

ARGUMENT

I. THE TRIAL COURT’S PRECLUSION OF THE COMPLAINANT’S STATEMENTS FROM BEING INTRODUCED AT TRIAL CONSTITUTES ABUSE OF DISCRETION AND WARRANTS REVERSAL OF THE JUDGMENT OF CONVICTION

This court’s standard of review is abuse of discretion. The harmful abuse of discretion that the trial justice committed was determining that the evidence proffered by the defense was inadmissible because it violated the Rape Shield Law of Rhode Island, §11-37-13. The facts are not in question, only the admissibility of relevant exculpatory evidence. The evidence in question was certain correspondence between the complainant and Mr. Book, and letters from the complainant to Mr. Kerr. They contained sexual language and related the sexual desires of the complainant. The trial court improperly deemed the written discussion of sexual matters as actual evidence of prior sexual conduct. Statements about desires for future acts does not equate to testimony of prior acts. For these reasons, this court should reverse the judgment of conviction and remand the case for a new trial.

A. The Rape Shield Law Does Not Define Sexual Activity; Its Purpose Is To Prevent Irrelevant Testimony Of A Victim’s Promiscuity

In Rhode Island, as in most jurisdictions, the legislature chose to address the historical problem of “putting the victim on trial,” where testimony of the complainant’s prior sexual acts had the sole purpose of proving assent by showing she was “practiced Messalina” rather than a “virtuous Lucretia”. New York v. Abbot, 19 Wend. 192, 196 (N.Y. 1838). This practice unfairly harassed the witness and damaged her reputation, and effectively raised the burden of proof for the state. The prejudicial effect of such collateral evidence would often outweigh any probative effect, if there was even a probative purpose. As the reporter’s note reads in §26.3, the Rape Shield Law’s purpose was to prevent the inquiry if it “is being pursued to embarrass and hopefully deter the victim from assisting with the prosecution.” RI Super. R. Crim. P. Rule 26.3 (2003). Since their inception, the Rape Shield Laws have encouraged rape victims to come forward and press charges as was intended.

However, that policy needs to be reconciled with Mr. Book’s inherent right to confront his accuser, as guaranteed both in the sixth amendment and the Rhode Island constitution. If the evidence was relevant, exculpatory, and possessed an independent basis for proving the defense’s theory, as stated in an offer of proof, then it should have been admitted. Mr. Book’s offer of proof demonstrated that indeed the evidence should have been admitted for those reasons. Thus the preclusion of the evidence was reversible error.

Rape Shield Law cases are fact sensitive and Rhode Island has yet to rule on a case analogous to the case at bar. However, Rhode Island has made a distinction between fact and fantasy when considering whether to allow statements of a sexual nature. In *State v. Oliveira*, the court held that false accusations of sexual assault were not evidence of prior sexual conduct. Not only are false accusations immensely probative on a witness’s credibility, but obviously by the very nature of being false, no sexual activity ever occurred. The complainant in *State v. Oliveira* was a child who testified against the defendant in charges of child molestation. The trial court refused to allow in a state agency report that the eight year old had previously filed two sexual assault charges which had been dropped. The defendant did not want to introduce evidence of prior sexual conduct but rather evidence of prior false accusations. The defense relied on this evidence because a jury would assume an eight year old would not have prior knowledge of sexual details such as ejaculation, unless of course she had demonstrated this knowledge before in false accusations, not to mention the relevance with respect to her credibility. The appellate court reversed, stating the trial court had misinterpreted the Rape Shield Statute. Similar to the instant case, the appellate court found the evidence was necessary to impeach

the credibility of the witness, especially because the prosecution had opened the door by asking the jury where else could the complainant had learned of the sexual acts unless the defendant was guilty. State v. Oliveira, 576 A.2d 111, 111-115 (1990). Likewise, Mr. Book did not want to introduce evidence of prior sexual conduct but rather prior written statements by the complainant that support Mr. Book's defense theory.

