

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MICHIGAN, Petitioner, v. NOLAN K. LUCAS

CASE NO: 90-149

PLACE: Washington, D.C.

DATE: March 26, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHIGAN, :

Petitioner :

v. : No. 90-149

NOLAN K. LUCAS :

- - - - - X

Washington, D.C.

Tuesday, March 26, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

DON W. ATKINS, ESQ., Wayne County Prosecuting Attorney, Detroit, Michigan; on behalf of the Petitioner.

KENNETH W. STARR, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

MARK H. MAGIDSON, ESQ., Detroit, Michigan; on behalf of the Respondent.

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1 PROCEEDINGS

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 90-149, Michigan against Lucas.

5 Mr. Atkins.

6 ORAL ARGUMENT OF DON W. ATKINS

7 ON BEHALF OF THE PETITIONER

8 MR. ATKINS: Mr. Chief Justice, and may it
9 please the Court:

10 The issue before the Court today is whether the
11 confrontation clause of the Sixth Amendment is violated
12 when the notice and hearing provision of the Michigan Rape
13 Shield Law is applied to exclude arguably relevant
14 evidence when no attempt is made to cure the defect until
15 the very day of trial. The Michigan court of appeals in
16 this particular case held that not only the 10-day notice
17 provision, but also the pretrial hearing provision of the
18 Rape Shield Law, violated the defendant's Sixth Amendment
19 rights to confrontation, quote, "when applied to preclude
20 the evidence of specific instances of prior sexual conduct
21 between the complainant and the defendant."

22 At the outset let me make clear what the statute
23 both requires and what it prohibits. What the statute
24 requires simply is two things: that a notice be filed
25 within 10 days after the arraignment on the information

1 requesting the court to hold a hearing to determine
2 whether particular evidence of prior sexual conduct
3 between the defendant and the victim is relevant and is to
4 be admitted. This notice in turn triggers a very
5 important procedural aspect of this case, and that is the
6 pretrial hearing to determine whether or not the evidence
7 is both logically and legally admissible in the case when
8 tried.

9 The importance, I think, of the Rape Shield Law,
10 at least the one we're dealing with here in Michigan, is
11 that the underlying principle of that particular notice
12 provision serves two very fundamental purposes. The major
13 premise, of course, that the legislature of Michigan
14 decided upon was that the victim of sexual assaults
15 certainly has a right to her sexual privacy, and that in
16 doing so we want to counterbalance that interest, which I
17 believe is clearly a legitimate interest, with the
18 interest of the defendant. And how best to do that?

19 QUESTION: Well, Mr. Atkins, in this case aren't
20 we dealing just with the notice requirement of this
21 statute? Isn't that all we have before us here?

22 MR. ATKINS: Precisely correct, Your Honor.

23 QUESTION: And the statute does not itself
24 specify what the trial court will do if the notice is not
25 given in a timely fashion.

1 MR. ATKINS: That is correct, Your Honor.

2 QUESTION: And in this case the trial court
3 decided to preclude the testimony and the evidence because
4 of the failure to comply with the notice requirement.

5 MR. ATKINS: That is correct, Your Honor.

6 QUESTION: And the Michigan court of appeals
7 held that preclusion of the evidence in every case would
8 be unconstitutional.

9 MR. ATKINS: I believe that's what they said.
10 In this particular --

11 QUESTION: So that's what we have to review,
12 whether that approach is correct and whether there might
13 be some cases where preclusion is allowable.

14 MR. ATKINS: Yes, Your Honor. I would not be
15 standing before the Court today except for the facts in
16 this case, in which the default occurred on the very day
17 of trial, some 7 months after the arraignment on the
18 information. I would -- readily admit to the Court today
19 that there has to be, to protect the defendant's Sixth
20 Amendment rights, a sliding scale of remedies, if you
21 will. If in fact this case had turned on a situation in
22 which the notice had been filed on the eleventh day after
23 the arraignment on the information, or perhaps at some
24 other reasonable time before trial in the case, and I
25 don't know what that time would be, it could be as little

1 as 2 days, it could be as little as a week, but somewhere
2 in between there the court, the trial court hearing that
3 motion must determine that automatic preclusion is not an
4 appropriate remedy.

5 QUESTION: The statute simply doesn't say what
6 the remedy is, does it?

7 MR. ATKINS: No, it does not, Your Honor. That
8 is correct. The statute does not require outright
9 preclusion because it is indeed silent upon that. It says
10 it shall not be admissible, but it does not indicate that
11 total preclusion is the only remedy. And I am not
12 suggesting that that should be the only remedy.

13 QUESTION: You said there were two interests
14 that the State had, and one is the privacy rights of the
15 victim, and what's the other?

16 MR. ATKINS: The other one is the balancing of
17 the rights of the defendant, the confrontational rights of
18 the defendant. Because the only issue before the Court,
19 as correctly noted earlier, is that we're dealing with a
20 notice provision. But that notice provision is intended
21 to provide a defendant in a criminal case with a window of
22 opportunity, if you will, a window which will permit him
23 to bring before the trier of fact, or in this case the
24 trial judge I should say, to determine outside of the
25 presence of the jury whether the evidence he wishes to

1 bring in is logically and legally relevant and admissible.

2 QUESTION: Is there much doubt in this case but
3 that the evidence should not have been admitted had the
4 notice been given?

5 MR. ATKINS: Should not have been admitted, Your
6 Honor?

7 QUESTION: Or should have been admitted?

8 MR. ATKINS: Taking it either way, Your Honor, I
9 think there is a legitimate argument that could be made,
10 and I think I attempted to make it earlier in my brief,
11 that what I think we were dealing with in this particular
12 case was not so much the evidence of the actual details of
13 the sexual encounters that they experienced in a previous
14 time before this event. What the defendant, I think,
15 wished to get across to the court and the trier of fact
16 was that there was an intimate relationship which may have
17 included a sexual aspect to that relationship.

18 There was no indication of an offer of proof or
19 otherwise that the specific details of the sexual
20 encounters they had earlier, before these events occurred
21 on August 31, had any particular relevance to the defense
22 presented at trial. The defense was one of consent
23 because we had a intimate relationship at an earlier time.

24 Nevertheless, whether or not that's the case, a
25 general sexual aspect of the relationship, or whether a

1 specific sexual act was important, I don't believe is
2 truly necessary for this Court's consideration.

3 QUESTION: Well, do you think that if there had
4 been a hearing in the case the judge would have given
5 certain instructions and rulings as to the extent to which
6 this relationship could have been described?

7 MR. ATKINS: I don't think there's any question
8 but that the judge could have fashioned a remedy. There
9 -- clearly he could have. He could have either permitted,
10 if the evidence which the defendant wished to place before
11 the trier of fact required the details of past sexual
12 encounters, or just simply the fact that there had been a
13 sexual relationship.

