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LaJoie v. Thompson: Does the Ninth Circuit Grant Young Victims Less Protection Under Rape Shield Statutes?

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NOTE

LAJOIE v. THOMPSON: DOES THE NINTH CIRCUIT GRANT YOUNG VICTIMS LESS PROTECTION UNDER RAPE SHIELD STATUTES?

I. INTRODUCTION

Almost every state as well as the Federal Rules of Evidence has enacted rape shield laws that limit the admission of evidence of an alleged victim's past sexual behavior.[1] In general, rape shield laws deny a defendant in a sexual assault case the opportunity to offer extrinsic evidence of the complainant's prior sexual conduct or reputation and the opportunity to cross-examine the complainant concerning her prior sexual conduct or reputation.[2] Rape shield statutes generally do not violate a defendant's constitutional right to present evidence.[3] However, a rape shield statute may deny the defendant's Due Process,[4] confrontation and compulsory process

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[1] *See* 29 AM. JUR. *Evidence* § 496 (2d ed. 1994). *See also* FED. R. EVID. 412.

[2] *See* 29 AM. JUR. *Evidence* § 496 (2d ed. 1994). *See generally* United States v. Payne, 944 F.2d 1458, 1468 (9th Cir. 1991) (trial for child molestation, defendant not allowed to introduce evidence of alleged victim's prior sexual encounter with another person); Wood v. Alaska, 957 F.2d 1544, 1545-1546 (9th Cir. 1992) (trial for rape, defendant precluded from introducing evidence that alleged victim showed the defendant her Penthouse photographs and that she spoke about her pornographic acting experiences); Tague v. Richards, 3 F.3d 1133, 1137 (7th Cir. 1993) (trial for child molestation, the trial court precluded evidence that the alleged victim had previously been molested by her father).

[3] *See* 29 AM. JUR. *Evidence* § 496 (2d ed. 1994). The defendant's Fourteenth Amendment Due Process rights and Sixth Amendment Confrontation and Compulsory Process Clause rights can be implicated by application of a rape shield statute that may limit or exclude evidence of the complainant's sexual history or reputation. *See id.*

[4] *See supra* note 3 and accompanying text. The Fourteenth Amendment provides in pertinent part: "[n]or shall any State deprive any person of life, liberty, or property

rights.[5] In June 2000, the United States Court of Appeals for the Ninth Circuit addressed whether the trial court violated Clint LaJoie's Due Process, confrontation, and compulsory process rights.[6]

In *LaJoie v. Thompson*,[7] the Ninth Circuit held that the trial court's preclusion of evidence regarding the victim's prior sexual abuse by others as a sanction for LaJoie's failure to comply with the 15-day notice requirement in Oregon's rape shield law violated LaJoie's Sixth Amendment rights.[8] The Ninth Circuit further held that the preclusion of this evidence regarding the prior sexual abuse of the victim warranted habeas relief.[9]

In Part II, this Note discusses *LaJoie's* facts and procedural history. Part III outlines the history of the Habeas Corpus statutes and discusses the Oregon and Federal rape shield statutes, with an emphasis on how these types of statutes af-

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without due process of law . . . " *See* U.S. CONST. amend. XIV.

[5] *See* 29 AM. JUR. *Evidence* § 496 (2d ed. 1994). *See also supra* note 3 and accompanying text. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor . . . " *See* U.S. CONST. amend. VI.

[6] *See* LaJoie v. Thompson, 217 F.3d 663, 667 (9th Cir. 2000). The appeal from the United States District Court for the District of Oregon was argued and submitted July 13, 1999 before Circuit Judge Fletcher, Circuit Judge Ferguson and Circuit Judge Tashima. *Id.* at 663. The opinion was filed on January 31, 2000. *Id.* The opinion was subsequently withdrawn and an amended opinion filed on June 23, 2000. *Id.* Circuit Judge Tashima authored the opinion. *Id.* at 665. Circuit Judge Ferguson authored a dissenting opinion. *See* LaJoie, 217 F.3d at 665.

[7] *See* 217 F.3d 663 (9th Cir. 2000).

[8] *See id.* at 673. *See generally* OR. REV. STAT. § 40.210(3)(a) (West 2000) (Rule 412, Oregon's "Rape Shield" Law). Oregon's Rule 412 provides in relevant part:

"(1) . . . reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible; (2) . . . evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence: (a) is admitted in accordance with subsection (4) of this section; and (b) Is evidence that: (A) relates to the motive or bias of the alleged victim; or (B) Is necessary to rebut or explain scientific or medical evidence offered by the state; or (C) Is otherwise constitutionally required to be admitted." *See* OR. REV. STAT. § 40.210(1)-(2)(a)-(2)(b)(A)-(C). Under Rule 412, "past sexual behavior" generally applies to child sexual abuse. *See LaJoie*, 217 F.3d at 666 (citing State v. Wright, 776 P.2d 1294, 1298 (1989)).

[9] *See LaJoie*, 217 F.3d at 673. The Ninth Circuit concluded that the exclusion of this relevant evidence seriously undermined LaJoie's defense. *Id.*

fect a criminal defendant's Sixth Amendment confrontation and compulsory process and Fourteenth Amendment Due Process rights. Part IV analyzes the Ninth Circuit's reasoning in *LaJoie*. Part V critiques the Ninth Circuit's reasoning in light of the majority's determination that the probative value of the excluded evidence substantially outweighed its potential prejudicial effect. Part VI concludes that the Ninth Circuit improperly held that excluding the evidence created a constitutional error because the prejudicial effect of the evidence substantially outweighed its low probative value. Accordingly, the Ninth Circuit improperly granted LaJoie's writ of habeas corpus because the trial court did not commit constitutional error to warrant habeas relief.

II. FACTS AND PROCEDURAL HISTORY

The state accused Clint LaJoie of sexually abusing, orally sodomizing, and raping his girlfriend's niece, VN, a minor child.[10] While VN lived with her aunt and LaJoie, LaJoie al-

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[10] *See id.* at 665. "VN" is used to protect the identity of the minor victim who was seven and eight years old at the time of the alleged sexual assaults. *See id.* The State charged LaJoie with rape in the first degree, OR. REV. STAT. § 163.375, sodomy in the first degree, OR. REV. STAT. § 163.405, and sexual abuse in the first degree, OR. REV. STAT. § 163.427, involving a child under the age of 12 years. *See* State v. LaJoie, 849 P.2d 479, 481 (1993). A person is guilty of rape in the first degree if:

> "(a) the victim is subjected to forcible compulsion by the person; (b) the victim is under 12 years of age; (c) the victim is under 16 years of age and is the person's sibling, of the whole or half blood, the person's child or the person's spouse's child; or (d) the victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness." (OR. REV. STAT. § 163.375 (West 2000)).

A person is guilty of sodomy in the first degree if he engages in deviate sexual intercourse with another person or causes another person to engage in deviate sexual intercourse if:

> "(a) the victim is subjected to forcible compulsion by the person; (b) the victim is under 12 years of age; (c) the victim is under 16 years of age and is the person's sibling, of the whole or half blood, the person's child or the person's spouse's child; or (d) the victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness." (OR. REV. STAT. § 163.405 (West 2000)).