Conversely, a Rhode Island case that rejected the defendant's offer of proof was *State v. Alger*, where the defendant was convicted of assaulting the victim twice in two weeks. He argued that the complainant had consented to a ménage à trois in the first instance. However, the court held that the excluded testimony could not show whether the complainant had actually consented to the first sexual encounter and, furthermore, that the ménage à trois testimony, with respect to the first encounter, was irrelevant as to the issue of consent in the second encounter. Critically, the statements represented a past act. The sole purpose of the evidence was to demonstrate to the jury that she was promiscuous, rather than to prove an independent element of the defense. The defendant did state his intention to impeach the credibility of the witness by showing she lied about her desire to have a ménage à trois. However, this was based on the theory that she had consented in the past and therefore would have continued to consent, which is exactly the flawed reasoning prohibited by the Rape Shield Law. Moreover, the statements actually mention the act of the ménage à trois. State v. Alger, 545 A.2d 504, 504-506 (1988). The defendant's offer of proof was rejected for the very reasons Mr. Book's offer of proof should have been accepted. Mr. Book's evidence did prove an independent element of the case, three in fact, unlike the defendant in *Alger*. The evidence was not to show promiscuity. In fact the evidence does not tend to show promiscuity, because there are no prior acts, but rather deviant sexual desires which would not prejudice the complainant since Mr. Book admits the same desires. Therefore under these guidelines, correspondence relating fantasies and not actual conduct are to be deemed mere statements and thus are admissible.

B. Statements Sexual In Nature Are Not Evidence Of Prior Sexual Conduct Per Se

Other courts have held sexual statements are not prior sexual conduct. Those courts have found that the Rape Shield Laws preclude evidence, usually testimony, of prior sexual acts. A statement sexual in nature or describing future intent cannot logically have anything to do with a past act. A paraplegic could indeed write a letter saying he wishes to have sex tomorrow. This cannot prove he had sex yesterday. People v. Jovanovic, 263 A.D.2d 182, 183 (N.Y. App. Div. 1999). State v. Vonesh, 401 N.W.2d 170, 171 (Wisc. App. 1986). State v. Guthrie, 428 S.E.2d 853, 854 (N.C. App. 1993). State v. Dorsey, 783 A.2d 947 (2001). State v. Martinez, 824 A.2d 443 (2003). Nebraska v. Johnson, 609 N.W. 2d 48 (Neb. App. 2000). Connecticut v. Cassidy, 492 A.2d 1239 (Conn. 1985). Michigan v. Ivers, 587 N.W.2d 10, 10-12 (Mich. 1998). The Rape Shield statute in Rhode Island, §11-37-13, does not define "sexual activity" nor does it specify whether prior sexual language is admissible. Rhode Island case law has not addressed the issue of admissibility of language as opposed to conduct. But other jurisdictions have.

In *New York v. Jovanovic*, the defendant was accused of sexual crimes and wished to admit emails from the complainant to the defendant to evidence the state of mind of both parties. Among those emails was a discussion about how the complainant enjoyed sadomasochism. Critically, "I'm what those happy pain fiends at the Vault call a 'pushy bottom,'" referencing a term for a submissive partner who pushes the dominant partner to inflict greater pain. The trial court precluded the emails, but the appellate court held that email messages were not subject to the Rape Shield Law. They did not constitute evidence of complainant's past sexual conduct, but were merely statements of a sexual nature, ones very probative of her possible consent. "Defendant's purpose in seeking to offer these statements in evidence was not to undermine complainant's character by demonstrating that she was unchaste. Rather, it was to highlight both the complainant's state of mind on the issue of consent, and his own state of mind regarding his own reasonable beliefs as to the complainant's intentions." New

York v. Jovanovic, 263 A.D.2d 182, 183 (N.Y. App. Div. 1999). Likewise, Mr. Book's evidence also consisted of correspondence, in the complainant's own words, which demonstrated her state of mind with respect to consent; while ignoring the issue of chastity.