14 But again, what this case is not about, it's not
15 about whether or not there was a case of ineffective
16 assistance of counsel, and it's not about whether or not
17 the trial judge abused his discretion by utilizing a
18 preclusion evidence -- of the evidence, and it's not about
19 whether the actual evidence which may have been offered
20 would have been relevant and otherwise admissible.

21 QUESTION: Well, are you saying that there are
22 substantial privacy rights of the victim that could and
23 would likely have been protected in this case had some
24 advance notice, particularly the notice required by the
25 statute, been given?

1 MR. ATKINS: That is precisely my point.

2 QUESTION: What happens in a preliminary hearing
3 in a case like this? I take it from the record that this
4 entire relationship was gone into at the preliminary
5 hearing.

6 MR. ATKINS: It was in fact.

7 QUESTION: That doesn't sound like it's got,
8 that the State has much interest in the privacy of the
9 victim, if a public preliminary hearing washes all this
10 linen.

11 MR. ATKINS: It is true, Your Honor, and it's
12 quite regrettable, and I believe, and I'll admit to the
13 Court that I think the prosecutor at the preliminary
14 examination simply dropped the ball. An objection should
15 have been made --

16 QUESTION: Would the statute apply to the
17 preliminary hearing?

18 MR. ATKINS: I believe it would have, because
19 the statute is silent as to what occurs prior to trial.
20 All that the statute permits is that 10-day window of
21 opportunity. It is maybe silent as to what occurs before
22 that, but nevertheless, I think the purposes of that could
23 have been prevented at the preliminary examination.

24 QUESTION: On what grounds?

25 MR. ATKINS: The examination -- well, if nothing

1 else, Your Honor, certainly on relevance grounds. Because
2 at the examination, the focus of the preliminary
3 examination is only to determine probable cause. A
4 question of what defense may arise later at trial is not
5 properly before a preliminary examination magistrate. All
6 that that magistrate needs to determine is whether or not
7 there is probable cause to believe the crime has been
8 committed, and whether or not this defendant may have
9 committed it.

10 QUESTION: Was this -- was this testimony at the
11 preliminary brought out by the prosecutor?

12 MR. ATKINS: No, it was brought out by defense
13 counsel during his cross-examination of the witness. The
14 specific sexual detail evidence, that's correct, Your
15 Honor.

16 QUESTION: Are there provisions in Michigan for
17 closing the preliminary hearings?

18 MR. ATKINS: There are provisions, Your Honor,
19 but I don't believe it would have applied in this case
20 anyway. It was not certainly requested by the prosecution
21 beforehand, and again, I don't know why the prosecutor
22 didn't object. Nevertheless, I don't believe that would
23 foreclose the prosecutor subsequently at trial from
24 attempting to exclude that evidence. Because again, if
25 you go to the purposes of the Rape Shield Law, that is

1 simply to protect at every possible opportunity, and it
2 should not preclude the admission or the exclusion of the
3 evidence at any subsequent hearing, whether it be at
4 pretrial hearing after the arraignment or whether it be at
5 the trial itself.

6 QUESTION: The trial is before a 12-person jury?

7 MR. ATKINS: This one wasn't. But of course it
8 would have been otherwise, because of the --

9 QUESTION: Was this a bench trial?

10 MR. ATKINS: It ended up being a bench trial
11 after the oral motion made on the day of trial was denied.
12 At that point, immediately thereafter, the defendant and
13 his counsel waived the right to jury trial, and then the
14 case was heard by the very judge who in fact heard the
15 oral motion for permission to admit that evidence.

16 QUESTION: Mr. Atkins, what is the State's --
17 there's no question about the interest in the victim's
18 privacy or in the defendant's right to confrontation. How
19 do you articulate the State's interest in requiring notice
20 so early on in the proceeding, 10 days from the --

21 MR. ATKINS: 10 days after the arraignment on
22 the information. Your Honor, again, this statute was the
23 first one in the country to be enacted in 1974. And I
24 think others were modeled perhaps after it, and changed
25 subsequently depending upon the nature of the

1 legislature's interest in it. But in this particular case
2 trials in Michigan, once the arraignment of the
3 information is had, actually enters onto a relatively fast
4 track. In this case I think the docket entries and the
5 case inquiry notice, which is part of the court record,
6 would indicate that the trial date originally was set for
7 sometime in late November, a period of only 4 weeks after
8 the arraignment on the information.

9 There was a final conference date of November
10 14, 1984, at which point the first adjournment was had.
11 What I am trying to indicate, of course, to the Justice is
12 this, that the 10-day period after the arraignment was set
13 because essentially many cases in Michigan, even cases
14 such as this, a major felony case, could be tried within a
15 very short period of time after the arraignment.

16 QUESTION: So that we really ought to look at it
17 not so much as a case requiring, or a statute requiring
18 notice 10 days after arraignment, but requiring notice say
19 3 or 4 weeks before the trial date? That would be an
20 equally accurate way of looking at the effect of this?

21 MR. ATKINS: I think it could have been done
22 either way, Your Honor, but I think the arraignment on the
23 information date was selected because, quite frankly,
24 Federal felony trials such as this could be tried,
25 certainly in Wayne County even though it's a busy

1 metropolitan court, anywhere from 2 to 4 weeks after the
2 arraignment. So by setting it earlier you accomplish a
3 number of tasks required of it, namely that you do not
4 surprise the prosecution. There are cases in which
5 extensive prehearings, pretrial hearings may be necessary
6 in a case such as this or even one in which the facts are
7 somewhat different. You prevent the surprise, you permit
8 both sides an opportunity to gather their sources, if you
9 will, for full investigation and analysis at that closed
10 in camera hearing.

11 It also provides another important aspect, and
12 that is for the judge in the individual case. Rather than
13 getting to a position 1 day or the day of trial in which
14 you have what may be called hydraulic pressures upon the
15 court to go at that time with the trial, if you have a
16 pretrial hearing sufficiently in advance of trial, the
17 trial judge has the opportunity to sit back calmly, if you
18 will, or at least in a more detached, less pressurized
19 atmosphere, to consider the arguments and the evidence of
20 both sides, both the defendant's evidence and the
21 prosecution's evidence. So there are some very important
22 I think benefits not only to the prosecution but also to
23 the defendant in preparing the case. And I think when you
24 have a situation in which the evidence sought to be
25 excluded or included, if it's the defendant's point of

1 view, is that you have an opportunity again for that
2 thorough analysis beforehand of permitting a more
3 realistic, even-handed approach.

4 QUESTION: Well, Mr. Atkins, I didn't think the
5 court below addressed the question of whether the notice
6 period is too short. Is that before us?