A person is guilty of sexual abuse in the first degree if he:

> "(a) subjects another person to sexual contact and: (A) the victim is less than 14 years of age; (B) the victim is subjected to forcible compulsion by the actor; or (C) the victim is incapable of consent by reason of being mentally defective,

legedly groped, fondled, and raped VN almost every night.[11] Undisputed evidence showed that VN suffered sexual abuse by four different men prior to residing with her aunt and LaJoie.[12]

Following several continuances at the request of the State, the court set LaJoie's trial for October 31, 1989.[13] On October 24, 1989, LaJoie filed a notice of intent to offer evidence under Oregon Revised Statute Section 40.210 (Rule 412) that others sexually abused VN in the past.[14] In addition, LaJoie filed a motion to compel the production of evidence in the Children Service's division (hereinafter "CSD") case file pertaining to this abuse.[15]

The State moved to strike the evidence on the basis that LaJoie had failed to comply with Oregon Rule 412's 15-day

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mentally incapacitated or physically helpless; or (b) intentionally causes a person under 18 years of age to touch or contact the mouth, anus or sex organs of an animal for the purpose of arousing or gratifying the sexual desire of a person." (OR. REV. STAT. § 163.427 (West 2000)).

[11] *See LaJoie*, 217 F.3d at 674. LaJoie was the boyfriend of VN's aunt. *See id.* VN's testimony showed that LaJoie came to VN almost every night, shook her awake, took off her underwear, and groped, fondled, and raped her while her aunt slept. *Id.* According to VN, LaJoie threatened to whip her with his leather belt if she told anyone. *Id.*

[12] *See id.* at 665. The uncontested evidence in the Children Service's Division (hereinafter, "CSD"), case file showed that VN had been sexually abused by four other men and raped by one other man in unrelated incidents. *See LaJoie*, 217 F.3d at 665. The specific incidents of abuse contained in the CSD case file were: (1) Michael Patterson had raped VN's brother and that he may have assaulted VN when she was two years old; (2) a boyfriend of VN's mother, Mike Forrest, may have sexually assaulted VN; (3) VN's great-uncle Daniel Leuck had admitted to fondling her rectal and vaginal areas on several occasions; (4) Brian Dayton, a teenager, had pulled down her pants on one occasion; and (5) Russell Watkins, another of her mother's boyfriends, had been convicted of raping and sexually abusing VN. *Id.* at 666. The CSD is now called the State Commission on Children and Families. *See* OR. REV. STAT. § 417.705 (West 2000). Oregon created the State Commission on Children and Families to promote the wellness of children and families at the state level. *See* OR. REV. STAT. § 417.735 (West 2000). The State Commission on Children and Families (formerly the CSD) evaluates reports of child neglect and abuse. *See* Bryan J. Orrio, Comment, *Ending the Domestic Violence Cycle Through Victim Education in Oregon's Restraining Order Process*, 33 WILLAMETTE L. REV. 971, 990 (1997).

[13] *See LaJoie*, 217 F.3d at 665. The trial did not start as scheduled on October 31, 1989, but was continued until November 3, 1989. *Id.* at 672 n.12.

[14] *See supra* note 12 and accompanying text.

[15] *See supra* note 12 and accompanying text; *infra* note 16 and accompanying text.

notice requirement.[16] The trial court conducted an *in camera*[17] review of the CSD file pursuant to Rule 412(4)(b) and concluded that the file did contain evidence potentially admissible under Rule 412(2)(b)(A) and (2)(b)(B).[18] Nevertheless, the court granted the State's motion to exclude the evidence because LaJoie failed to meet the fifteen-day notice requirement under Rule 412(4)(a).[19]

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[16] *See* OR. REV. STAT. § 40.210(4)(a) (West 2000) (Rule 412(4)(a)), which provides that: "If the person accused of committing rape, sodomy or sexual abuse or attempted rape, sodomy or sexual abuse intends to offer evidence under subsection (2) or (3) of this section, the accused shall make a written motion to offer the evidence not later than 15 days before the date on which the trial in which the evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which the evidence relates has newly arisen in the case." *See id. See also LaJoie*, 217 F.3d at 666 n.3.

[17] *See* OR. REV. STAT. § 40.210(4)(b) (West 2000) (Rule 412(4)(b)). Section 40.210 provides in pertinent part that: "If the court determines that the offer of proof contains evidence described in subsection (2) or (3) of this section, the court shall order a hearing in camera to determine if the evidence is admissible." *Id.* At the hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. *Id.* "In camera" means out of the presence of the public and the jury. *See* OR. REV. STAT. § 40.210(5)(b) (Rule 412(5)(b)). An in camera hearing serves two purposes: (1) it gives the defendant the opportunity to demonstrate to the court why certain evidence is admissible and ought to be presented to the jury; and (2) at the same time it protects the privacy of the victim in those instances where the court finds that evidence is inadmissible. *See* State v. LaJoie, 312 Or. 286, 397-398 (1991).

[18] *See LaJoie*, 217 F.3d at 666. The trial court concluded that the CSD file contained evidence potentially admissible under Rule 412(2)(b)(B) because it was relevant to rebut or explain medical evidence offered by the State. *Id.* The State offered evidence that VN had scarring on her hymen consistent with penetration and repetitive sexual abuse. *Id.* at 666-667. The evidence in the CSD file that Russell Watkins, one of VN's mother's boyfriends, had been convicted of raping VN was relevant to rebut or explain the State's evidence of VN's injuries. *Id.* at 666. The court also found that one piece of evidence from the CSD file was relevant to show the motive or the bias of the alleged victim, VN, because it tended to show that VN's allegations were false and were invited by CSD caseworkers, and thus was potentially admissible under Rule 412(2)(b)(A). *Id.*

[19] *See LaJoie*, 217 F.3d at 666. The specific evidence which LaJoie intended to offer was that: (1) Michael Patterson had raped VN's brother and that he may have assaulted VN when she was two years old; (2) a boyfriend of VN's mother, Mike Forrest, may have sexually assaulted VN; (3) VN's great-uncle Daniel Leuck had admitted to fondling her rectal and vaginal areas on several occasions; (4) Brian Dayton, a teenager, had pulled down her pants on one occasion; and (5) Russell Watkins, another of her mother's boyfriends, had been convicted of raping and sexually abus-

At trial, the jury convicted LaJoie of first-degree rape, sodomy, and sexual abuse of VN and sentenced him to consecutive terms totaling 45 years with a mandatory minimum sentence of 10 years.[20] LaJoie appealed his conviction to the Oregon Court of Appeals claiming that the trial court's ruling to exclude certain evidence under the notice provision of Oregon's Rule 412 denied him his Sixth Amendment Confrontation[21] and Compulsory Process[22] rights as well as his Fourteenth Amendment Due Process rights.[23] The Oregon Court of Appeals summarily affirmed the trial court's ruling.[24]

LaJoie petitioned for review by the Oregon Supreme Court.[25] The Oregon Supreme Court granted discretionary review and affirmed the Oregon Court of Appeals.[26] On Decem-

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ing VN. *Id.* LaJoie did not meet the exceptions under Rule 412's notice requirement for newly discovered evidence or evidence relating to a new issue because the court determined that LaJoie's attorney learned of the evidence well before the deadline and LaJoie admitted that the evidence was known to defense counsel well in advance of the notice deadline. *Id.* at 675. *See also supra* note 12 and accompanying text.

[20] *See LaJoie*, 217 F.3d at 667. First-degree rape and sodomy are Class A felonies and first-degree sexual abuse is a Class B felony. *See* OR. REV. STAT. §§ 163.375, 163.405, and 163.427 (West 2000). The maximum term of an indeterminate sentence of imprisonment for a Class A felony is 20 years and for a Class B felony, 10 years. *See* OR. REV. STAT. §§ 161.605(1)-(2) (West 2000).

[21] *See LaJoie*, 217 F.3d at 667. *See also supra* note 5 and accompanying text. The main purpose of the Confrontation Clause is to ensure a criminal defendant the opportunity to cross-examine witnesses testifying against him. *See LaJoie*, 217 F.3d at 668 (citing Delaware v. Van Arsdall, 475 U.S. 673, 678-679 (1986)).