In Wisconsin v. Vonesh, the court allowed in two sexually-oriented notes written by the complainant. That court held that the act of writing about sexual desires was not itself prior sexual conduct. In that case the complainant, a young girl, had accused the defendant, her father, of sexually assaulting her. There was evidence of a motive to fabricate. But in addition, the defense found it necessary to prove that the complainant had had previous knowledge of the sexual acts in question. Online correspondence of the girl to another boy contained such statements as "...and I wanted you to fuck me," and a gamelike challenge, the "kissing license", for the boy to kiss the girl and then, if he dared, to proceed with more advances. When the defendant threatened to show the notes to the complainant's mother, the complainant allegedly fabricated the charges of assault. The court held, "The conduct or behavior contemplated in the 'license' is future conduct or behavior and is not shielded by the [Rape Shield] law." The court's dubious view of the state's version of the law was demonstrated in the case by, "Apparently it is the position of the state that because the complainant used a word -- "fuck" -- which describes a sexual activity, the note constitutes evidence of sexual conduct *even if* the complainant did not know the meaning of the word. We reject this proposition." Wisconsin v. Vonesh, 401 N.W.2d 170, 171 (Wisc. App. 1986). Analogously the mention of "threesome" ought not to be construed as sexual conduct.

In North Carolina v. Guthrie, the defendant sought to cross-examine the complainant about a letter she had voluntarily written to a school friend in which she asked her friend to have sex with her, which she admitted to doing on voir dire. The trial court sustained the prosecution's objection to the testimony on the grounds that it was prohibited by the Rape Shield Statute. The appellate court held that evidence of a conversation was not evidence of a sexual act and therefore was improperly excluded. North Carolina v. Guthrie, 428 S.E.2d 853, 854 (N.C. App. 1993). This statement was an invitation for future sex as were the faxes in Mr. Book's case.

In Michigan v. Ivers the defendant was convicted of sexual assault. The trial court had precluded testimony regarding statements made by the complainant earlier in the day. She had asked her friend, who she was visiting at college, to "get her a guy." This probative statement not only was relevant and exculpatory but the court found that the statements were mere language which evidenced a state of mind that the complainant may have been considering having sex that evening, but did not mention prior sexual conduct. Michigan v. Ivers, 587 N.W.2d 10, 10-12 (Mich. 1998). Similarly, Mr. Book is that "guy" in a statement about a future intent by the complainant.

Conversely, where the evidence, whether statements or more direct evidence, refers to actual prior sexual conduct, courts have held that such evidence equals sexual conduct since such evidence has the same prejudicial effect. Mr. Book's case was different. An analysis of his offer of proof demonstrates he was not "fishing" for promiscuity with which to demonize the complainant. The evidence does not show the complainant was a whore, but rather a selfish liar.

In New York v. Hauver the defendant was charged with raping the complainant in his car. One statement by the complainant was excluded and one was admitted. The excluded statement, "she was out whoring around" was properly excluded since it implied actual prior sexual conduct. One cannot whore around unless one was having sex. The statement was exactly the type of embarrassing collateral evidence the Rape Shield Law prohibits. The court however noted how the defendant was properly allowed to introduce the statement "she was out to get laid that night," because it spoke of a possible future act, and not a past act. New York v. Hauver, 129 A.D.2d 889, 890 (N.Y. App. Div. 1987). The first statement is inherent proof of prior sexual conduct, absent in Mr. Book's case. The second statement is again a statement that goes to the complainant's intentions for the future.

Even if the statements are oral, if they prove a prior sexual act took place they are precluded. In Stephens v. Miller the defendant was charged with attempted rape of the witness in her home, while he maintained it was consensual. The defendant stated in an offer of proof that the two of them were

"doing it doggy fashion" when he said to her "don't you like it like this? . . . Tim Hall said you did." The court properly excluded the statements because of their prejudicial impact. The court did, however, allow the defendant to testify that he had said something to the victim that angered her and led her to fabricate the charge. Stephens v. Miller, 13 F.3d 998, 1001 (U.S. App. 1994). In Mr. Book's case, the statements are necessary to show the relationship with Mr. Kerr that led to the complainant's motive to fabricate. However, in the *Stephens* case, the statements prove that she had had sex before, unlike the case at bar.

