

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

CEDRIC JEFFRIES,

Petitioner,

v.

THE STATE OF OHIO

Respondent.

PETITION FOR WRIT OF CERTIORARI

Cedric Jeffries respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Ohio affirming his conviction.

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QUESTION PRESENTED

I. Does a State rape-shield law violate the Constitutional rights to confrontation and due process when it excludes evidence that a complaining witness had previously been the victim of a non-consensual sexual assault by a person other than the defendant, which evidence was necessary for the jury's evaluation of the complaining witness' testimony?

**LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW
AND RULE 29.6 STATEMENT**

All parties appear in the caption of the case on the cover page. None of the parties thereon have a corporate interest in the outcome of this case.

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The decision of the Ohio Supreme Court affirming petitioner's conviction, *i.e.*, affirming the decision of the Eighth District Court of Appeals, was entered on April 22, 2020. It is reported as *State v. Jeffries*, ___ N.E.3d ___, 2020-Ohio-1539. It is appended at A-1 through A-12.

The decision of the Ohio Supreme Court, accepting jurisdiction in part and refusing to exercise jurisdiction in part, was entered on May 23, 2018 and is reported as *State v. Jeffries*, 152 Ohio St.3d 1477, 98 N.E.3d 292 (Table), 2018-Ohio-1989. It is appended at A-13.

The decision of Ohio's Eighth District Court of Appeals (the initial appellate decision) affirming petitioner's conviction was entered on January 18, 2018, and is reported as *State v. Jeffries*, 104 N.E.3d 900 (2018), 2018-Ohio-162. It is appended at A-14 ff.

JURISDICTION

Petitioner seeks review from the April 22, 2020 decision of the Supreme Court of Ohio affirming his conviction. *State v. Jeffries*, ___ N.E.3d ___, 2020-Ohio-1539. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and 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 defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2907.02(D) of the Ohio Revised Code provides in relevant part:

Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

INTRODUCTION

The jurors in this case heard a teenage girl testifying about close to a decade of sexual abuse allegedly inflicted upon her by the defendant. Her testimony was the gravamen of the prosecution's case – there was no DNA or other scientific

evidence to support her allegations. They also heard that this activity went on without her disclosing it to an adult because, according to her testimony, she feared she would not be believed and might be sent to foster care. It is easy to see a juror accepting that explanation and understanding that delay: “I can see why this must have been something difficult to discuss,” the juror would reason. Moreover, these thoughts would be voiced during deliberations, as twelve jurors find themselves asking, and answering, this same question – and concluding that such a delay does not indicate a lack of credibility. In this case, the defendant was convicted.

How much different would those deliberations have been if the jurors knew that the child had previously been quick to report a sexual assault committed by someone else, her foster brother, that pre-dated any of the allegations in this case – and her allegations at that time were believed? Would the question have arisen in the jury room as to “why would she wait so long in this case when she did not wait in a prior circumstance when she was actually assaulted – maybe the sexual assault in this case is not actually true?” The trial court took that question away from the jurors by not letting them know about the prompt reporting of the sexual abuse that everyone agrees pre-dated the allegations in this case.

Allowing evidence of the prompt reporting of a prior sexual assault is not a matter of subjecting the alleged victim to impermissible attacks on some Victorian-minded theory of promiscuity – which does offend the laudable goals of the rape-shield law. In this case, no juror would ever question the teenager’s testimony on the basis that she was promiscuous when she was sexually assaulted as a four-year

old. But jurors would – and should – question why a four-year-old was so quick to report sexual conduct at that age and then wait so long in this case.

This case marks the intersection between the salutary goals of the rape-shield law and the jurors' right to know enough context to make the right decision.

STATEMENT OF THE CASE

Cedric Jeffries was charged in a four-count indictment with two counts of rape and two counts of kidnapping. The indictment was based upon two different incidents involving D.S., one when she was 12 and the other when she was 16. Mr. Jeffries pled not guilty.

Prior to the trial, the court held a hearing regarding the admission of the minor victim's prior allegations of non-consensual sexual misconduct against a different person than Mr. Jeffries. The matter was renewed during trial when the court again considered the admission of prior allegations of non-consensual sexual abuse against the complaining witness outside the presence of the jury. Ultimately, the trial court refused to permit Appellant to question the complaining witness or otherwise seek to admit these facts into evidence.