[22] *See LaJoie*, 217 F.3d at 667. *See also supra* note 5 and accompanying text. The United States Supreme Court has held that the Compulsory Process Clause guarantees at a minimum that criminal defendant have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt. *See LaJoie*, 217 F.3d at 668 (citing Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987)).

[23] *See LaJoie*, 217 F.3d at 667. *See also supra* note 4 and accompanying text. The Ninth Circuit in *LaJoie v. Thompson* articulated that whether directly rooted in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *See LaJoie*, 217 F.3d at 668 (citing Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

[24] *See* State v. LaJoie, 804 P.2d 1230 (1991) (affirmed LaJoie's conviction without published opinion).

[25] *See LaJoie*, 849 P.2d at 480.

[26] *See id.* at 490. The Oregon Supreme Court, in a divided 4-3 decision, held that an defendant's failure to give statutorily mandated notice under Rule 412 requires a trial court to refuse to allow the accused to present such evidence at trial and this re-

ber 31, 1996, LaJoie filed a petition for a writ of habeas corpus alleging that the trial court's ruling to exclude evidence offered under Rule 412 violated his Sixth Amendment rights of confrontation and compulsory process and his Fourteenth Amendment right to due process.[27] The United States District Court for the District of Oregon denied LaJoie's petition.[28] LaJoie appealed the district court's denial of his petition for a writ of habeas corpus to the United States Court of Appeals for the Ninth Circuit.[29] The Ninth Circuit granted re-

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quirement is constitutional. *Id.* The Oregon Supreme Court found that the process required by Rule 412 for the admission of evidence of past sexual behavior of an alleged victim of a sexual crime is neither arbitrary nor disproportionate to the purposes that it is intended to serve. *Id.* The Oregon Supreme Court further found that the process established by Rule 412 is a reasonable condition on the defendant's right to present evidence and is justified by legitimate state interests in avoiding undue trial delay and in protecting the alleged victims of sexual crimes from harassment. *Id.* Moreover, the Court found that Rule 412 contains adequate mechanisms for excusing noncompliance in those situations in which the noncompliance occurs for reasons beyond the defendant's control. *See LaJoie*, 849 P.2d at 490. The dissent argued that the case should be remanded for the trial court to make the necessary judicial inquiry and pertinent findings within the special procedural framework, as set forth in Rule 412(3), within which the admissibility of the alleged victim's prior sexual conduct must be determined. *Id.* at 499. The dissent found that strict application of the statutory rule, as required by the majority, violates the federal constitution. *Id.*

[27] *See LaJoie*, 217 F.3d at 667. LaJoie filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254. *Id.* A person may file a petition for a writ of habeas corpus on the grounds that he or she is in custody in violation of the Constitution or laws or treaties of the United States once he or she has exhausted the remedies available in the courts of the State or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant. *See* 28 U.S.C. § 2254(a) and (b) (West 2000). The United States Supreme Court, any justice thereof, may consider writs of habeas corpus the district courts and any circuit judge within their respective jurisdictions. *See* 28 U.S.C. § 2254(a). LaJoie properly petitioned for a writ of habeas corpus to the United States District Court for the District of Oregon as he alleged that he is in custody in violation of the Constitution of the United States. *See LaJoie*, 217 F.3d at 667. 28 U.S.C. § 2254(d)(1)-(2) provides that "an application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

[28] *See LaJoie*, 217 F.3d at 667 (petition denied without published opinion).

[29] *See id.*

view of the district court's decision to deny LaJoie's petition for writ of habeas corpus, challenging his conviction for rape, sodomy, and sexual abuse of a minor child.[30]

III. BACKGROUND

A. HABEAS CORPUS

Historically, common law courts used the writ of habeas corpus to protect and extend their own jurisdiction.[31] Presently, state prisoners seek habeas corpus relief attacking the validity of fact or the length of his or her confinement after the prisoner has exhausted all available state court remedies or the prisoner shows circumstances that render available State processes ineffective to protect his or her rights.[32] The

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[30] *See id.* The United States District Court for the District of Oregon issued a certificate of appealability. *See id.* The certificate of appealability certifies the issues to be considered by the Ninth Circuit on appeal. *See* FED. R. APP. P. 22(b)(1); 9th Cir. R. 22-1(a)-(d). The district court issues the certificate of appealability when petitioner's claims have been adjudicated on the merits in State court proceedings, which is a necessary prerequisite to obtain relief under 28 U.S.C. § 2254(d)(1). *See* Canales v. Roe, 151 F.3d 1226, 1227-1228 (9th Cir. 1998); 28 U.S.C. § 2254(d)(1). The Ninth Circuit has jurisdiction under 28 U.S.C. §§ 1291 and 2253. *See LaJoie*, 217 F.3d at 667. Under 28 U.S.C. § 1291 the courts of appeals have jurisdiction of appeals from all final decisions of the district courts of the United States. *See* 28 U.S.C. § 1291. The final order in a habeas corpus proceeding is subject to review by the court of appeals for the circuit in which the proceeding is held. *See* 28 U.S.C. § 2253. The circuit court reviews de novo a district court's decision to grant or deny a § 2254 habeas petition. *See LaJoie*, 217 F.3d at 667.

[31] *See* Peyton v. Rowe, 391 U.S. 54, 58-59 (1967). Habeas corpus was a common-law writ prior to its statutory establishment by the Habeas Corpus Act of May 27, 1679, and was recognized in the federal Constitution and regulated by former §§ 451 to 456 (now § 2241 et seq.) of Title 28.

[32] *See* Preiser v. Rodriguez, 411 U.S. 475, 477 (1973). Federal habeas relief is dependent upon an unconstitutional state court adjudication because a state prisoner's right to federal habeas relief is created by the entry of an unconstitutional state court judgment subjecting the prisoner to incarceration or death. *See* Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997). *See also* 28 U.S.C. §§ 2241 and 2254. Section 2241 defines what persons are eligible for habeas corpus relief. *See* 28 U.S.C. § 2241. It provides in pertinent part:

> "(a) writs of habeas corpus may be granted by the United States Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions; (b) the Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the

habeas corpus statute authorizes a federal court to issue a writ of habeas corpus to require the agency holding the applicant in custody to produce witnesses to testify at a hearing.[33] The Antiterrorism and Effective Death Penalty Act of 1996

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district court having jurisdiction to entertain it; (c) the writ of habeas corpus shall not extend to a prisoner unless: (1) he is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) he is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) he is in custody in violation of the Constitution or laws or treaties of the United States." *Id.*

Section 2254 defines the applicability of habeas corpus. *See* 28 U.S.C. § 2254. It provides in pertinent part:

"(a) the United States Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States; (b)(1) an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—(A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant; (d) an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding; and (e)(1) in a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The application shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.*

Under the Antiterrorism and Effective Death Penalty Act of 1996 which applies to LaJoie's petition, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States, or (2) involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States. *See id.*; 28 U.S.C. § 2254(d)(1). In a federal habeas proceeding the standard for determining whether habeas relief must be granted is whether . . . the error had substantial and injurious effect or influence in determining the jury's verdict. *See LaJoie*, 217 F.3d at 673 (citing Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)).

[33] *See supra* note 32 and accompanying text.