More fundamental is what essentially does constitute conduct, even if there are no statements. In *Colorado v. Murphy*, the defendant was convicted of sodomizing another male. The defendant wished to introduce evidence of prior homosexual acts. The Colorado Supreme Court held that the prior homosexual acts were prior conduct and thus precluded under the Rape Shield Law. The second issue was whether sexual orientation itself could be admitted. The court held that sexual orientation was inadmissible because it was irrelevant (just as promiscuity is) to a witness's credibility. The court held that the purpose of the Rape Shield Statute was to prevent humiliating "fishing expeditions" such as that one. Colorado v. Murphy, 919 P.2d 191, 194 (Colo. 1996). Mr. Book however, neither wishes to introduce prior conduct nor go fishing. Mr. Book's evidence was relevant to the credibility of the complainant.

In *Michigan v. Wilhelm* the defendant witnessed the complainant show her breasts to men at a bar and allow those men to fondle her breasts. The defendant subsequently sexually assaulted the victim in a boat in his parent's driveway. The defendant claimed the fondling was not sexual conduct. The Supreme Court however held it was indeed conduct. Secondly, the defendant claimed it was probative with respect to consent. However, the court correctly held that "evidence of a rape victim's unchastity is ordinarily insufficiently probative of her consent to intercourse with a defendant." The defendant argued the same logic the Rape Shield Law refutes, that promiscuity in and of itself increases the likelihood of consent and lowers a witness's credibility. Michigan v. Wilhelm, 190 Mich. App. 574, 585 (Mich. App. 1991). However, Mr. Book's evidence was not prior sexual conduct but rather statements of the complainant's fantasies to Mr. Book. The correspondence did not show the complainant was more promiscuous and thus was more likely to have consented, but rather that she discussed the very issue of ménage à trois intimately with Mr. Book immediately prior to the incident and thus was more likely to have consented.

The essential factor of these determinations is in the nature of the evidence, i.e. future plans or prior conduct. The correspondence demonstrated multiple times the complainant's fascination with ménage à trois. The correspondence was highly exculpatory but nonetheless consisted of only opinions and desires. In the March 21st fax she stated, "That is why I like those threesomes. It can be just me and the ones I love." (R. 14). In the March 22nd letter to Mr. Kerr, she wrote, "Two is boring, three is never a crowd...Perhaps we should expand and explore new options, new horizons, with the tow of us as the base, and the other slot should vary." (R. 17). In the March 24th fax she wrote "The meat in between the two slices of bread. Nick and I are close, you are right. I consider him one slice of bread." (R. 15). In the March 30th fax she wrote, "There should be two guys, one girl. That is the perfect threesome" followed by her acceptance of his invitation for dinner, "Thanks for the invitation. It does sound so intriguing, and adventurous, on some level. If you know what I mean, mon cher ami." (R. 18). These were mere opinions of ménage à trois; at most they are possible invitations for future sex. In fact, they were dispositive of her state of mind the night of the incident. Meanwhile prior sexual conduct was not related in any of the correspondence nor was the existence of the complaint's prior sexual activity the point of Mr. Book's defense.

C. The Correspondence In This Case Was Mere Language And Not Sexual Conduct

The trend in these cases is that language is not to be construed as sexual conduct. That is, the actual letter, or writing of the letter, is not conduct; nor are the sexual desires or fantasies that may be

contained in any letters. In Mr. Book's case, the evidence was clearly mere language. In none of the faxes or letters was sexual conduct explicit. Most of the language was about desires for future acts. For example, in the March 24th fax, the complainant writes about her addiction to ménage à trois, her desire to be the meat between two slices of bread. The complainant stated that Mr. Kerr and she were "explorers". Such language is too vague to be considered evidence of a prior sexual episode. The only fax that even bears a resemblance to prior sexual conduct was March 24th where she stated "Don't forget, Nick and I know each other, a lot. He, my fiancé and I, well... there have been some wild times." If this vague flirtatious chatter and fleeting reference can be considered evidence of a prior sexual act than any innuendo *could* be; all flirtation would be suspect. But could, would, might, hinted, dreamt, and winked are not tangible evidence of prior sexual conduct, such as testimony by third parties of an actual episode in time would be. *Jovanovic* held that a statement of pride about being a "pushy bottom" was admissible. Likewise, a statement that she wanted [Mr. Book] to be the new slice of bread should have been admissible.