After a jury trial, Jeffries was convicted of all counts. Both parties agreed that counts one and two merged and counts three and four merged for purposes of sentencing. The State of Ohio elected to go forward with sentencing on counts two and three. Jeffries was sentenced to fifteen years to life on count two concurrent with ten-year sentence on count three.

Jeffries filed a timely appeal with the Eighth District Court of Appeals, raising seven assignments of error. On January 18, 2018, that court issued its decision affirming Jeffries convictions, but remanding the case to the trial court for a hearing regarding imposition of court costs. *State v. Jeffries*, 104 N.E.3d 900 (2018), 2018-Ohio-162.

An appeal was taken to the Ohio Supreme Court, asking that court to consider two questions of law:

- (1) As a matter of statutory interpretation, does Ohio's rape shield law preclude admission of an alleged victim's having previously been sexually assaulted, or is the rape shield law limited to instances of prior consensual sexual activity?
- (2) If Ohio's rape shield law does preclude evidence of the prior sexual assault of an alleged victim, that evidence must still be admitted at trial when relevant to the defendant's ability to cross-examine the alleged victim on matters critical to the alleged victim's credibility.

STATEMENT OF FACTS

Evidence Presented at Pre-Trial Hearing Regarding Rape-Shield.

A pre-trial hearing regarding the admissibility of prior sexual abuse of D.S. In this regard, D.S. testified that she was sexually abused by a foster brother when she was in foster care. The alleged victim was approximately four or five at the time. The sexual abuse in that case did occur and involved both sexual contact and

sexual conduct perpetrated against her. D.S. reported the matter while she was still in foster care.

Evidence at Trial

D.S.'s early recollections was that she lived in foster care. When she was approximately six years old, D.S. went to live with Mr. Jeffries and his mother, Henrietta Gould. Mr. Jeffries was a "father figure" to D.S. and Ms. Gould was her "grandmother." (Defendant Jeffries and D.S.'s mother had at one time been in a relationship, although D.S. was not Jeffries' child). D.S. testified to a series of incidents of sexual abuse perpetrated by Mr. Jeffries during the next ten years while she lived in the Gould-Jeffries home. D.S. testified that she never reported the incidents because she was afraid she would not be believed.

D.S. testified that, at age sixteen, she decided to tell her school principal about the ongoing abuse. This was approximately two weeks after the last incident. She ran away.

D.S. testified that she received a text message from Henrietta Gould's phone, that she thought was from Cedric, stating: "Police on way. Baby, don't tell on me. I love you. Come home, we'll work it out. I love my family. Don't let them take y'all. Please, please, I forgive you. Call now." D.S. testified that, the very next day, she went to school with her bags and was called up to the office to see the principal, who was aware that she had run away. D.S. then told her high school principal about the alleged sexual abuse. There was no DNA or other forensic evidence in this case.

Cedric Jeffries testified at trial and denied any inappropriate sexual activities with D.S. He explained that he did text D.S. to get her to come home on the morning after she had run away. He further explained that the sentence “don’t tell on me” was not what he had typed but was the result of an auto-correct which, because he had been up all night trying to find D.S., he had failed to override prior to sending the message.

REASONS FOR GRANTING THE PETITION

Mr. Jeffries has been denied a fair trial and deprived of his constitutional right to confront witnesses and to due process. U.S. Const. Amends. VI and XIV. *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

The Ohio Supreme Court has held in this case that Ohio's rape-shield law precluded admissibility of the alleged victim's having promptly reported a prior sexual assault – testimony that would have directly contradicted the reasons she gave for not having reported the alleged sexual assaults in the instant case during a ten-year period of alleged abuse. State evidentiary rules that unduly restrict the right of cross-examination violate the Sixth Amendment. *E.g., Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988).

Whether rape-shield laws unfairly and unduly impinge upon the right to confrontation has been a source of more than 20 years of litigation throughout the lower federal courts and state courts. *See, e.g., Grant v. Demskie*, 75 F.Supp. 2d 201, 213-17 (S.D.N.Y.1999) (extensively collecting cases and literature

demonstrating split in lower courts on issue of whether various state rape-shield law apply to non-consensual sexual activity and the Constitutional limitations on limiting cross-examination via rape-shield), *aff'd* 234 F.3d 1262 (2nd Cir. 2000); *Sittner v. Bowersox*, 969 F.3d 846 (8th Cir. 2020). This Court has previously addressed the constitutionality of a rape-shield law's notice-and-hearing requirement. *Michigan v. Lucas*, 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991).

