The purpose of this article is to analyze the approach of the United States Supreme Court toward violations of the constitutional right of cross-examination, and to consider the new rape statute in relation to the Court's approach.

The right of a criminal defendant to cross-examine his adverse witnesses has long been recognized as a constitutional right. The basic source of this right is the fourteenth amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." Due process essentially guarantees a citizen a fair trial. In a criminal proceeding the defendant has "the right to a fair opportunity to defend against the State's accusations" by testing the truth of the state's version of

3 W. VA. CODE ANN. § 61-8B-12 (Cum. Supp. 1976). The statute provides that evidence of "prior sexual conduct with the defendant" is admissible only if "such evidence [is] heard first out of the presence of the jury [and] is found by the judge to be relevant." W. VA. CODE ANN. § 61-8B-12(a) (Cum. Supp. 1976). "[E]vidence of specific instances of the victim's sexual conduct with persons other than the defendant" and any reputation or opinion evidence of the victim's sexual history is inadmissible, unless the victim first introduces evidence on the issue. W. VA. CODE ANN. § 61-8B-12(b) (Cum. Supp. 1976).
4 U.S. CONST. amend. XIV, § 1.
the facts, and by putting his own version before the jury. Cross-examination is an essential part of this fair trial process, for it functions as a device to test the reliability of the state's witnesses, for example, testing a witness' reputation for truth, and ability to accurately perceive facts. In Mr. Justice Black's words, "[a] person's right to... an opportunity to be heard in his defense... include[s], as a minimum, a right to examine the witnesses against him..." In the absence of such a procedural safeguard, the fairness of the trial process could be seriously endangered.

Traditionally, the actual scope of cross-examination is a state concern, "for the States under our federal system have the principal responsibility for defining and prosecuting crimes." The state rules of evidence set forth which particular lines of inquiry are admissible, or inadmissible, to test an adverse witness. The Court will interfere with a state ruling, such as a limitation on the content of cross-examination, only when such a ruling "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

While the Court has clearly recognized a defendant's right of cross-examination as a constitutional right, such clear recognition has extended only to the validity of cross-examination as a procedural technique to assure truth. The Court has been considerably

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7 C. McCormick, Evidence §§ 29, 33 (2d ed. 1972); see 5 J. Wigmore, Evidence §§ 1367-68 (Chadbourn rev. 1974).
8 In re Oliver, 333 U.S. 257, 273 (1948).
10 For example, the majority of courts, for impeachment purposes, only allow evidence of the witness' misconduct when the misconduct has some relation to veracity. And some courts, for impeachment purposes, prohibit all evidence of misconduct. C. McCormick, Evidence § 42, at 82-83 (2d ed. 1972).
12 According to one commentator, the Constitution only prescribes which "mode of procedure shall be followed-i.e., a cross-examining procedure..." and
more reluctant to recognize that the actual content or substance of cross-examination is fundamental enough to be a constitutional concern. The Court says that a defendant has a fundamental right to an effective cross-examination, and will determine, in some cases, that trial court limitations on particular lines of inquiry unconstitutionally deny effective cross-examination to the defendant. But analysis of these cases shows that the Court's involvement in this area is, at most, cautious. The Court seems unwilling to take a strong enforcement stand, and as yet, has neither relied on, nor set forth, any clear standard of the minimal requirements for effectiveness. The guidelines the Court does seem to rely on to determine effectiveness indicate reluctance to take control over the actual scope of lines of inquiry on cross-examination.

In the past, the Court did not focus on the actual minimum requirements of cross-examination. The Court's approach was to find that the right to cross-examination was enforceable as a fundamental right only when the "totality of the circumstances rendered the trial unfair under state procedure." In In re Oliver, the defendant was sentenced to jail without a full trial. The Court found that the denial of any cross-examination was a constitutional violation when the denial of several substantial rights rendered the proceeding unfair. But in Stein v. New York, when the
defendant was convicted as a result of the confessions of his co-defendants who did not testify at trial, the Court found that the totality of the evidence established the guilt of all three defendants, and that the complete denial of cross-examination to the third defendant was not a constitutional violation. So, the Court's primary focus was on the totality of the requirements for a fair trial.