In conclusion, the evidence at issue was a probative statement made by the complainant that evidenced her state of mind. It was a statement of desire by the complainant for a future act, a desire that was inconsistent with a sexual assault. It was not a matter of harassing the witness. Rather, it was a relevant point for a jury to be aware that the complainant stated in her own words that she wanted to do something, and now claims she did not want to do that.

II. THE TRIAL JUSTICE COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER BY PRECLUDING THE CORRESPONDENCE AND DENYING HIS MOTION

§26.3 requires that a defendant make an offer of proof before attempting to cross examine a witness in front of the jury about prior sexual conduct. Despite the fact that the correspondence was mere language, Mr. Book did make this request. Mr. Book gave an offer of proof that the evidence was mere language and was essential in this case to prove: a motive to fabricate; implied consent; and that the witness was lying on the stand.

Finally, and most importantly, Mr. Book's sixth amendment right was violated. Thus, even if the evidence did consist of testimony of prior sexual conduct, it ought to have been admitted. The offer of proof's purpose is to show that the evidence must be admitted in the interest of justice because the probative value outweighs the prejudicial impact. The Rape Shield Law notwithstanding, a defendant's right to cross-examine a witness with relevant, exculpatory, and contradictory evidence is inviolable.

A. Appellant's Offer Of Proof Was Sufficient Because It Consisted Of An Independent Basis Of Relevancy

Mr. Book in his motion offered proof that his proffered evidence had an independent basis. Mr. Book did this by demonstrating three elements of his defense: a motive to fabricate; an implication of consent; and the need to impeach the witness. Mr. Book met his evidentiary burden.

Independent evidence can be understood from *State v. Lemon*, where the state's own physician testified that she showed no signs of assault and the complainant had told the police that the defendant had not ejaculated in her. In a perfect case of the prosecution opening the door, the prosecution wished to introduce evidence, from a toxicologist, of seminal fluid from a vaginal swab, thus implying that she had had sexual contact with the defendant. In response to this, the defendant requested to admit evidence of her own testimony to the physician that she had had sex eight days prior to the incident, and that this was the source of the seminal fluid. The trial court held that this rebuttal was not "independent proof of prior sexual activities." "Independent" meaning "independent of anything associated with the case." The appellate court held that this was reversible error. *State v. Lemon*, 456 A.2d 261, 262 (R.I. 1983). RI Super. R. Crim. P. Rule 26.3 (2003).

In *Olden v. Kentucky*, the defendant had been charged with assaulting the complainant. The complainant was actually living with a third party in an extra-marital relationship. The defendant's theory rested upon the idea that fear of damaging that relationship motivated the complainant to lie. The trial court precluded the evidence deeming the evidence of an extra-marital relationship too prejudicial, despite the fact that she testified for the state that she was living with her mother, which was not true. With respect to the defendant's independent reasoning for introducing the evidence, the Supreme Court stated, "It is plain to us that a reasonable jury might have received a significantly different impression of the witness' credibility had defense counsel been permitted to pursue his proposed line of cross-examination." *Olden v. Kentucky*, 488 U.S. 227, 230 (U.S. 1988).

Those cases discuss what an independent element is. Mr. Book's offer of proof contained three independent elements. As in *Olden*, Mr. Book's first element, in his offer of proof, was the complainant's motive to fabricate. In *State v. Oliveira*, supra, the "[complainant] stated that she hated defendant because he would not give her toys and would give her sister everything." This hatred revealed an alternative source of the victim's animosity toward the defendant and therefore a reason to fabricate the charge. *State v. Oliveira*, 576 A.2d 111, 111-115 (1990). *Davis v. Alaska*, 415 U.S. 308 (1974). *Olden v. Kentucky*, 488 U.S. 227 (1988).