7 MR. ATKINS: No, I don't believe it is.

8 QUESTION: No?

9 MR. ATKINS: That particular question is not.

10 QUESTION: And why isn't the State's interest
11 sufficiently protected, even though the request comes late
12 to consider this testimony and offer it, if the trial
13 court grants an in camera hearing and considers
14 alternative sanctions but lets the evidence in? I mean,
15 isn't that a possibility and an appropriate way to address
16 the State's interests?

17 MR. ATKINS: It could be in other situations,
18 Your Honor. Again, I think this particular case is
19 important, and it's important to the Court I think because
20 it came on the day of trial. As I indicated earlier, I
21 think it would be entirely appropriate and, in guarding
22 the defendant's Sixth Amendment rights, to be able at a
23 sufficient time before trial to hold this kind of a
24 hearing. I think preclusion may be appropriate and, of
25 course as in Taylor v. Illinois, the Court held that a

1 preclusion remedy was appropriate, and I believe that
2 violation occurred either on the day of trial or perhaps
3 even the second day of trial.

4 QUESTION: Mr. Atkins, can I interrupt? I have
5 a little difficulty getting -- really focusing on the
6 precise issue before us. As I understand it the opinion
7 we're reviewing is the one in appendix 8 of the cert.
8 petition, the court of appeals' opinion, the per curiam,
9 in which they say they solely upon the failure of
10 defendant to comply with the notice provision of
11 subsection 2, they reverse, and that because the Michigan
12 court had previously held that provision unconstitutional.
13 Is there anything in this opinion that on the face of the
14 opinion indicates that this was based on a Federal ground?

15 MR. ATKINS: Oh, yes, Your Honor, I believe it
16 is.

17 QUESTION: Where in the opinion do they say
18 anything about -- they don't cite the Sixth Amendment or
19 any Federal cases.

20 MR. ATKINS: I believe they did in the initial
21 opinion. I believe they said that it was definitely a
22 violation of the Sixth Amendment right of confrontation.

23 QUESTION: By the initial opinion, do you mean
24 the opinion in this case or in the Williams case?

25 MR. ATKINS: No, in this case, which relied upon

1 the Williams decision. This particular panel of the court
2 of appeals in the Lucas case. In the case, the initial
3 decision by the Michigan court of appeals alluded to and
4 specifically referred to relying upon the decision in the
5 Williams case --

6 QUESTION: Right.

7 MR. ATKINS: -- at 95 Michigan appeals, I
8 believe it is. And that case was specifically grounded
9 upon the Sixth Amendment right to confrontation.

10 QUESTION: I'm asking about this case. Do we
11 have to read the Williams opinion to understand the basis
12 for their holding the notice opinion unconstitutional?

13 MR. ATKINS: I think it makes it clearer, Your
14 Honor, that in fact the Lucas --

15 QUESTION: Can you tell me whether on the face
16 of this opinion there is a reasonable basis for believing
17 this decision was based on Federal law?

18 MR. ATKINS: Yes, Your Honor, I do, because it
19 in turn relied upon the Williams case.

20 QUESTION: Just because it cited a Michigan case
21 which in turn relied on it. So you have to go to the
22 other case to find the Federal ground for decision?

23 MR. ATKINS: I think you could do that, yes,
24 Your Honor.

25 QUESTION: Well, you must do it, isn't that

1 true?

2 MR. ATKINS: If the Sixth Amendment is not
3 mentioned in the Lucas opinion, then you, of course --

4 QUESTION: I don't find it mentioned and I don't
5 find any Federal cases cited. And the Sixth Amendment --
6 on the Sixth Amendment they hold that the fact that the
7 notice had to be given within 10 days made, violated the
8 confrontation clause.

9 MR. ATKINS: Yes, it did.

10 QUESTION: Mr. Atkins, I just want to go back to
11 something you said in response to one of Justice
12 O'Connor's questions. Is it correct that you agree that
13 there has got to be some kind of an exception mechanism
14 applied to the statute?

15 MR. ATKINS: Yes.

16 QUESTION: Okay.

17 MR. ATKINS: Absolutely. And I think that can
18 be found in the decision of the Michigan Supreme Court in
19 the Hackett case in which Justice Boyl discusses that
20 there may be other Sixth Amendment rights that are not
21 covered by the statute which have to be considered by a
22 trial court even though they may not be specifically
23 mentioned. In other words, Michigan takes a broad view of
24 not only the victim's rights, but the necessary
25 confrontational rights of the defendant. They too must be

1 defended as well.

2 If I may, Your Honor, reserve any time for
3 rebuttal?

4 QUESTION: Very well, Mr. Atkins.

5 General Starr.

6 ORAL ARGUMENT OF KENNETH W. STARR

7 ON BEHALF OF THE UNITED STATES,

8 AS AMICUS CURIAE SUPPORTING THE PETITIONER

9 MR. STARR: Mr. Chief Justice, and may it please
10 the Court:

11 Over the past 15 to 20 years, 48 States and the
12 Congress of the United States have passed rape shield
13 statutes. Michigan's law was the first. It was the first
14 in a series of efforts throughout the Nation to protect
15 rape victims, and specifically of responding to the
16 problem of forcing rape victims to endure what frequently
17 became, in the view of the Congress of the United States
18 and other State legislatures, an unnecessarily humiliating
19 process with the systemic effect that, in the view of
20 Congress, rape victims were less willing to report this
21 chronically under-reported crime.

22 QUESTION: May I ask, General Starr, in the
23 survey, is this the only statute that has this particular
24 10-day notice requirement?

25 MR. STARR: That is correct. However, it is my

1 understanding, as Mr. Atkins indicated, that the
2 arraignment date in Michigan is in fact closely tied,
3 ordinarily, to the trial date.

4 QUESTION: But the only reason I ask you, I
5 suppose if we affirm in this case it would not necessarily
6 invalidate the rape shield statutes all over the country.

7 MR. STARR: Well, except that the ground on
8 which this statute was invalidated did not have to do with
9 the timing of the notice. It had to do, rather, with to
10 whom this statute applied. As I understand the attack in
11 the State courts, there was no indication at all that the
12 period for challenging or for educing the notice and to
13 file the appropriate motion and the like was unreasonable.
14 Indeed it couldn't have been here.

15 This was a twice-continued trial. This
16 proceeding was originally scheduled for trial in November
17 of 1984. It was twice postponed at the defendant's
18 request. And yet it was only on May 14, the first day of
19 trial, that counsel says in utter -- not present counsel,
20 but trial counsel says in utter violation of the rule, I
21 want to educe evidence even though I know it goes against
22 the statute. The Michigan court of appeals --

23 QUESTION: Yes, but the trial judge would have
24 excluded it even if the offer had been made on the
25 eleventh day, as I understand.