This case asks this Court to again enter this national discourse and provide guidance about the substance of what can be precluded by a rape-shield law without violating the fundamental right of cross examination, which is “an essential and fundamental requirement for the kind of fair trial which is this country’s goal.” *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973). This Court is asked to hold that the Ohio Supreme Court fundamentally erred when it concluded that Ohio’s rape-shield law precluded evidence of non-consensual sex under circumstances where the evidence relating to the complaining witness’ having been previously sexually assaulted was vital to the determination of guilt – and then said it was leaving for “another day” whether application of this conclusion violated the Sixth Amendment. *See, Jeffries*, 2020-Ohio-1539 at ¶ 28. Mr. Jeffries remains in prison, denied a fair trial – the Ohio Supreme Court erred when it affirmed a conviction that was constitutionally flawed even though it acknowledged that on “another day” it might have to reach a different conclusion in a different case.

The circumstances where the right of confrontation requires admission of evidence of a complaining witness' previously having been sexually assaulted, regardless of what a state rape-shield law provides, frequently occur. Many times, the evidence is necessary to rebut the "sexual innocence inference theory" by which jurors may conclude that the alleged sexual assault occurred because the child was able to describe sexual activity that would otherwise be outside their knowledge.

Alvarado v. State, 89 N.E.3d 442, 446 (Ind. App. 2017). This was one of the reasons articulated by Mr. Jeffries when he argued for the admission of the evidence of the prior sexual abuse of the complaining witness.

With respect to the "sexual innocence inference theory," courts are divided about whether a rape-shield statute that has been interpreted to include non-consensual sexual activity must yield to Sixth Amendment considerations.

Compare Francis A. Gilligan, Edward J. Imwinkelried & Elizabeth F. Loftus, *The Theory of "Unconscious Transference": The Latest Threat to the Shield Laws Protecting the Privacy of Victims of Sex Offenses*, 38 B.C.L.Rev. 107, 140–42 (1996) ("There are numerous cases upholding the admission of evidence") *with People v. Rice*, 709 P.2d 67, 68–69 (Colo.Ct.App.1985) (Colorado's rape shield statute does not permit admission to show fabrication by alleged victim); *State v. Clarke*, 343 N.W.2d 158, 162–63 (Iowa 1984) (not admissible; sexual inference theory "is based on unsubstantiated assumptions and fears about what a jury may infer from the complaining witness's testimony."); 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure: Evidence* § 5387 & n. 95–2 (1999 Supp.) ("In a

number of states, courts have held that in cases of child sexual abuse the defendant has a right to show the prior sexual conduct of the child to rebut any inference that the child's sexual sophistication is the result of the encounter with the defendant. This seems unnecessary inasmuch as the defendant can easily rebut this inference by questions or evidence limited to the child's prior knowledge of sexual terminology or practices, assuming that the prosecutor would not be willing to stipulate that the child was not sexually innocent."). *See also, Grant*, 75 F.Supp. at 214.

In other cases, such as the instant case, there are additional theories of innocence that are precluded by application of the rape shield law. Some federal circuits have recognized that rape-shield laws cannot constitutionally prohibit evidence of previous non-consensual sex involving the complaining witness when necessary to explain how a child could exhibit physical symptoms consistent with rape, such as genital injury. *See, e.g., Tague v. Richards*, 3 F.3d 1133, 1139 (7th Cir. 1993) (evidence offered to explain injury to hymen and contraction of sexually transmitted disease); *United States v. Begay*, 937 F.2d 515, 519-23 (10th Cir. 1991) (injury to hymen); *United States v. Bear Stops*, 997 F.2d 451, 457 (8th Cir. 1993) (en banc) (evidence offered to explain why complaining witness had sexual abuse symptoms).

By accepting this case, this Court will clarify this critical issue and explain why an interpretation of state rape-shield laws must always take into account the Sixth Amendment consequences of curtailing cross-examination. Moreover, this

Court will explain why the laudable goals of rape-shield laws must be interpreted to coexist with the Constitutional right to a fair trial.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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