Recent cases indicate that the Court is moving toward viewing effective cross-examination as a fundamental constitutional right, in itself, regardless of the totality of the circumstances. In 1965, the Court incorporated the confrontation clause of the sixth amendment into the fourteenth amendment due process clause. Cross-examination was held to be an essential element of confrontation. Incorporation is a device by which the Court is saying that cross-examination is a fundamental right, in itself, and essential to any fair trial.

In subsequent cases the Court focused on the cross-examination itself to see whether denial of a particular line of inquiry resulted in ineffective cross-examination. Constrained broadly, such cases indicate that the Court could be setting up an enforceable minimum standard for effectiveness in the form of a rule suggesting that the denial of some particular lines of inquiry is, per se, a constitutional violation. In Smith v. Illinois, the Court found that a state court denial of a line of inquiry as to the adverse witness' real name and present address was a constitutional violation. The Court said that "[t]o forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." In Davis v. Alaska, the Court

\[\text{18} \ 346 \text{ U.S. at 190-92.} \]
\[\text{19} \ 346 \text{ U.S. at 195-96.} \]
\[\text{The confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ..." U.S. Const. amend. VI.} \]
\[\text{20} \ 346 \text{ U.S. at 195-96.} \]
\[\text{21} \ \text{Pointer v. Texas, 380 U.S. 400, 403 (1965).} \]
\[\text{22} \ \text{Id. at 404. See also 5 J. Wigmore, Evidence § 1395, at 150; § 1397, at 158 (Chadbourn rev. 1974).} \]
\[\text{23} \ \text{Note, Criminal Procedure-Sixth Amendment Right of Confrontation Made Obligatory in State Prosecutions, 44 N.C. L. Rev. 173, 178-80 (1965). See also Adamson v. California, 332 U.S. 46, 71-123 (1947) (Black, J., dissenting opinion) (discussion of incorporation).} \]
\[\text{24} \ 390 \text{ U.S. 129 (1968).} \]
\[\text{25} \ \text{Id. at 131.} \]
\[\text{26} \ 415 \text{ U.S. 308 (1974).} \]
found that a statutory denial of a line of inquiry as to a juvenile witness' past record with the police was a constitutional violation. The Court said that "the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness] . . . by disclosure of his juvenile record . . . is outweighed by . . . [defendant's] right . . . ."27 Indeed, an even broader interpretation suggests that the Court is moving toward a position that any state limitation of the scope of cross-examination may deny effectiveness.28

Under such a broad interpretation, a statutory limitation on a defendant's inquiry into a victim's prior sexual conduct might be a per se constitutional violation. Such a denial of inquiry is similar to the denial of inquiry in Davis v. Alaska.29 In Davis, the Court acknowledged that the state had an interest in preserving "the anonymity of . . . juvenile offenders."30 As the state argued, the "exposure of a juvenile's record . . . would likely cause impairment of rehabilitative goals . . . ." and "cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily . . . ."31 But the Court said that such "temporary embarrassment"32 is not as important as the defendant's right to confrontation. One of the major policy reasons for the new rape statute is that it protects the victim from the humiliation of almost being on trial, herself.33 A state law which excludes a victim's sexual con-

27 Id. at 319.
29 Id. at 422. The author says that "[t]he Davis case is analogous to, and should control, the situation where the state, in a prosecution for forcible rape, must prove lack of consent . . . ." Id.
30 415 U.S. at 319.
31 Id.
32 Id.
duct in order to protect the victim from humiliation and damage to reputation is not much different from a state law which excludes a juvenile’s police record, in order to protect the juvenile from embarrassment.

The problem with such a broad interpretation is that it places the Court in the position of controlling the rules of cross-examination. “[T]he Constitution is too blunt an instrument to regulate the procedural and evidentiary details of criminal prosecutions.” Speaking of constitutional control of the rules of hearsay, one commentator has said that it is not “that there is no room in the Constitution for a requirement of some measure of evidentiary reliability.” In this area, however, “rules of law must be rules of thumb.” Judges need “broad categories of admissibility” which lead to a quick decision based on the subtleties of the details of each trial. Judges do not have time for constitutional analysis at each step of admitting evidence. Furthermore, as Mr. Justice Harlan has said, “[n]othing in this language [of the Confrontation Clause] . . . would connote a purpose to control the scope of the rules of evidence.”