1 MR. STARR: Oh, I disagree with that, with all
2 respect, Justice Stevens. I think the message of the
3 courts of Michigan are quite clear that preclusion as a
4 remedy is a remedy that should be carefully calibrated,
5 just as this Court taught in cases such as Taylor against
6 Illinois. I think his -- if you read what he said, what
7 Judge Farmer said, the transcript can be read, if you give
8 it a hard reading, to suggest automatic preclusion. I
9 would suggest, Justice Stevens, that the better, more
10 appropriate, and fair way to read it is in context of a
11 matter that is --

12 QUESTION: All I did was read the court of
13 appeals opinion which says based solely on the failure to
14 comply with the notice provision.

15 MR. STARR: There was a complete failure to --

16 QUESTION: And that was the sole reason for
17 their decision.

18 MR. STARR: But at a critical point.

19 QUESTION: So we have to examine the trial
20 transcript to find out the grounds for decision, too? And
21 was he relying -- well, never mind.

22 MR. STARR: I don't think that there is -- the
23 specific issue that is before the Court is, as Justice
24 O'Connor was suggesting, a very narrow one. Is this kind
25 of notice requirement, which is responsive to the systemic

1 problem of this kind of process, operating to degrade
2 victims of crime? Is this notice provision
3 unconstitutional per se on its face as applied to this
4 kind of case? And the answer to that surely is no, that
5 it's not. This Court has held time and again that States
6 are free to impose reasonable rules so as to order their
7 criminal proceedings, and a notice provision was
8 specifically upheld 21 years ago in Williams against
9 Florida.

10 The Federal Rules of Criminal Procedure are
11 filled with notice provisions that must be complied with.
12 A notice provision is in fact simply a way of ordering the
13 procedure so that a determination can be made as to
14 whether this evidence is admissible or not.

15 In response to Justice Kennedy's point, it seems
16 to me that there is a potential here that some, much
17 perhaps, of this evidence would have been deemed relevant
18 if the appropriate proceedings had been followed.
19 However, and I think this is an important part of this
20 case, this evidence is not the critical sort of evidence,
21 the key sort of evidence that has troubled this Court in
22 cases such as Chambers against Mississippi, Rock against
23 Arkansas, and the like.

24 This is marginal testimony at best, and the
25 reason is this. This was tried before a judge who was

1 operating under no delusions. He could not have been
2 operating under the misimpression that there was in fact
3 not an intimate relationship here. The victim herself
4 testified that there was a boyfriend-girlfriend
5 relationship for --

6 QUESTION: Why would trial before a judge make
7 any difference than trial before a jury on that point,
8 General Starr?

9 MR. STARR: Well, the evidence -- I simply mean
10 that -- it makes none. It's simply the trier of fact,
11 which in this instance was Judge Farmer, had before him in
12 this record at trial -- it was a different judge in the
13 preliminary examination -- evidence of the intimacy of the
14 relationship. What -- the evidence, therefore, that was
15 sought to be educed was in fact marginal.

16 And the key point is this. Nothing went to the
17 witnesses' credibility, nothing went to bias. It is not
18 like this Court's opinions in Delaware against Van Arsdall
19 and other cases where the credibility of a witness is on
20 the line. There was no testimony --

21 QUESTION: It wasn't marginal, General Starr. I
22 mean, you think that that's the -- is that necessary for
23 reversing here?

24 MR. STARR: This Court, in reversing a State
25 trial on confrontation clause grounds, has looked to

1 whether this was critical evidence. That is exactly the
2 term the Court used in Chambers against Mississippi, and I
3 think that is sound. The Court looks at the trial to see
4 whether the basic confrontation clause value was achieved,
5 basic Sixth Amendment values of whether this individual
6 was able to put his case before the trier of fact. And
7 here there can be no doubt, a fair minded reading of this
8 transcript will indicate that he was permitted to do that,
9 including cross-examining the victim at length.

10 I thank the Court.

11 QUESTION: Well, General Starr, I suppose we
12 don't have to decide that question because the court below
13 didn't make any findings on the critical nature of the
14 evidence or the prejudice to the defendant here.

15 MR. STARR: That is exactly correct. Again, the
16 issue --

17 QUESTION: It could be remanded.

18 MR. STARR: The issue is very narrow as to
19 whether this kind of notice requirement, which is found in
20 the Federal Rules of Criminal Procedure, is
21 unconstitutional per se.

22 QUESTION: So, well -- we should remand and say
23 what? Consider whether it was crucial evidence? If it --
24 if it wasn't crucial evidence, then you're wrong, but if
25 it -- or if it was crucial evidence, then you are wrong?

1 MR. STARR: It seems to me that the Court can --

2 QUESTION: Suppose it was crucial evidence.

3 Could it have been kept out?

4 MR. STARR: If it were crucial evidence I think

5 we would have a different case under Chambers --

6 QUESTION: I know we'd have a different case.

7 Could it be kept out?

8 MR. STARR: I think the result might be

9 different. That's exactly the teaching of this Court.

10 QUESTION: Well, would it?

11 MR. STARR: Not here. Not here. This evidence

12 was in fact not critical, this was not -- no one was kept

13 off the stand --

14 QUESTION: I know it. I'm saying assuming it is

15 critical, can't the State say this is the way we run a

16 trial? You get this evidence in in advance.

17 MR. STARR: Oh, yes. I'm sorry.

18 QUESTION: I mean, there are a lot of other

19 provisions. Suppose there are requirements that you list

20 your witnesses for the trial judge before the trial, and

21 then somebody comes in at the last minute, never having

22 listed a witness, no particular reason, and says I want to

23 get on an additional witness.

24 MR. STARR: Quite right.

25 QUESTION: Do you have to let that witness on?

1 MR. STARR: No. We would look under the Taylor
2 v. Illinois analysis to the entirety of the circumstances
3 to see whether preclusion, which is a serious remedy, is
4 an appropriate remedy.

5 QUESTION: This whole thing is governed by what
6 a State can do with respect to individual cumulative
7 witnesses is governed by the Constitution?

8 MR. STARR: It can be under this Court's --

9 QUESTION: Chambers is a total sport. It has
10 never been cited again in any opinion of this Court.

11 MR. STARR: Well, this Court has looked to the
12 importance of evidence, including more recently in Rock
13 against Arkansas. The point I would close with is this.
14 There is no need at all to constitutionally second guess
15 State court judgments where in fact it is not behaving,
16 the State court is not behaving in an arbitrary way and
17 imposing a remedy that is disproportionate to the
18 violation. And here, under all the circumstances it seems
19 to me that preclusion is not -- by no means an
20 inappropriate remedy.