In *United States v. Platero*, the defendant, who was charged with sexual assault, wished to introduce evidence that the complainant was involved in an extramarital affair, and that to protect this relationship, she fabricated the assault charge. The trial court determined there was no relationship at all. But the appellate court held that such a determination was a question of fact for a jury to decide. *United States v. Platero*, 72 F.3d 806, 806-808 (U.S. App. 1995). Likewise, a jury can decide whether there was relationship between Mr. Kerr and the complainant and whether this led to a motive to fabricate.

In *State v. Lamoureux* the defendant had been given an offer of proof that was denied because it did not sufficiently or independently prove the motive to fabricate theory. In that case, the complainant had a boyfriend who was married to someone else. The defendant claimed he was limited in his cross examination on certain elements, among them: the complainant's relationship with her boyfriend; and her victim's compensation claim. These two went to her motive to fabricate. However, the mere fact that she had a boyfriend was not enough for a good faith showing. The *Lamoureux* defendant wished to show the complainant was unsatisfied with her boyfriend which did not show a motive to lie, and was irrelevant as to whether she consented. *State v. Lamoureux*, 623 A.2d 9, 9-11 (1993).

In contrast, Mr. Book had independent proof of his theory that the complainant's relationship led to her motive to fabricate. The correspondence showed that Mr. Kerr was not only the complainant's boyfriend but also would have likely been jealous. In the March 22nd letter she asked if Mr. Kerr was mad; in the March 23rd fax Mr. Book asked if there was a "jealousy" issue. (R. 16).

The second independent element in Mr. Book's offer of proof was that the language in the correspondence implied consent or so a jury could find. As noted, supra, in *Michigan v. Ivers* the statement "get me a guy" strongly implied consent. *Michigan v. Ivers*, 587 N.W.2d 10, 10-12 (Mich. 1998). Likewise in this case, without inclusion of the evidence, there was no way for the jury to know that she could have reasonably been open to the idea of a ménage à trois. In her letters to Mr. Kerr, she related her continued desire to have a ménage à trois and implied she had found the second slice of bread. In her faxes with Mr. Book, the complainant continued to discuss ménage à trois and throughout the letters maintained a very flirtatious tone. She maintained that this was just for fun. However, a jury could also note that her intentions for a ménage à trois were evidenced in her letters to Mr. Kerr, thus corroborating the theory of consent. Those letters dispel the notion that the faxes were just for fun, because her theme did not change when writing to Mr. Kerr, especially about finding the other slice of bread. Mr. Book did not even know he was being referred to as another slice of bread.

Furthermore, when asked during cross examination what the complainant thought when Evan appeared at the poetry reading she answered, "I didn't know what he thought, but I felt sure that there

was nothing romantic with another person along.” (R. 72, 144). This statement led the jury, as it was intended, to the conclusion as stated, that romance is much less likely with three people. But ironically, that is the opposite conclusion from what the jury would have thought had the jury been made aware of the correspondence. After two weeks of talk about ménage à trois, a third person might very well have *raised* the likelihood that Mr. Book had romantic feelings and was ready to feed her “addiction”.

This inconsistent testimony leads to the third and final element of Mr. Book’s offer of proof. Namely, that the inclusion of the correspondence was imperative for impeachment of the witness. North Carolina v. Guthrie, 428 S.E.2d 853, 853-855 (N.C. App. 1993). State v. Oliveira, 576 A.2d 111, 112 (R.I. 1990). The jury could have found the veracity of the complainant’s testimony dubious if they were aware that she was contradicting what she specifically wrote to Mr. Book and Mr. Kerr in her own words. Recall that in State v. Oliveira, supra, the court held that the prior false accusations should have been allowed in to challenge the witness’s credibility. State v. Oliveira, 576 A.2d 111, 112 (R.I. 1990). During cross-examination the complainant testified under oath that Mr. Kerr was just a friend. However, in the March 24th fax, she stated that she considered Mr. Kerr one “slice of bread”. The jury should have been allowed to decide if these two statements were consistent.