(hereinafter, "AEDPA"), became law on April 26, 1996 and applies to petitions for a writ of habeas corpus filed after that date.[34] A federal court may grant a writ of habeas corpus only if the State court's decision was either contrary to, or involved an unreasonable application of Federal law as established by the Supreme Court of the United States.[35]

1. Contrary to Clearly Established Federal Law

In *Williams v. Taylor,*[36] the United States Supreme Court spelled out the meaning of the "contrary to" clearly established federal law clause.[37] The Court first cited the dictionary definition of the word "contrary" to mean diametrically different from, mutually opposed to, or opposite in character or nature.[38] The Court next examined the text of § 2254(d)(1) which requires that the state court's decision must be substantially different from the relevant precedent of the United States Supreme Court.[39] Accordingly, a state court's decision will be

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[34] *See* Antiterrorism and Effective Death Penalty Act of 1996, PUB.L. NO. 104-132, 110 Stat. 1214. *See also Wood*, 114 F.3d at 1493-1494 (9th Cir. 1997). In *Wood*, the Ninth Circuit held, in line with the Second, Third and Tenth Circuits, that the AEDPA cannot be applied retroactively to actions filed prior to the enactment date. *See Wood*, 114 F.3d at 1493-1494. *See generally* Boria v. Keane, 90 F.3d 36, 38 (2d Cir. 1996); Burkett v. Love, 89 F.3d 135, 138 n.2 (3d Cir. 1996); Edens v. Hannigan, 87 F.3d 1109, 1112 n.1 (10th Cir. 1996). Accordingly, the AEDPA applies to LaJoie's petition for a writ of habeas corpus because he filed it after the AEDPA's effective date of April 24, 1996. *See LaJoie*, 217 F.3d at 667. In the AEDPA, Congress placed a restriction on the federal courts' power to grant writs of habeas corpus to state prisoners. *See* Williams v. Taylor, 529 U.S. 362, 427-428 (2000). 28 U.S.C. § 2254(d)(1), prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

[35] *See* 28 U.S.C. § 2254(d)(1). *See also supra* note 28 and accompanying text. The Court has determined that the "contrary to" and "unreasonable application" clauses are accorded independent meaning. *See Williams*, 529 U.S. at 425.

[36] 529 U.S. 362 (2000).

[37] *See id.*

[38] *See id.* (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 495 (1976)).

[39] *See Williams*, 529 U.S. at 424. The *Williams* Court found Williams' constitutionally guaranteed right to effective assistance of counsel was established at the time his state court conviction became final. *See id.* Therefore, if his trial lawyer's failure to investigate and to present substantial mitigating evidence to the sentencing jury was either contrary to or an unreasonable application of established law, Wil-

contrary to clearly established United States Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in United States Supreme Court cases.[40] In addition, a state court's decision is contrary to clearly established United States Supreme Court precedent if that court confronts a set of facts that are materially indistinguishable from a decision of the United States Supreme Court, but nevertheless arrives at a different result from that of established United States Supreme Court precedent.[41] In *Van Tran v. Lindsey*,[42] the Ninth Circuit noted Justice O'Connor's opinion in *Williams* that articulated the distinct meanings of the "contrary to" and "unreasonable application of" clauses in § 2254(d)(1).[43] The Ninth Circuit reiterated the rule articulated by the Court in *Williams*: a state court's decision is "contrary to" federal law if it either 1) fails to apply the correct controlling authority, or 2) applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result.[44]

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liams was entitled to habeas relief. *See id.* at 415-416. The Court found that Williams was entitled to relief because his counsel's failure to present mitigating evidence deprived him of his constitutionally protected right to provide mitigating evidence to the sentencing jury in his murder trial. *Id.* at 420-421.

[40] *See id.* at 425-426. In *Williams,* Justice O'Connor delivered the opinion of the Court as to part II. *See Williams*, 529 U.S. at 424. Her opinion, which was cited by the Ninth Circuit in *LaJoie*, 217 F.3d at 667-668, used the Court's decision in *Strickland v. Washington* to illustrate when a state court's decision will be contrary to clearly established United States Supreme Court precedent. *See Williams*, 529 U.S. at 425-426; Strickland v. Washington, 466 U.S. 668, 694 (1984). Her opinion in *Williams* stated that if a State court rejected a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal trial would have been different, that State court decision would be "contrary to" clearly established United States Supreme Court precedent because the Court held in *Strickland* that a prisoner only must demonstrate a "reasonable probability that . . . the result would have been different." *See Williams*, 529 U.S. at 425-426; *Strickland*, 466 U.S. at 694.

[41] *See Williams*, 529 U.S. at 426.

[42] 212 F.3d 1143, 1150 (9th Cir. 2000).

[43] *See id.* at 1150.

[44] *See id. See also Williams*, 529 U.S. at 425-426; 28 U.S.C. § 2254(d)(1).

2. Unreasonable Application

In *Williams v. Taylor*,[45] Justice O'Connor defined the meaning of the "unreasonable application of" clause of § 2254(d)(1).[46] She stated that when a state court decision unreasonably applies the law of the United States Supreme Court to the facts of the applicant's case, the reviewing federal court may conclude that the state court decision falls within § 2254(d)(1)'s "unreasonable application" clause.[47] The *Williams* court held that the reviewing federal court must inquire whether the state court's application of clearly established federal law was objectively unreasonable.[48] Justice O'Connor emphasized that an unreasonable application of federal law differs from an incorrect application of federal law.[49] Accordingly, under the "unreasonable application" clause of § 2254(d)(1), the State court's application of clearly established federal law must be erroneous or incorrect as well as objectively unreasonable.[50]

The Ninth Circuit in *Van Tran v. Lindsey*[51] applied Justice O'Connor's definition of "unreasonable application" in *Williams*.[52] However, the Ninth Circuit recognized, as did the

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[45] 529 U.S. 362 (2000).

[46] *See id.* at 427-429.

[47] *See id.* at 427.

[48] *See id.* at 428. The Court rejected the Fourth Circuit's subjective "reasonable jurists" test in *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998) that a State court decision involves an unreasonable application of clearly established Federal law only if the State court applied the Federal law in a manner that reasonable jurists would all agree is unreasonable. *Id.* at 427-428. The Court found that this "all reasonable jurists" standard would mislead federal habeas courts by focusing their attention on a subjective rather than on an objective one. *See Williams*, 529 U.S. at 428.

[49] *See id.* Justice O'Connor explained that a "state court's *incorrect* legal determination has [never] been allowed to stand because it was *reasonable*." *Id.* at 429. She emphasized that "Congress specifically used the word 'unreasonable,' and not a term like 'erroneous' or 'incorrect.' " *Id.* Justice O'Connor further stated that under the "unreasonable application" clause, a federal habeas court may not issue a writ of habeas corpus simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly, rather, the application must also be unreasonable. *Id.*

[50] *See Williams*, 529 U.S. at 429.

[51] 212 F.3d 1143, 1150 (9th Cir. 2000).

[52] See id. at 1150. *See also LaJoie*, 217 F.3d at 667-68; *Williams*, 529 U.S. at 427. A state court's decision can involve an "unreasonable application" of federal law if it either 1) correctly identifies the governing rule but then applies it to a new set of

Court in *Williams*, that these two categories could overlap making it difficult to determine whether a State court's decision unreasonably extended a rule to a new context or simply contradicted controlling authority.[53]

3. Error Must Have Substantial and Injurious Effect or Influence

Once error has been found, the reviewing federal court must find that the error had a substantial and injurious effect or influence on the jury's verdict.[54] In *Kotteakos v. United States,*[55] the Court considered whether the petitioners suffered substantial prejudice from being convicted of a single general conspiracy when the evidence, as conceded by the Government, proved not one, but eight or more different conspiracies of the same sort executed through a common key figure.[56] The Court held that the error's effect must be weighed against the entire setting of the record in relation to the judgment.[57] The inquiry must be whether the particular error had substantial influence on the jury.[58] The Court concluded that the error permeated the entire trial and those petitioners' rights not to be tried collectively for the group of distinct and separate offenses was substantially affected.[59] Therefore, the Court found it highly probable that the error had a substantial and injuri-

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facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. *See Van Tran*, 212 F.3d at 1150.