21 QUESTION: Thank you, General Starr.

22 MR. STARR: Thank you.

23 QUESTION: Mr. Magidson.

24 ORAL ARGUMENT OF MARK H. MAGIDSON

25 ON BEHALF OF THE RESPONDENT

1 MR. MAGIDSON: Mr. Chief Justice, and may it
2 please the Court:

3 This case involves a State evidentiary statute
4 which as applied in this particular case impermissibly
5 interfered with Mr. Lucas' right to present a defense
6 either by way of cross-examination or through his own
7 direct testimony on the stand. Now the statute involved
8 here is the Michigan Rape Shield Law. The overall
9 purpose, as we have heard, is to prevent a victim of rape
10 from being unnecessarily humiliated on the stand by
11 keeping out of evidence her prior sexual practices,
12 particularly as it applies to third parties.

13 All States, well, 48 States, have passed rape
14 shield laws. All of those jurisdictions include
15 exceptions to the rape shield law. One exception is where
16 the prior sexual relationship or experiences are between
17 the complaining witness and the defendant. All States
18 have those exceptions. In Michigan --

19 QUESTION: Mr. Magidson, are you saying that all
20 the others, the other 47 States all have that particular
21 exception?

22 MR. MAGIDSON: Yes. That's common. Now, every
23 State has different exceptions, but common to every
24 jurisdiction that I have been able to look at, common to
25 all of those jurisdictions is the fact that one of the

1 exceptions to the rape shield law is where the prior
2 sexual relationship is between the complaining witness and
3 the defendant. In Michigan if a defendant wishes to use
4 this evidence, as we have heard, he must file a motion and
5 an offer of proof within 10 days after the arraignment on
6 the information. And this is the earliest notice
7 requirement in the country.

8 And I take exception to what was said here as to
9 the time period. As a practical matter, what we're
10 talking about from the time of the arraignment on the
11 information to the time of trial in Wayne County, we're
12 looking at between 2 and 4 months.

13 QUESTION: Well, we don't have the question of
14 the validity of the time of the notice before us in this
15 case, though, do we?

16 MR. MAGIDSON: No, that's correct.

17 QUESTION: Granted, it's short, but I didn't
18 think we had to decide that -- decide it on that basis
19 here.

20 MR. MAGIDSON: No, you don't. The only reason I
21 mention it is that --

22 QUESTION: Uh-huh.

23 MR. MAGIDSON: -- it's so out of proportion, the
24 length of time is so out of proportion to all of the other
25 jurisdictions, including the Federal rule, that I think

1 it's significant, that it raises an issue.

2 QUESTION: Now -- yes. Now, do you agree that
3 the Michigan court of appeals here said that preclusion
4 could never be a remedy by virtue of the Constitution?

5 MR. MAGIDSON: No, Justice O'Connor.

6 QUESTION: In essence that appeared to be its
7 holding, a per se rule.

8 MR. MAGIDSON: No. I don't think so. I think
9 what the Michigan court of appeals was saying as in this
10 case as applied to these facts, because what the court of
11 appeals was looking at, I think, is the fact that here,
12 unlike other situations, the prosecutor and the
13 complaining witness both had notice of the defense, in
14 this case the defense of consent.

15 QUESTION: Well, it certainly appears, if you
16 look at the authorities they rely on, that the Michigan
17 court of appeals thinks at least that in all cases where
18 it would preclude evidence of sexual conduct between a
19 victim and the defendant, that preclusion cannot be
20 imposed. I mean, that's what I derive from it.

21 MR. MAGIDSON: The court painted with a broad
22 brush. I concede that.

23 QUESTION: Well, if that was its rule, do you
24 think that's accurate? Might there not be some cases and
25 some circumstances where preclusion even of that testimony

1 might be appropriate?

2 MR. MAGIDSON: Yes. The -- and I think Taylor
3 v. Illinois gives us guidance where, as in Taylor, you had
4 a defense counsel who it was determined made a deliberate
5 effort to misrepresent to the court. There the defense
6 counsel said I found a newly discovered witness. The
7 trial court brought in that witness and the witness said
8 no, I have talked to the lawyer about a week ago.

9 There the -- in Taylor, the Court here held that
10 where there is a deliberate act by defense counsel to gain
11 a tactical advantage to try to somehow blindside the
12 prosecutor, then preclusion might be an appropriate
13 sanction. And I think that's the standard we need to look
14 at.

15 QUESTION: Mr. Magidson, why, why isn't it
16 always an appropriate sanction, at least as far as the
17 Federal Constitution is concerned?

18 MR. MAGIDSON: Because --

19 QUESTION: Why isn't it always all right to
20 insist upon the rules of trial? Suppose what had happened
21 here is that the jury had retired to consider its verdict
22 and defense counsel jumps up and says oh, Your Honor, I
23 meant to call one other witness? I'm sorry about that, I
24 forgot to do it before the jury retired, but please let me
25 call, this one other witness is very important to our

1 case. And the judge says I'm sorry, we have a rule you put
2 in your witnesses before the jury retires. No, you can't.
3 It is excluded. You broke the rule, you lose. Why is
4 this any different?

5 MR. MAGIDSON: Well, first this was before the
6 trial started.

7 QUESTION: Well, it's a different time, it's a
8 different rule, but it's the same principle. There are
9 rules of trial. The rules are clear. They're not
10 difficult to comply with. This counsel didn't comply with
11 them.

12 MR. MAGIDSON: I would agree --

13 QUESTION: What's the matter with that?

14 MR. MAGIDSON: The problem here is that there
15 was no evidence that he intentionally, in this case she
16 intentionally disregarded the court rule. At best --

17 QUESTION: Well, in my hypothetical counsel just
18 forgot. It wasn't intentional. But there are rules of
19 trial. Why can't the court enforce the rules of trial?

20 MR. MAGIDSON: And the court can. And the, each
21 case is different. Now, for instance in the case of
22 People v. Merritt, which is a Michigan Supreme Court case
23 dealing with alibi, there defense counsel didn't file the
24 timely notice and the court, the supreme court in
25 Michigan, said that there the defense counsel was sick, he

1 was ill, and that the preclusion sanction should only be
2 applied in the most egregious circumstances. In the case
3 -- in the example that --

4 QUESTION: Is that a constitutional ruling of
5 the Supreme Court of Michigan, or just an interpretation
6 of the statute?

7 MR. MAGIDSON: It's interpretation of the
8 statute. But the point being is that I think that --
9 again, this Court in Taylor v. Illinois has said the same
10 thing. The most egregious cases where there might be
11 other remedies --

12 QUESTION: But that, but that's the issue for
13 the discretion of the judge. Does that have to be a
14 constitutional rule? I mean, I would not say that you
15 must exclude it all the time, but as far as the Federal
16 Constitution is concerned, why can't you say a rule is a
17 rule if a State wants to do it that way?