B. The Appellant’s sixth Amendment Right Was Violated Because He Was Unable To Effectively Cross Examine The Witness Without The Precluded Evidence

With respect to Mr. Book’s overarching right to confrontation, Mr. Book was unable to effectively cross examine the complainant due to the trial court’s ruling. An early Rhode Island case is State v. Eckhart where the defendant was charged with selling drugs. His theory was that the prosecution “bought” the witness’s testimony by reducing a prostitution charge from over a year before. The court held that while “fishing on cross-examination is permitted, the trial justice may ask the fisherperson to demonstrate that there is a reasonable possibility there are fish in the pond before the license is issued.” After an extensive consideration of the issue, the trial justice decided the defense failed to supply any nexus between the reduction and testimony. State v. Eckhart, 117 R.I. 431, 438 (R.I. , 1977). Mr. Book was also hindered in his right to cross examination by the exclusion of the evidence. But in his offer of proof, he showed there were plenty of fish. The letter of March 22nd to Mr. Kerr for example was one fish that showed the complainant’s concern that Mr. Kerr was unhappy with her search for a second slice of bread.

Accordingly, in State v. Oliveira, the court specifically stated, “by not allowing the defendant the opportunity to challenge [the complainant’s] credibility, the trial justice inappropriately infringed on the defendant’s sixth amendment rights of confrontation and effective cross-examination.” State v. Oliveira, 576 A.2d 111, 111-115 (1990).

In the landmark case Olden v. Kentucky, supra, the Supreme Court granted certiorari and specifically stated that the appellate court had failed to accord proper weight to the appellant’s sixth amendment right. The Supreme Court held that the appellate court had improperly limited the defendant’s right to conduct reasonable cross-examination, and failed to properly weigh the probative and prejudicial impacts. Olden v. Kentucky, 488 U.S. 227, 228, 109 S. Ct. 480, 481 (1988). This reversible error is parallel to the instant case.

This concept leads to the critical test to be applied when the Rape Shield Law collides with a defendant’s sixth amendment right, namely, the probative versus prejudicial balancing test. This test is inherent in the legislative intent of the Rape Shield Laws. In Kansas v. Perez, the court reversed the conviction of rape. The complainant, a 16 year old, had had consensual sex with two other men at a party which the defendant had witnessed. The defendant wished to introduce testimony by the other two men, but was precluded from doing so. However, the appellate court reversed holding that the factors the court should have considered were: distinctive sexual patterns so closely resembling defendant’s version of the alleged encounter as to tend to prove consent; evidence tending to prove he

believed the complainant was consenting to his sexual advances; and evidence tending to prove complainant's motive to fabricate. i.e. The probative value outweighed any prejudicial impact. Kansas v. Perez, 995 P.2d 372, 372 (Kan. App. 1999). Connecticut v. Sullivan, 244 Conn. 640, 649 (Conn. 1998).

The trial justice in the case at bar severely limited Mr. Book's ability to cross examine the complainant. He would have shown she had a motive to fabricate, namely that Mr. Kerr was dear to her, and one slice of bread in her sandwich. However, he was precluded from doing so. Mr. Book would have shown the complainant was likely to consent because she had wanted a ménage à trois, and was looking for a second slice of bread, which Mr. Book qualified as. However, he was precluded from doing so. Mr. Book would have, during cross examination, questioned her credibility by showing she was lying, by referring to the correspondence in which she called Mr. Kerr one slice of bread and where the jealousy issue was raised, after she stated in court he was "just a friend". However, he was precluded from doing so. Furthermore, the trial justice failed to realize that the evidence was more probative than prejudicial. This error led to the preclusion of exculpatory evidence which justice requires be admissible under the sixth amendment. Thus this violation of Mr. Book's rights necessitates reversal.

CONCLUSION

For the reasons laid out above, this court should find the trial justice committed reversible error, abused its discretion, and improperly applied the law. This court should reverse the judgment of conviction and remand the case for a new trial with all the correspondence to be admitted into evidence.