[53] *See Van Tran*, 212 F.3d at 1150. *See also Williams*, 529 U.S. at 427. The Ninth Circuit further noted that in some cases the reviewing federal court may have difficulty distinguishing between a State court decision that is contrary to clearly established Federal law or that constitutes an unreasonable application of clearly established Federal law. *See VanTran*, 212 F.3d at 1150. In those cases it will be necessary for the reviewing federal court to test the petitioner's allegations against both standards. *Id.* at 1150.

[54] *See* Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).

[55] 328 U.S. 750 (1946).

[56] *See id.* at 752.

[57] *See id.* at 764. The Court articulated that the reviewing court must take into account what the error meant to the jury, not singled out and standing alone. *Id.*

[58] *See id.* The Court emphasized that if "one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos*, 328 U.S. at 765.

[59] *See id.* at 769, 775.

ous effect or influence in determining the jury's verdict and granted habeas relief.[60]

In *Brecht v. Abrahamson*,[61] the Court addressed whether the State's erroneous references to the defendant's post-Miranda silence during the trial for impeachment purposes substantially influenced the jury's verdict.[62] The Court applied the "substantial and injurious effect or influence" standard and concluded that the error committed at Brecht's trial did not substantially influence the jury's verdict because, when considering the record as a whole, the State's references to Brecht's post-Miranda silence were infrequent and were, in effect, merely cumulative of the extensive and permissible references to his pre-Miranda silence.[63] Accordingly, the Court did not grant habeas relief.[64]

B. Clearly Established Federal Law

The Court has traditionally been reluctant to impose constitutional restraints on ordinary evidentiary rulings by state trial courts.[65] The Court has consistently held that the Constitution reserves wide latitude to trial judges in criminal trials to exclude evidence that is repetitive, poses an undue risk of harassment, prejudice or confusion of the issues, or is only

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[60] *See id.* at 776.

[61] 507 U.S. 619 (1993).

[62] *See id.* at 622-23. At Brecht's trial for first-degree murder he testified that he shot the victim, but claimed that it was an accident. *Id.* at 624. During cross-examination the state made references to Brecht's pre-*Miranda* silence because he failed to mention to anyone that the shooting had been an accident. *Id.* at 625. The state's closing argument made references to both Brecht's pre-*Miranda* and post-*Miranda* silence. *See id.* The Court held that the state's error did not warrant habeas relief because the improper references to Brecht's post-*Miranda* silence were infrequent when considered in the context of all the evidence, and therefore, did not substantially influence the jury's verdict. *See Brecht*, 507 U.S. at 639.

[63] *See id.* The Court also found that the evidence of Brecht's guilt was certainly weighty, if not overwhelming, and that circumstantial evidence also pointed to his guilt. *Id.*

[64] *See id.*

[65] *See* Crane v. Kentucky, 476 U.S. 683, 689 (1986). The Court reasoned that in any given criminal case a trial judge must make dozens, and sometimes hundreds, of decisions regarding the admissibility of evidence. *Id.* at 689. Therefore, the Court is reluctant to impose constitutional restraints on ordinary evidentiary rulings by state trial court. *Id.*

marginally relevant.[66] Furthermore, the Court has never questioned the State's power to exclude evidence through evidentiary rules that serve the interests of fairness and reliability.[67]

1. Rape Shield Statutes

a. General Character Evidence Rules

Generally, evidence of the character or reputation of a party has long been held to be legally irrelevant in determining a controversy, and therefore, inadmissible.[68] Historically, as an exception to this rule, evidence of the victim's general reputation for chastity could be admitted in a prosecution for rape.[69] Today, rape shield statutes have been enacted by the Federal Rules of Evidence and by most states which bar or limit the admissibility of evidence of the victim's past sexual history or reputation.[70] Rape shield statutes reflect the judgment that most evidence about chastity has far too little probative value on the issue of consent to justify extensive and

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[66] *See generally Crane*, 476 U.S. at 689-690; *Van Arsdall*, 475 U.S. at 679. Federal Rule of Evidence 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger or unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. FED. R. EVID. 403.

[67] *See Crane*, 476 U.S. at 690; Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

[68] *See* 29 AM. JUR. *Evidence* § 363 (2d 1994). Federal Rule of Evidence 404 provides in relevant part that "evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . except evidence of a particular character trait of the victim of the crime offered by the accused . . . " FED. R. EVID. 404. Oregon Revised Statute § 40.170 (also known as Oregon Evidence Code Rule 404) provides in relevant part that: "(1) evidence of a person's character or trait of character is admissible when it is an essential element of a charge, claim or defense; (2) evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except: (b) evidence of a pertinent trait of character of the victim of the crime offered by an accused." OR. REV. STAT. § 40.170.

[69] *See* 29 AM. JUR. *Evidence* § 373 (2d 1994). This evidence was admissible to show consent. *See id. See also* FED. R. EVID. 404(a)(2) and OR. REV. STAT. § 40.170(2)(b) (Rule 404). Both Federal Rule of Evidence 404 and Oregon Evidence Code 404 provide that a defendant may offer evidence of a pertinent character trait of the victim of the crime that allows a defendant to introduce evidence of the victim's general reputation for chastity to prove consent. *See id. See also supra* note 68 and accompanying text.

[70] *See* 1 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 193, at 822 (4th ed. 1992).

intrusive inquiry into a victim's sexual history.[71]

b. Rape Shield Statutes

Oregon has enacted an exclusionary rape shield statute.[72] Oregon's Rule 412 primarily seeks to protect victims of sexual crimes from degrading and embarrassing disclosure of intimate details about their private lives.[73] However, certain exceptions enumerated in Oregon's Rule 412 allow for the admissibility of specific types of evidence of the sexual history and sexual predisposition of the victim for limited purposes.[74]

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[71] *See generally* United States v. Driver, 581 F.2d 80, 81 (4th Cir. 1978); United States v. Kasto, 584 F.2d 268, 271-272 (8th Cir. 1978); State ex rel. Pope v. Superior Court, 545 P.2d 946, 950-951 (Ariz. 1976).

[72] *See* OR. REV. STAT. § 40.210 (OR. EVID. CODE Rule 412). *See* text accompanying note 8. Federal Rule of Evidence 412 is similar. *See* FED. R. EVID. 412. It provides in relevant part: "(a)(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior; or (a)(2) Evidence offered to prove any alleged victim's sexual predisposition, is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c)." *Id.*

[73] *See LaJoie*, 849 P.2d at 489. Oregon's Rule 412 is also intended to encourage victims of sexual misconduct to report and assist in the prosecution of the crime by preventing highly prejudicial evidence from reaching the jury and thus helping to protect jury impartiality. *Id.* The statute serves legitimate state interests in protecting the victim because the prospect of having past sexual conduct divulged affects not only the victim's decision to report the sex crime but also the victim's willingness to see the process through. *Id.* at 483-484. The purposes of Federal Rule of Evidence 412 are similar. *See* FED. R. EVID. 412, Advisory Committee Notes. Federal Rule of Evidence 412 aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process. *Id.* Federal Rule of Evidence 412 is constructed to achieve the objectives of carefully balancing the victim's interests in retaining some privacy and dignity with the defendant's constitutional rights under the Fourteenth and Sixth Amendments to present a complete defense and of encouraging victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders. *See* FED. R. EVID. 412, Congressional Discussion.