18 MR. MAGIDSON: It becomes a constitutional issue
19 where -- it's a balancing test. And where the Sixth
20 Amendment rights become offended, then that's where it
21 becomes a constitutional issue. If by imposing a
22 preclusion sanction you are thereby infringing or
23 impinging upon the rights of a defendant, Sixth Amendment
24 rights to present a defense, then that's where the
25 balancing test. If it had to do with something other than

1 his constitutional rights --

2 QUESTION: You would extend that to the first
3 hypothetical I gave you also, to where the trial is over,
4 the jury is retired, and you want to get in additional
5 evidence?

6 MR. MAGIDSON: Based on --

7 QUESTION: You would extend that rule? You
8 would not say too bad?

9 MR. MAGIDSON: I don't think that there should
10 be a per se blanket -- per se preclusion under any
11 circumstances. Perhaps in that situation where already --
12 the book -- the book is already closed, I would say that
13 would be an extreme case, but --

14 QUESTION: I don't know why it's more extreme.
15 It's very easy to say wait a minute, we'll call the jury
16 back in, we have one more witness. No big deal.

17 MR. MAGIDSON: Well, if the reason perhaps is
18 that the defense counsel suffered a stroke or something
19 during trial and didn't recall, I don't know all the
20 possibilities.

21 QUESTION: I don't think the Constitution
22 requires a State to do that. I think a State can say the
23 rule is the rule. You didn't -- we have a way that we try
24 cases around here. This is the way. You didn't do it.
25 The evidence doesn't get in. Period.

1 MR. MAGIDSON: Well, the problem, at least with
2 this statute as it was interpreted by the trial judge, the
3 statute itself is silent. It doesn't give a remedy. It
4 doesn't indicate what should be done. Here the trial
5 court strictly construed this statute. Number one, no
6 deviations from the time period. The trial -- the trial
7 judge looked at the statute and said well, the 10-day time
8 period has passed, there is no alternatives, no
9 alternatives other than preclusion. And so technically
10 the trial counsel was correct in not seeking to bring the
11 motion later because a court interpreted very strictly.

12 The problem then with this strict application of
13 this statute which required that the time limits must be
14 strictly complied with, as well as the preclusion
15 sanctions which followed, caused two problems. The
16 problems are then what is the remedy when a defense
17 attorney who was at most negligent fails to comply with
18 this notice requirement, and then what are the
19 consequences of precluding that evidence or testimony.

20 QUESTION: But the Michigan court of appeals, as
21 I read their opinion, Mr. Magidson, didn't rely at all on
22 the first part, on the first of the two problems you say.
23 That the fact that the -- that the notice -- the notice
24 was given long after the statutory time.

25 MR. MAGIDSON: No, that's correct. The court of

1 appeals indicated that -- for this reason. They looked at
2 the purpose of notice. Why have notice at all? It has
3 been indicated here there is at least two reasons to have
4 notice. One is to, in the case of an alibi or insanity
5 defense you give notice to allow the prosecutor to
6 prepare. You give notice of your witnesses, who they are,
7 so then they can interview them or find other witnesses.
8 The same with insanity. The Michigan court said, well,
9 there's no need to do that because the party is in court,
10 number one, and number two, the people in this case had
11 notice at the earliest opportunity in this litigation.

12 The defendant took the stand at this preliminary
13 examination. He testified, and this is even prior to the
14 arraignment on information, this, the preliminary
15 examination is the first stage of the criminal proceeding,
16 it's a hearing. He took the stand and he testified that
17 this was a consensual act. We have had sex many times in
18 the past, and this was just another situation. So at that
19 point he indicated to the prosecutor and to the
20 complaining witness that that was his defense. And I
21 think that was behind what the court of appeals in
22 Michigan was looking at.

23 QUESTION: But that -- didn't -- wasn't their
24 stated reason for saying this thing is applied or this
25 statute was unconstitutional was that you could not

1 preclude testimony about past relationships between the
2 defendant and the victim, whatever you could do with
3 respect to third parties?

4 MR. MAGIDSON: No. What it becomes then is a --
5 I don't think they said that. I think you can preclude
6 it. I think what they were saying is that the advance
7 notice requirement where you have the two parties there in
8 court loses its logical underpinnings. You don't need
9 this lengthy notice period.

10 What the trial court could have done right then
11 and there is a couple of things. First of all it could
12 have adjourned the trial. But assuming that the trial
13 court didn't want to adjourn the trial, they could have
14 had a hearing, an in camera hearing right then and there,
15 could have conducted that, though jury wasn't selected.

16 And this is no different than what occurs many
17 times in every court situation throughout the country.
18 Every trial judge is faced with this. You look at the
19 evidence, an offer of proof is made, and there is an
20 objection. The jury is sent out and then you decide, for
21 instance, if there are photographs or something, is it
22 more prejudicial than probative. Trial courts do this day
23 in and day out, make these type of rulings all the time.
24 So what the Michigan court of appeals was saying is that
25 in these particular situations this is no different, that

1 it could have happened right then.

2 The trial court could have fashioned other
3 remedies as well. I hate to suggest this, but it could
4 have fined trial counsel for bringing the motion at the
5 eleventh hour. It could have done -- it could have
6 determined that the -- it could make inquiry into the past
7 sexual, it couldn't cross-examine the complaining witness,
8 but it would have allowed Mr. Lucas to testify. There is
9 infinite -- amounts of possibilities that the trial court
10 could have done to fashion an appropriate remedy.

11 Here this didn't occur. The trial court felt
12 that it did -- did not have discretion, which in a factor
13 was -- we believe was error and at least I argued that in
14 the lower courts. But the fact is that the court always
15 has discretion to exercise whatever appropriate remedies -
16 -

17 QUESTION: Was part of the reason of the
18 Michigan court of appeals' holding that this -- the
19 purpose of the statute was only to provide notice and give
20 the State a chance to investigate this testimony, and
21 since it was testimony only involving the defendant and
22 the victim there was no need for that sort of
23 investigation?

24 MR. MAGIDSON: I think that was the thrust of
25 the analysis of the Michigan court of appeals.

1 QUESTION: And then they in effect rejected the
2 State's claim that this evidence, quite apart from notice,
3 could be reviewed and excluded if it was not material?

4 MR. MAGIDSON: I think the court of appeals
5 indicated that this becomes like just a normal type of
6 weighing the prejudicial effect versus probative value,
7 and that if it was in fact more prejudicial than
8 probative, then it wouldn't be admitted and that a
9 separate hearing could have been held outside the presence
10 of the jury to do that. And that is normally done in
11 these type of cases.

