Protecting the Privacy of Sexual Assault Victims:
Evidence of Prior Sexual Conduct

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Countries working to protect sexual assault victims and hold perpetrators accountable for their crimes of sexual violence should prevent re-victimization, particularly in the introduction of evidence of a victim's prior sexual conduct.

In 2008, the United Nations Division for the Advancement of Women in the Department of Economic and Social Affairs released the "Handbook for legislation on violence against women." This handbook recommends that "legislation should prevent introduction of the complainant's sexual history in both civil and criminal proceedings." *From* "Handbook for legislation on violence against women ", 3.9.7.2 (2009). Such legislation is generally termed a rape shield law. Every U.S. state currently has some form of a rape shield statute. *See* National Center for Victims of Crime (FAQ Rape Shield Laws).[1]

There are certain exceptions to the introduction of prior sexual conduct evidence in such laws. These exceptions should incorporate sufficient protections for the victim while maintaining due process for the criminal defendant. The case below, which interprets Minnesota's rape shield statute, may provide useful insights into ways sexual assault laws may protect a victim's privacy, encourage reporting of sexual assault, and prevent the admission of irrelevant evidence.

The Minnesota Dominic Jones case

A young woman, P.J., and her friend went to the apartment of several male college students. P.J. drank seven to eight shots of vodka. Three of the men sexually assaulted P.J., who later lost consciousness on the couch. When she was unconscious, the appellant, Dominic Jones, also sexually assaulted her.

P.J. later reported that three men forced her to engage in sexual penetration. P.J. testified that before trial she had never met or seen appellant, Dominic Jones. The jury found appellant guilty of fourth-degree criminal sexual conduct (sexual contact with a victim who is physically helpless).

Prior to trial, defense counsel had moved for permission to admit evidence regarding P.J.'s sexual contact with the other three men on the evening of the assault. The trial court denied the motion under Minnesota's rape shield statute. In affirming the conviction on appeal, the Minnesota Court of Appeals held that the trial court properly excluded evidence of P.J.'s prior sexual conduct with the other three men. *State v. Jones*, No. A08-0966 (Minn. Ct. App. July 7, 2009) (unpublished).

The rape shield statute was designed to protect victims' privacy, encourage reporting of sexual assault, and prevent the admission of irrelevant evidence. *From* Minnesota County Attorney's Association Sexual Assault Prosecution Manual 63 (2006) (hereinafter "Manual").

Minnesota has both a rape shield statute, Minn. Stat. § 609.347 (2008), and a rule of evidence, Minn. R. Evid. 412, governing the admission of past sexual conduct of the victim. The statute is generally considered to provide greater limits on the

admissibility of a victim's prior sexual conduct. Minn. Stat. § 609.347 prohibits the admission of the victim's previous sexual conduct unless the defendant first seeks a court order. In order for the evidence to be admissible, the court must determine that an enumerated exception applies and that the probative value of the evidence is not substantially outweighed by its prejudicial nature.

For example, a defendant may argue that exclusion of a victim's prior sexual conduct violates the constitutional right to present a defense and to cross-examine witnesses. The rape shield statute recognizes, however, that prior sexual conduct is generally irrelevant. A defendant has no right to introduce irrelevant evidence or evidence in which the prejudicial effect outweighs the probative value. *See State v. Crims,* 540 N.W.2d 860, 867-68 (Minn. Ct. App. 1995).

Even if such evidence may arguably be relevant in a particular case, trial courts may limit a defendant's right to cross examine a witness based on concerns regarding harassment, prejudice, confusion of issues and witness safety. *Michigan v. Lucas*, 500 U.S. 145 (1991). In the majority of cases in Minnesota, the defendant's constitutional rights have not been violated by the exclusion of the victim's prior sexual conduct. *See* Manual at 73-74.

Consent as a defense falls under one of the enumerated exceptions in Minnesota's rape shield statute. Under this exception, when the defendant seeks to admit the victim's sexual conduct with others, he must show that the victim fabricated prior sexual assault allegations. In the Dominic Jones case, the court of appeals concluded that such a showing was not made.

Additionally, when consent is a defense and in order for the victim's prior sexual conduct with others to be admissible when consent is a defense, the prior conduct must establish a common scheme or plan. In order to satisfy this requirement, the prior sexual conduct must establish a pattern of clearly similar behavior; to qualify as a pattern, the sexual conduct must occur regularly and be similar in all material respects. *See State v. Davis*, 546 N.W.2d at 34. In the Dominic Jones case, the court of appeals rejected appellant's argument that P.J. engaged in a common scheme or plan. The court noted the "significant distinctions" between the prior incident with the three men and the incident with appellant. For example, P.J. reported that she was physically coerced to engage in penetration with the three men, but she was unresponsive and likely unconscious during appellant's assault. *Jones*, No. A08-0966.

Although a rape shield statute may provide that evidence of prior sexual conduct between the accused and the victim is admissible when consent is a defense, such evidence still may not meet the test of relevancy or may be more prejudicial than probative.[2] When consent is a defense and the defendant seeks to offer evidence of prior sexual conduct between the complainant and *himself*, there are limits on a defendant's ability to present such evidence. There are cases where courts have excluded such evidence when the victim has denied prior consensual sexual conduct. *See, e.g., State v. Rothering*, 397 N.W.2d 346 (Minn. Ct. App. 1986) (noting that the potential for harm outweighed any probative value the evidence might have had); *Graydon v. State*, 953 S.W.2d 45 (Ark. 1997) (stating that the purpose of the rape shield in protecting victims and encouraging victims to participate in prosecution of attackers "would surely be thwarted if every

defendant in a rape case was allowed to present uncorroborated 'evidence' that he and the victim had previously engaged in sexual intercourse over the victim's denial that she had ever known her assailant before the incident").

A rape shield statute serves as a useful tool to prosecutors in preventing irrelevant evidence and in protecting a victim's privacy. The Dominic Jones case is a good example of how such a statute achieves these goals. Issues of consent, force, and introduction of a victim's prior sexual conduct occur in most, if not all, cases of sexual assault. Those drafting, implementing, and monitoring sexual assault legislation should ensure that the laws provide sufficient privacy protections to sexual assault victims while maintaining due process protections for defendants.

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[1] For a list of the various rape shield statutes and a comparative analysis of the statutes, see the National District Attorneys' Association website at www.ndaa.org/pdf/vaw_rape_shield_laws_may_05.pdf. The full text of these statutes is found at www.ndaa.org/pdf/ncpa_statute_rape_shield_laws_june_06.pdf. For a description of how these various statutes originated, see Harriet R. Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, Minnesota Law Review (April 1986).

[2] For a discussion of how some rape shield statutes fail in protecting victims who have consented to past acts of sexual conduct, see Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, George Washington Law Review (2002).