Most importantly, a deeper analysis of the cases shows that although the Court has shifted towards viewing the right of effective cross-examination as a fundamental right in itself, the Court is not willing to go so far as to set up per se rules as to the effectiveness of particular lines of inquiry. The Court seems reluctant to take on such control of the rules of evidence.

In one recent case, Chambers v. Mississippi, the Court continued to use the familiar totality of the circumstances approach to find that the denial of cross-examination was a fundamental right only when, under all the circumstances, the trial was unfair. In Chambers, the state voucher rule against impeaching one’s own witness prevented the defendant from showing that the witness had previously confessed to the crime for which the defendant was convicted. In addition, the trial court’s application of the state

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33 Id. at 1437.
34 Id.
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hearsay rule prevented the defendant from presenting key witnesses in his own defense. The Court held that the denial of cross-examination, "coupled with" the exclusion of the favorable witnesses, "denied [the defendant] . . . a trial in accord with . . . due process." Furthermore, the Court strictly limited the holding to the "facts and circumstances of this case" which altogether denied a fair trial to the defendant. The Court said that it was establishing "no new principles of constitutional law" and was granting the states all the "respect traditionally accorded to [them] . . . in the establishment and implementation of their own criminal . . . rules and procedures."

Other recent cases depart somewhat from the totality of the circumstances approach and set forth some guidelines to a standard for constitutionally effective cross-examination. But these guidelines are nothing more than a flexible boundary formed by a constellation of factors. In Davis v. Alaska, the trial court followed the state law and issued a protective order which prohibited the defendant from questioning the witness as to his status as a juvenile offender. The defendant was thus precluded from following a line of inquiry that was designed to bring out the witness' possible bias from connection with the police. The Court held that even though defendant had an opportunity to cross-examine the witness as to other matters, the denial of such an inquiry violated the defendant's right to effective cross-examination.

The Davis Court relied on several factors to determine whether the cross-examination was effective. The witness was a crucial witness; he was the only one who identified the defendant and placed him at the scene of the crime. So, "[t]he accuracy and truthfulness of [his] . . . testimony were key elements in the

40 Id. at 302. The Court did not decide whether the denial of cross-examination alone would cause reversal, since the denial of due process was a result of the conjunction of the denial of cross-examination with the refusal to allow the defendant to call favorable witnesses. Id. at 293. Furthermore, the Court was careful to say that, although the right to cross-examination "is implicit in the constitutional right of confrontation, . . . [i]t is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Id. at 295.

41 410 U.S. at 303.
42 Id. at 302-03.
44 Id. at 318.

State's case . . . ." Also, the goal of the inquiry was valid; a cross-examiner is "permitted to . . . test the witness' perceptions and memory . . . [and] to impeach . . . the witness." Indeed, revelation of the "possible biases . . . of the witness as they may relate directly to the issues" is "always relevant as discrediting the witness and affecting the weight of his testimony." Furthermore, the inadmissible evidence would have been strong probative of the witness' possible bias. Since the witness was on probation for a similar crime, he had "possible concern that he might be a suspect in the investigation" or that he might lose his probationary status if he did not lie. Finally, the Court felt that the defendant had been allowed no other adequate line of inquiry to show that the witness lacked credibility. "While counsel was permitted to ask [witness] . . . whether he was biased, counsel was unable to make a record from which to argue why [witness] . . . might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." 