12 QUESTION: Well, they, the Michigan court of
13 appeals reversed this conviction because, as I read it, it
14 said that, that what is left is the usual evidentiary
15 issues of the materiality of the evidence to the issues in
16 the case and the balancing of its probative value with the
17 danger of unfair prejudice. The trial court did not
18 exclude the proposed testimony on either of those grounds.
19 You would think that it might be a different case if the
20 trial court had --

21 MR. MAGIDSON: That's true.

22 QUESTION: -- excluded the evidence on those
23 grounds.

24 MR. MAGIDSON: That's true.

25 QUESTION: So, it sounds -- it doesn't sound to

1 me like the Michigan court of appeals was saying there's a
2 per se rule --

3 MR. MAGIDSON: No.

4 QUESTION: -- against the exclusion, total
5 exclusion of these --

6 MR. MAGIDSON: No, absolutely not. The --

7 QUESTION: Williams reads like it, but this
8 opinion doesn't.

9 MR. MAGIDSON: This opinion is limited, as I see
10 it, to the particular facts of this case where the --
11 there had been notice already and the trial court failed
12 to exercise its discretion in getting this information.
13 The failure to go into this, to permit this, it was
14 suggested by counsel that it was not that big a deal, but
15 the thing is that this was important testimony on the
16 issue, in a narrow issue of consent. In these cases the
17 failure to allow inquiry into this past sexual
18 relationship undermined the integrity of the fact-finding
19 process.

20 The fact finder would have a different
21 impression, if you will, of the credibility not only of
22 the complaining witness but then also of the defendant, of
23 his position, his theory, because there were two sides to
24 this story, as there is in every case. And so without
25 that, having that knowledge of the rather extensive

1 relationship between the parties, the fact finder was
2 deprived of having the full picture, was not able to make
3 findings of fact based on all of the information.

4 And in this case, and as the -- as Michigan has
5 held and all jurisdictions, the -- on the issue of, when
6 the defense is consent the prior sexual relationship
7 between the individual parties is more probative than
8 prejudicial. And as far as, in terms of the Law Review
9 and other articles, the experts who have reviewed this,
10 the State legislature in all States have come to similar
11 conclusions. So the evidence was relevant, was material,
12 and was more probative than prejudicial.

13 And I think what is also important here is the
14 -- more or less the flip side of the coin is that not only
15 was the defendant unable to cross-examine the complaining
16 witness on this, he was unable to testify in his -- in his
17 own behalf. And so even assuming that, in this case that
18 the witness, the complaining witness, couldn't be cross-
19 examined, what justification was there not to allow the
20 defendant in his own behalf to testify?

21 The purpose 00 there is two purposes, as we have
22 discussed, of why this notice provision existed, but one
23 of the purposes is not to penalize a defendant. He was
24 deprived of getting on the stand and giving his -- his own
25 version of what occurred. And this is similar to cases

1 where, for instance, the trial court held that a
2 confession was voluntary and then prohibited at the time
3 of trial the defendant from testifying about police
4 coercion. This Court said differently. It said that once
5 you allow a defendant to testify you can't simply exclude
6 certain material portions of his testimony without
7 offending the principles under the Sixth Amendment and due
8 process.

9 So here Mr. Lucas --

10 QUESTION: You could exclude parts of his
11 testimony on the ground that they were irrelevant.

12 MR. MAGIDSON: Yes, you could. That's there's
13 no doubt about that.

14 QUESTION: Was there an effort made to cross-
15 examine the victim on the same subject?

16 MR. MAGIDSON: There was -- whenever the efforts
17 were made the prosecutor, the trial prosecutor would jump
18 up and object. Yes.

19 QUESTION: And it was sustained by the court?

20 MR. MAGIDSON: Absolutely.

21 Now -- so between those two denials, the denial
22 of the cross-examination, the denial to present his own
23 testimony, we had here an infringement done on his
24 constitutional rights. And I think it's important to
25 recognize that underlying all of this was not an

1 intentional or deliberate action on the part of his trial
2 counsel. In fact there was a reference made that at the
3 time of the arraignment on the information, which was
4 October 25th, 1984, his trial counsel at that time pled
5 him not guilty. And in that case inquiry report that was
6 referred to there is a notation that on that same date,
7 October 25, 1984, his defense counsel had made a motion
8 for substitution of counsel. We don't know -- it's not
9 clear exactly when that occurred.

10 There is a suggestion in the record that at the
11 time, from the arraignment on the information on,
12 possibly, the defendant was not represented. The State
13 thereafter appointed counsel sometime in either January or
14 February of 1985, well after the time to have -- that this
15 motion could have been filed. The strict interpretation
16 of this -- of this statute would have precluded. And as
17 the trial court said, the 10 days had passed, so what was
18 the defendant to do? So this is why it's different than
19 in the case of Taylor v. Illinois where there was a
20 deliberate effort to gain a tactical advantage. Here at
21 most we have negligence.

22 Now --

23 QUESTION: Do you suppose the court of appeals
24 said that where the evidence offered is prior sexual
25 relationship between the victim and the defendant that you

1 never exclude the evidence based solely on the lack of
2 notice?

3 MR. MAGIDSON: No. I don't think that they said
4 that.

5 QUESTION: They didn't? I thought they -- I
6 thought they said that -- I thought that's exactly what
7 they said. They said you might be able to exclude it when
8 it's offered on the basis -- on materiality or undue
9 prejudice, but not because they didn't have notice.

10 MR. MAGIDSON: Not because of notice. Well,
11 they've indicated -- they indicated was it lost its
12 logical underpinnings.

13 QUESTION: Exactly.

14 MR. MAGIDSON: Exactly.

15 QUESTION: And they followed Williams in that
16 regard.

17 MR. MAGIDSON: Right.

18 QUESTION: So it is a per se rule that where the
19 victim and the defendant are the ones involved, that the
20 notice statute cannot be applied at all?

21 MR. MAGIDSON: It -- I think that that's one
22 interpretation of the court of appeals. I don't know that
23 it has to be interpreted. I think what it's -- we're
24 looking at here is the facts of this case where notice was
25 in effect given at the preliminary examination. Now,

1 whether in a different case if there was no notice given
2 -- we have -- I have -- we have no quarrel. We're not
3 saying that there's -- notice isn't a legitimate
4 requirement under --

5 QUESTION: Even where the -- where the evidence
6 concerns the victim and the defendant?

7 MR. MAGIDSON: Certainly there is a far less
8 need to require notice, and that's what the Michigan court
9 of appeals indicated. But for -- I don't want to suggest
10 to the Court that notice in a criminal procedure, as was
11 indicated in Florida v. Williams, that's been held to be
12 constitutional as long as it's reasonable. But what is
13 reasonable in one context can be unreasonable in another
14 context, and I think what the Michigan court of appeals
15 indicated in this particular context, where there's --
16 notice was already provided at the preliminary
17 examination, there was no need, it lost its logical
18 underpinnings. And particularly since --

19 QUESTION: Do you agree that there are instances
20 in which the victim's relation with the defendant cannot
21 be explored as to certain of the details of that
22 relationship? Are there ever instances where limiting
23 instructions in the court are proper?