[74] *See* OR. REV. STAT. § 40.210 (Rule 412(b)) which provides that evidence of a victim's past sexual conduct is admissible if it: (A) relates to the motive or bias of the alleged victim; or (B) Is necessary to rebut or explain scientific or medical evidence offered by the state; or (C) Is otherwise constitutionally required to be admitted. *Id.* Similarly, Federal Rule of Evidence 412 allows some evidence of the sexual history of the victim to be admitted for limited purposes. *See* FED. R. EVID. 412. Federal Rule of Evidence 412 provides: "under 412(b)(1)(A), evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other the accused was the source of semen, injury or other physical evidence is admissible in a criminal

The exceptions to Oregon's Rule 412 demonstrate the balance that the statute strikes between protecting the victim's interests and the defendant's constitutional rights to a meaningful opportunity to present a complete defense.[75]

The fifteen day notice requirement in Oregon Rule 412 was also designed to serve the state's legitimate interests, including protecting alleged victims of sex based crimes from surprise.[76] In addition, the procedure is justified by legitimate state interests, including the interests in avoiding undue trial delay and in protecting the alleged victims of sexual crimes from harassment.[77] Moreover, the exceptions built into the procedural framework of the fifteen-day notice requirement serve to protect the constitutional interests of the defendant

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case; likewise, under 412(b)(1)(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person of the accused of the sexual misconduct offered by the accused to prove consent or by the prosecution is admissible; and under 412(b)(1)(C), evidence the exclusion of which would violate the constitutional rights of the defendant is admissible." *Id.*

[75] *See LaJoie*, 217 F.3d at 670-671. The defendant's Sixth Amendment right to present relevant testimony may, in appropriate circumstances, bow to accommodate other legitimate interests in the criminal trial process. *Id.* at 668. Restrictions on a criminal defendant's right to confront witnesses and to present relevant evidence are constitutional so long as they are not arbitrary or disproportionate to the purposes they are designed to serve. *Id.* Before enacting Federal Rule of Evidence 412, Congress made specific findings regarding the constitutional issues surrounding the federal rape shield law. *See* FED. R. EVID. 412, Congressional Discussion. Congress found in relevant part: The principal purpose of this legislation is to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives and it does so by narrowly circumscribing when such evidence may be admitted. *Id.* Rule 412 does not sacrifice any constitutional right possessed by the defendant because it fairly balances the interests involved – the rape victim's interest in protecting her private life from unwarranted public exposure; the defendant's interest in being able adequately to present a defense by offering relevant and probative evidence; and society's interest in a fair trial, one where unduly prejudicial evidence is not permitted to becloud the issues before the jury." *Id.*

[76] *See LaJoie*, 849 P.2d at 483-484. The notice requirement in Oregon's Rule 412 serves a number of functions including: requiring the defendant to tell the prosecutor and the court in advance of trial of his intention to use certain evidence and to ask that it be admitted at trial; providing all of the parties with notice of what the defendant intends to prove at trial so that all parties will know what is at issue; preventing surprise to the prosecutor, the victim and the court; allowing the prosecutor to weigh the evidence and to prepare arguments against its admission; and most importantly to protect against surprise, harassment and undue delay. *Id.*

[77] *See id.*

in preventing a full and complete defense.[78]

Michigan v. Lucas,[79] demonstrated the role these legitimate state interests play in a sexual assault case.[80] In *Lucas*, the Court balanced the competing interests of the alleged victim and the defendant under Michigan's rape shield statute.[81] The defendant, Lucas, was convicted of criminal sexual conduct.[82] At Lucas' trial, the court prohibited Lucas from introducing evidence of a prior sexual relationship between himself and the victim because Lucas failed to comply with the rape shield statute's 10-day notice and hearing requirements.[83] The Court held that restrictions on a criminal defendant's Sixth Amendment rights may not be arbitrary or disproportionate to the purposes they were designed to serve.[84] The Court con-

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[78] *See id.* at 489. The legislature created two exceptions to the requirement of 15 days' notice – the evidence is newly discovered or the issue is newly arisen – which apply when the defendant cannot comply for reasons beyond the defendant's control thus protecting the defendant's constitutional right to present a full defense to the jury. *Id.*

[79] 500 U.S. 145 (1991).

[80] *See id.* at 147.

[81] *See id.* at 146. The *Lucas* Court analyzed Michigan's rape shield statute that prohibited a criminal defendant from introducing at trial evidence of an alleged rape victim's past sexual conduct subject to two exceptions. *Id. See also* MICH. COMP. LAWS § 750.520j (1979). Those two exceptions are: "(1) evidence of the victim's past sexual conduct with the actor; and (2) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." *Id.* If the defendant proposes to offer evidence under one of these two exceptions, the defendant must file a written motion and an offer or proof within 10 days after he is arraigned. *Id.* The trial court may order an *in camera* hearing to determine whether the proposed evidence is material and not more prejudicial than probative. *Id.*

[82] *See Lucas*, 500 U.S. at 146.

[83] *See id.*

[84] *See id.* at 151. The *Lucas* Court articulated what is known as the "*Lucas* test," that restrictions on a criminal defendant's right to confront witnesses and to present relevant evidence may not be "arbitrary or disproportionate" to the purposes they were designed to serve. *Id.* at 151. Several United States Supreme Court cases demonstrate restrictions on criminal defendants' rights that are not arbitrary or disproportionate to the purposes the restrictions were designed to serve: in *Taylor v. Illinois*, the Court held that preclusion of a defense witness' testimony as a sanction for defense counsel's failure to disclose the witness to the prosecution in pretrial discovery was not arbitrary or disproportionate to the purposes that the discovery rules were designed to serve. *See* 484 U.S. 400, 408-412 (1998). The Court stated that the rules providing for pretrial discovery serve the same purpose as the defendant's right to compulsory process, to ensure that the ends of justice are met by a full and fair presentation of the facts. *Id.* at 411. Notably, the Court emphasized that "the Sixth

cluded that Michigan's rape shield statute does not per se violate the Sixth Amendment.[85] Importantly, the Court noted that Michigan's rape shield statute represents a valid legislative determination that rape victims deserve heightened protection against harassment, surprise, and unnecessary invasions of privacy.[86] Therefore, in a sexual assault case when the prosecutor seeks to exclude evidence under a rape shield statute, the victim's as well as the state's interests must be balanced with the defendant's constitutional rights and interests.[87]

2. Sixth Amendment Compulsory Process Clause

The Court has established that under the Compulsory Process Clause, criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before the jury evidence that might influence the determination of

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Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system." *Id.* at 412-413 (citing United States v. Nobles, 422 U.S. 225, 241 (1975)). *See also Ritchie*, 480 U.S. at 54 (1987) (restriction on criminal defendant's right to examine the victim's Children's and Youth Services file was not arbitrary or disproportionate where defense counsel was able to cross-examine all the trial witnesses fully); United States v. Scheffer, 523 U.S. 303, 305-309 (1998) (trial court's exclusion of defendant's polygraph examination results did not violate Sixth Amendment rights because Federal Rule of Evidence 707 which excludes evidence of polygraph examinations is not arbitrary or disproportionate to serving the legitimate interests of ensuring that only reliable evidence is introduced at trial, preserving the jury's role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial).

[85] *See Lucas*, 500 U.S. at 153. The Court reversed the Michigan Court of Appeals' per se rule that the notice requirement in Michigan's rape shield law violated the Sixth Amendment in all cases where it was used to preclude evidence of past sexual conduct between a rape victim and a criminal defendant. *See id.* at 146, 149-153. The *Lucas* Court recognized that in appropriate cases, criminal defendants' Sixth Amendment right to present relevant testimony may bow to accommodate other legitimate interests in the criminal trial process. *See id.* at 149.

[86] *See id.* at 150. The Court also found that the statute protects against surprise to the prosecution. *Id.* Moreover, the notice and hearing procedure contained in the rape shield statute allows the trial court to determine in advance of trial whether the evidence is material and whether its prejudicial nature outweighs its probative value. *See Lucas*, 500 U.S. at 150.