_Davis v. Alaska_ is the only case in which the Court specifically relied on all of these factors to find a denial of effectiveness. But other recent cases reveal a similar approach. In _Smith v. Illinois_, the Court held that a defendant was constitutionally entitled to ask preliminary questions as to the witness' real name and present address. Such a holding would seem to indicate that the Court is setting up at least one per se minimum standard of effectiveness, which is that an effective cross-examination must allow preliminary questions. But the absolute nature of even this requirement

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415 U.S. at 317.
41 Id. at 316.
42 Id.
43 Id. quoting 3A J. WIGMORE, EVIDENCE § 940, at 775 (Chadbourn rev. 1974).
44 415 U.S. at 318.
45 Id.
46 Douglas v. Alabama, 380 U.S. 415 (1965). The principal witness refused to answer any questions, so his confession was read to him under the guise of refreshing his memory. The confession indicated that the defendant was guilty, but the defendant had no opportunity to cross-examine the witness as to the contents of the confession. The Court held that since the only direct evidence of the defendant's guilt was in the confession, the confession was "a crucial link in the proof" and the denial of cross-examination deprived the defendant of effective cross-examination. Id. at 419. Furthermore, the Court relied on the fact that cross-examination would have been especially probative to dispel the jury's inference, from the witness' refusal to testify, that the confession was true. Id.
is uncertain. Lower courts have successfully held that denial of preliminary questions was not a constitutional violation when the witness was not crucial, and when the defendant was allowed adequately to cross-examine the witness by other lines of inquiry.

Under this more narrow interpretation of the Court's approach, it is unlikely that the Court will find that the evidentiary limitations of the new rape statute unconstitutionally deny effective cross-examination. By the Court's present factorial test, inquiry into prior sexual conduct is not always essential to effectiveness. In a rape case, the victim is usually the crucial witness, since she is the only one, besides the defendant, who was present at the crime. But the goal of the inquiry into her prior sexual conduct is not always valid. Since consent is a direct issue in a rape case, cross-examination to elicit further evidence on the direct issue of consent is always valid. Impeachment of the credibility of the victim, through a showing of bias, prior inconsistent statements, lack of capacity to observe and remember facts, and reputation for truthfulness, is also a valid goal of cross-examination. But the general rule of evidence is that impeaching the credibility of a witness by introducing character evidence, other than that related to truthfulness, is not a valid goal.

Most importantly, the evidence of a victim's prior sexual conduct is usually not helpful in achieving such goals. On the issue of consent, the victim's previous sexual conduct with others is not highly probative of whether the victim consented to sexual relations with the defendant. Past evidentiary rulings which held that such conduct was probative on the issues of consent were based on an outdated morality that women who had sexual relations outside

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44 See Alford v. United States, 282 U.S. 687 (1931). The Court held that such preliminary questioning, which identified the witness with his setting, was essential to any cross-examination. But the Court also relied on the fact that the goal of the preliminary questioning was to show that the witness was biased because he was under "coercive effect of his detention" by officers of the United States. Id. at 693.


57 See note 3 supra.

58 See note 7 supra.

59 See note 7 supra.

60 C. McCormick, Evidence § 44 (2d ed. 1972).
of marriage were "morally depraved" and more likely to consent to sexual relations again when given any opportunity. Society's morality is quite different today. It is no longer "taboo for a woman to have consented to sexual relations with more than one man in her lifetime. She is free to exercise her consent . . . ." The fact that she has consented with one man does not logically mean that her state of mind toward the defendant was ever consensual in nature. As one commentator has summarized the situation, "the relationship between a woman's chastity and whether or not she has been raped is simply too attenuated to warrant consideration as relevant evidence." It is possible, however, that habitual sexual conduct with others, as in prostitution, may be relevant in some cases. Finally, the fact that a woman is unchaste, and therefore, possibly of a bad moral character, has little, if any, bearing on her truthfulness.

In conclusion, the Court's approach to enforcing violations of a criminal defendant's right to cross-examine adverse witnesses is to enforce the right only if effective cross-examination has been denied. The Court seems reluctant to find that effective cross-examination has been denied, and basically relies only on a weak factorial test to determine effectiveness. Under this test, it is un-

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66 Id. at 434. The statutory restrictions on the admission of evidence of prior sexual conduct to impeach the victim will probably not be challenged. At common law, evidence of reputation for chastity was not admissible to impeach the witness' credibility. State v. Franklin, 139 W. Va. 43, 64-65, 79 S.E.2d 692, 704 (1953); State v. Detwiler, 60 W. Va. 583, 585, 55 S.E. 654, 655 (1906).
likely that West Virginia's new rape reform statute denies effective cross-examination to the defendant.

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