24 MR. MAGIDSON: Sure. There -- I am sure there
25 are. There are probably many.

1 QUESTION: And do you agree that there are some
2 instances when it would be of material assistance to the
3 court to have that hearing in advance of the trial?

4 MR. MAGIDSON: I think it could, but when
5 balancing the two I don't think that it would be that
6 great of inconvenience to have a -- it prior to trial.

7 QUESTION: But it would be some inconvenience?

8 MR. MAGIDSON: There would be some
9 inconvenience, because the normal administration of
10 justice, but there are normally, in any felony trial there
11 is normally motions eliminating other pretrial matters
12 taken up by a court, and frequently other types of
13 hearings are conducted at the type of trial, walker
14 hearing, motions to suppress. Testimony sometimes in
15 Wayne County is heard even at the day of trial because you
16 have the witnesses present and they don't -- trial doesn't
17 require -- the trial court doesn't require witnesses to
18 come down twice. They come down once for the motion and
19 then for the day of trial.

20 So there would be some inconvenience, but on the
21 other hand there could be convenience for doing it at the
22 time of trial as well.

23 Now, there is just one other area I would like
24 to address, and that is there has been a suggestion that
25 this should be remanded to determine whether this was

1 harmless error. And I would just indicate that the
2 Michigan Supreme Court, after the court of appeals decided
3 this case there was an appeal to the Michigan Supreme
4 Court. The Michigan Supreme Court then remanded to the
5 court of appeals for harmless error analysis. The
6 Michigan court of appeals made that analysis and
7 determined that since credibility was central to the case,
8 that this was not harmless beyond a reasonable doubt.

9 So, and here this Court has given great
10 deference to the State court's interpretation regarding
11 harmless error. This is different than, say, Van Arsdall
12 where there was no State determination. And in fact the
13 Michigan -- after that analysis was made it was then taken
14 back up to the Michigan Supreme Court, and the Michigan
15 Supreme Court let the decision stand. So here there is --
16 we believe that the error was not harmless beyond a
17 reasonable doubt, and we would ask that the Michigan court
18 of appeals decision be affirmed.

19 That concludes my argument.

20 QUESTION: Thank you, Mr. Magidson.

21 Mr. Atkins, do you have rebuttal? You have 4
22 minutes remaining.

23 REBUTTAL ARGUMENT OF DON W. ATKINS

24 ON BEHALF OF THE PETITIONER

25 MR. ATKINS: Thank you, Your Honor. A couple of

1 very brief points I would like to make. I believe if the
2 Court in reading the case will understand that what the
3 court of appeals of Michigan did in this case was really
4 say flat out that whenever you're excluding evidence which
5 involves prior sexual conduct between the defendant and
6 the complainant in a particular case, that alone -- that
7 alone violates the Sixth Amendment right of confrontation.
8 The only issue that I think is properly before this Court,
9 as I have tried to emphasize earlier in this case, is that
10 the question being whether the operation of the notice and
11 prehearing provisions of the Rape Shield Law in and of
12 themselves are violative of a defendant's right to
13 confrontation. That is the only issue. I think the issue
14 is simply that.

15 QUESTION: Mr. Atkins, Justice White asked your
16 colleague a question about whether the last part of the
17 opinion of the court of appeals in this case doesn't
18 suggest that the testimony could have been excluded on the
19 basis of its material -- lack of materiality or on the
20 balancing process, the thought being that the court of
21 appeals suggested that the trial court might have done
22 that.

23 MR. ATKINS: I think, Your Honor, you could have
24 taken another tack, and the tack is this, whether or not
25 that evidence would have been object --

1 QUESTION: I mean, but I'm interested in your
2 view of whether or not the Michigan court of appeals said
3 that or held that.

4 MR. ATKINS: No, Your Honor. I -- again I would
5 say that I think the Michigan court of appeals said flat
6 out that the statute was unconstitutional, period, when
7 applied to prior sexual conduct between the defendant and
8 the victim, and those being the two --

9 QUESTION: In this case, you mean?

10 MR. ATKINS: Yes, Your Honor, I do believe that.

11 QUESTION: You mean just the fact of having --
12 of requiring notice? Requiring notice --

13 MR. ATKINS: Well, the notice -- I think they
14 have said that both the notice and the pretrial hearing
15 provision, in camera hearing provision, were both in --
16 together -- tandem, unconstitutional when applied to this
17 situation without any further consideration.

18 QUESTION: They didn't say the notice provision
19 was unconstitutional, only enforcing it by exclusion was
20 unconstitutional.

21 MR. ATKINS: I'm not so sure that that is quite
22 how I see it either, Your Honor, but I do see it as a
23 situation in which the notice itself cannot, in my
24 opinion, preclude a defendant from -- or deny a defendant
25 his Sixth Amendment right of confrontation. I think the

1 issues of whether or not the evidence may have been
2 relevant, again whether they are issues of ineffective
3 assistance of counsel and failure to raise it, are all
4 collateral issues which, even in the State of Michigan, a
5 defendant can raise in subsequent proceedings after
6 consideration by this Court.

7 But I think again, in conclusion, Your Honor,
8 that there is nothing in the Constitution which would have
9 prevented the kind of remedy provided here. I would say
10 in a lesser situation perhaps something else would have
11 been appropriate, but I think the line has to be drawn and
12 I think the trial court properly drew the line on the day
13 of trial. I think those are the only issues before the
14 Court, and I would ask the Court that in light of the
15 matter before it and the evidence presented at trial, that
16 this Court in fact reverse the Michigan court of appeals.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Atkins.

18 The case is submitted.

19 (Whereupon, at 11:59 a.m., the case in the
20 above-entitled matter was submitted.)
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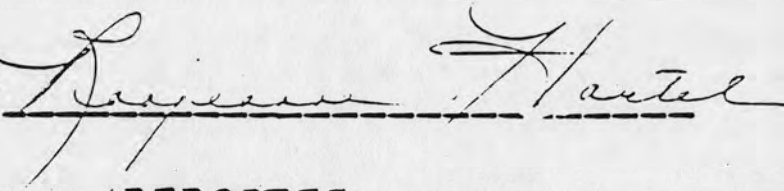
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