[87] *See id.*

guilt.[88] Several Court cases have addressed the effect of rape shield statutes on a criminal defendant's Sixth Amendment compulsory process rights.[89]

In *Taylor v. Illinois*,[90] the Court considered whether a court order precluding a defense witness' testimony as a sanction, because defense counsel failed to comply with a discovery rule, violated the defendant's Sixth Amendment compulsory process rights.[91] In *Taylor*, defense counsel failed to list a witness in response to the state's pretrial discovery request and the trial judge refused to allow the undisclosed witness to testify.[92] The Court held that the lower court did not commit constitutional error.[93] The Court acknowledged that the defendant's right to present witnesses in his own defense is essential to the adversary system itself.[94] However, a criminal defendant does not have the unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.[95] Considering the doubtful veracity of the witness' testimony, the Court found that precluding the defense witness from testifying constituted an appropriate sanction for counsel's violation of the discovery rules and did not violate compulsory process.[96]

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[88] *See supra* note 23 and accompanying text.

[89] *See generally* Taylor v. Illinois, 484 U.S. 400, 401 (1988) and *Crane*, 476 U.S. at 684.

[90] 484 U.S. 400 (1988).

[91] *See id.* at 401-402.

[92] *See id.*

[93] *See id.* at 402. The *Taylor* Court found that preclusion of the witness' testimony as a sanction for a discovery violation is not absolutely prohibited by the Compulsory Process Clause of the Sixth Amendment. *Id.*

[94] *See Taylor*, 484 U.S. at 408-409 (citing United States v. Nixon, 418 U.S. 683, 709 (1974)). The *Taylor* Court reasoned that because this country has elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law, the need to develop all relevant facts in this system is both fundamental and comprehensive. *Id.* The Court also found that the function of the courts requires that compulsory process be available for the production of evidence, needed either by the prosecution or the defense. *Id.* Furthermore, the integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts within the framework of the rules of evidence. *Id.*

[95] *See id.* at 410.

[96] *See Taylor*, 484 U.S. at 416-417. The Court doubted the veracity of the undisclosed witness' testimony because he was proffered by the defense as an eyewitness, however, his testimony outside the presence of the jury dramatically contradicted defense counsel's representations to the trial court. *Id.* at 404-405.

Similarly in *Crane v. Kentucky*,[97] the Court addressed whether the Sixth Amendment Compulsory Process Clause had been violated.[98] Crane sought to introduce evidence of the circumstances surrounding his confession to cast doubt on the validity and credibility of his confession.[99] The Court relied on prior decisions to re-state the long-standing rule that the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.[100] Accordingly, exclusion of this kind of exculpatory evidence, in the absence of any valid state justification, deprived the defendant of the right to test the prosecutor's case through the presentation of all relevant evidence.[101]

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[97] 476 U.S. 683 (1986).

[98] *See id.* at 684. In *Crane*, a unanimous Court reversed the decision of the Kentucky Supreme Court, which had affirmed Crane's conviction, and remanded to the trial court to determine whether exclusion of the testimony was harmless error. *Id.* at 691.

[99] *See id.* at 685. The trial court excluded evidence of the circumstances surrounding the defendant's confession. *See id.* at 684. The trial court denied Crane's motion to suppress his confession to police having found that the confession was voluntary. *See Crane*, 476 U.S. at 685. Those circumstances were: he had been detained in a windowless room for a protracted period of time; he had been surrounded by as many as six police officers; he had repeatedly requested and been denied permission to telephone his mother; and he had been badgered into making a false confession. *Id.* The trial court refused to allow Crane to introduce evidence of these circumstances because the court rejected Crane's theory that the evidence was relevant to cast doubt on the validity and credibility of Crane's confession. *Id.* at 686.

[100] *See id.* at 690. A criminal defendant's constitutionally guaranteed right to present a complete defense is rooted in the Due Process Clause of the Fourteenth Amendment as well as in the Compulsory Process and Confrontation clauses of the Sixth Amendment. *See generally* Washington v. Texas, 388 U.S. 14, 23 (1967); Davis v. Alaska, 415 U.S. 308 (1974); California v. Trombetta, 467 U.S. 479, 485 (1984). *See also infra* text accompanying note 145. The Court stated that an essential component of procedural fairness is the opportunity to be heard. *See Crane*, 476 U.S. at 690. The Court further articulated that this opportunity would be empty if the State were allowed to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. *Id.*

[101] *See id.* at 690-691. The Court found that criminal defendant's have the right to have the prosecutor's case encounter and "survive the crucible" of meaningful adversarial testing, therefore, the exclusion of exculpatory evidence, in the absence of valid state justification, deprives a criminal defendant of this right. *Id.*

3. Sixth Amendment Confrontation Clause

The Sixth Amendment Confrontation Clause ensures a criminal defendant the opportunity to cross-examine witnesses testifying against him.[102] The opportunity guaranteed to a criminal defendant to confront and cross-examine the witnesses against him is important in an adversarial system to produce a full and fair presentation of the facts.[103] The right to cross-examine ensures that the evidence admitted against the accused is reliable and subject to the rigorous adversarial testing that is a staple of American criminal proceedings.[104] The United States Supreme Court has fully analyzed this Sixth Amendment right in several cases.[105]

In *Pennsylvania v. Ritchie*,[106] the Court considered whether the trial court violated the Ritchie's right of cross-examination by denying him information necessary to prepare his defense.[107] At trial, Ritchie sought disclosure of the alleged victim's Children and Youth Services file, on the grounds that the information in the file might contain the names of favorable witnesses, in addition to other unspecified exculpatory evidence.[108] The trial judge refused to order Children and Youth Services to disclose the files to the defendant.[109] In *Ritchie,* the Court analyzed whether the failure to disclose the contents of the file violated Ritchie's confrontation and compulsory process rights.[110] The Court found that its own prece-

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[102] *See LaJoie*, 217 F.3d at 668 (citing *Van Arsdall*, 475 U.S. at 678-679 (1986)). *See also supra* note 5 and accompanying text.

[103] *See Van Arsdall*, 475 U.S. at 680. In *Van Arsdall*, the Court found that a reasonable jury might have received a significantly different perspective of the witness' credibility if the trial court had allowed defense counsel to engage in appropriate cross-examination. *See id.* at 680.

[104] *See* Tague v. Richards, 3 F.3d 1133, 1138 (7th Cir. 1993) (citing Maryland v. Craig, 497 U.S. 836, 846 (1990)).

[105] *See generally Ritchie*, 480 U.S. at 39 and *VanArsdall*, 475 U.S. at 678.

[106] 480 U.S. 39 (1987).

[107] *See id.* at 42-43. The Court in *Ritchie* addressed whether and to what extent a State's interest in the confidentiality of its investigative files concerning child abuse must yield to a criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence. *Id.*

[108] *See id.* at 44.

[109] *See id.*

[110] *See Ritchie*, 480 U.S. at 45. The *Ritchie* Court analyzed, under the Fourteenth Amendment Due Process Clause, Ritchie's claim that the failure to disclose the con-

dent establishes that the Compulsory Process Clause guarantees that criminal defendants have the "right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt."[111] Therefore, the *Ritchie* Court concluded that because defense counsel cross-examined all of the trial witnesses fully, the trial court's failure to disclose the file did not violate the defendant's rights under the Confrontation Clause.[112]

To the contrary in *Delaware v. Van Arsdall*,[113] the Court found a violation of the Confrontation Clause.[114] The Court held that the trial court violated Van Arsdall's confrontation rights by prohibiting his inquiry into the possibility that a witness was biased as a result of the state's dismissal of that witness' pending public drunkenness charge.[115] The Court further stated that a trial judge may impose some limits on defense counsel's inquiry into the potential bias of a prosecution witness, however, the trial judge may not prohibit all inquiry

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tents of the file violated his Sixth Amendment confrontation and compulsory process rights because the Sixth Amendment guarantees are applied to the states through the Due Process Clause of the Fourteenth Amendment. *See id. See infra* note 115 and accompanying text.

[111] *See Ritchie*, 480 U.S. at 56. *See generally* Chambers v. Mississippi, 410 U.S. 284 (1973); Cool v. United States, 409 U.S. 100 (1972); Washington v. Texas, 388 U.S. 14 (1967).

[112] *See Ritchie*, 480 U.S. at 54. The Court emphasized that the Confrontation Clause guarantees the opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. *Id.* The Court explained that the Confrontation Clause guarantees a criminal defendant the opportunity for an effective cross-examination because this right "means more than being allowed to confront the witnesses physically." *See VanArsdall*, 475 U.S. at 678. The Court found that a defendant many not cross-examine in any way he sees fit because the Confrontation Clause does not prohibit reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. *Id.* at 679.

[113] 475 U.S. 673 (1986).

[114] *See id.* at 679.

[115] *See id.* at 679. The Court found the Sixth Amendment Confrontation Clause guarantees a criminal defendant the right to be confronted with the witnesses against him as well as the opportunity to cross-examine those witnesses. *See id.* at 678 (citing Davis v. Alaska, 415 U.S. 308, 315-316 (1974)). The Court also recognized that the exposure of a witness's motivation is a proper and important function of the constitutionally protected right of cross-examination." *See id.* at 678-679.

by defense counsel into the possible bias of a prosecution witness as the trial court did in *Van Ardsall* without violating the Confrontation Clause.[116] Therefore, a trial judge's complete prohibition of a criminal defendant's line of cross-examination violates the Confrontation Clause.[117]

Similarly, in *Agard v. Portuondo*,[118] the Seventh Circuit addressed a criminal defendant's confrontation clause rights in the context of a trial court's denial of defense counsel's cross-examination under New York's rape shield law.[119] In *Agard*, the trial court denied defense counsel's attempt to cross-examine the victim on whether she had ever engaged in anal intercourse with persons other than the defendant.[120] The court ruled that the rape shield statute proscribed defense counsel's inquiry into the victim's prior sexual history and that any probative value was far exceeded by the prejudice.[121] The court noted that a state might restrict a defendant's right to introduce evidence without violating the defendant's constitutional right to present a defense if the restrictions are neither arbitrary nor disproportionate to the purposes they are designed to serve.[122] Accordingly, the court

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[116] *See VanArsdall*, 475 U.S. at 679. The Court stressed that the Constitution entitles a defendant to a fair trial, not a perfect one. *Id.* at 681; *See generally* United States v. Hasting, 461 U.S. 499, 508-509 (1983); Bruton v. United States, 391 U.S. 123, 135 (1968)).

[117] *See VanArsdall*, 475 U.S. at 679.

[118] 117 F.3d 696 (7th Cir. 1997).

[119] *See id.* at 702.

[120] *See id.*

[121] *See id.* The trial court also rejected Agard's request that the testimony be allowed with a limiting instruction to the jury. *Id.* Agard asserted that the trial court's ruling violated his constitutional rights to confrontation and due process because it denied him the ability to present a complete defense. *See Agard*, 117 F.3d at 702. New York's rape shield law relied upon by the trial court in *Agard*, bars the use of evidence at trial of an alleged victim's prior sexual conduct with persons other than the defendant, but grants the trial court discretion to admit such evidence in the interest of justice. *Id. See generally* N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992). However, this discretionary power granted to the trial court must be exercised within the boundaries of the Sixth and Fourteenth Amendments. *See Agard*, 117 F.3d at 702.

[122] *See Agard*, 117 F.3d at 702. (citing Rock v. Arkansas, 483 U.S. 44, 55-56 (1987)). The court found that rape shield laws exemplified the trial court's traditional power to exclude evidence when the prejudicial character far exceeds its probative value. *Id.* at 703. The Seventh Circuit recognized that rape shield laws serve the purpose of protecting victims of rape from harassment and embarrassment in court to encourage women to report these crimes. *Id.* The court found that rape shield laws

held that the trial court did not violate Agard's confrontation rights by limiting defense counsel's cross-examination of the victim because application of the rape shield statute was neither arbitrary nor disproportionate to the purposes it was designed to serve.[123]

The Seventh Circuit also addressed a defendant's confrontation clause rights in *Tague v. Richards*.[124] In *Tague*, Tague claimed that application of Indiana's rape shield statute violated his Sixth Amendment confrontation rights.[125] Tague had been charged with molesting his neighbor A.T., an eleven-year old girl.[126] On cross-examination of a state witness Dr. Hibbard, Tague sought to elicit testimony that A.T. had told Dr. Hibbard that her father had molested her several years earlier.[127] The trial court excluded this testimony under Indiana's rape shield statute because it related to prior sexual acts involving A.T.[128]

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also serve a second purpose of reinforcing the trial judge's traditional power to keep inflammatory and distracting evidence from the jury. *Id.*

[123] *See id.* The court found that application of the rape shield statute was not arbitrary or disproportionate because of the highly prejudicial nature of the evidence. *See Agard*, 117 F.3d at 703. The court recognized that evidence of more unusual sexual activities, such as anal intercourse, is likely to distract a jury from the other evidence it is asked to consider. *Id.* Furthermore, the court concluded that the probative value of the evidence was low because "it is far from clear what bearing prior consensual experience with a particular sexual practice has on the probability of trauma occurring during a subsequent non-consensual act." *Id.*

[124] 3 F.3d 1133, 1135 (7th Cir. 1993).

[125] *See id.* at 1135.

[126] *See id.* at 1136.

[127] *See id.* Dr. Hibbard, a prosecution witness, had interviewed and physically examined A.T. *Id.* Dr. Hibbard's examination of A.T. revealed that there was extra tissue on A.T's hymen and she was infected with gardnella vaginitis, a disease rarely found in children and thought to be sexually transmitted. *See Tague*, 3 F.3d at 1136. Dr. Hibbard also testified that vaginal discharge, the main symptom of the disease, surfaced around the time of the alleged attacks by Tague and Dr. Hibbard concluded that A.T. was most likely a victim of sexual abuse. *Id.* However, Dr. Hibbard also testified that she could not determine if the hymenal damage occurred three months or three years before the examination and that other possible, but unlikely, causes of damage existed. *Id.*

[128] *See id.* at 1137. Indiana Code § 35-37-4-4, Indiana's rape shield statute, prohibits a criminal defendant from introducing any evidence of the victim's past sexual conduct in his defense against a sex crime charge, with the exception of evidence: (1) of the victim's or a witness' past sexual conduct with the defendant; (2) which in a specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded; or (3) that the victim's

However, the court agreed with Tague that application of Indiana's rape shield statute to exclude the testimony violated his confrontation rights.[129] The court recognized that the general purpose of rape shield statutes is to exclude evidence that, although relevant, has little probative value and a great capacity to embarrass and distract.[130] The court acknowledged that eliminating the risk of embarrassment furthers the state's interest in encouraging children to report cases of molestation.[131] Nevertheless, the court found that the state's interest did not outweigh Tague's constitutional right to cross-examine and thereby challenge the medical evidence offered by the state through Dr. Hibbard's testimony.[132]

Likewise, in *Wood v. Alaska,*[133] the Ninth Circuit considered whether the trial court's exclusion of evidence about the

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pregnancy at the time of trial was not caused by the defendant. *See* IND. CODE § 35-37-4-4'(a)-(b). The Indiana Supreme Court upheld the trial court's determination that the evidence regarding A.T.'s molestation by her father did not fall within any of the exceptions contained in Indiana's rape shield statute. *See Tague*, 3 F.3d at 1137.

[129] *See Tague*, 3 F.3d at 1138. The Seventh Circuit found that application of the rape shield statute under the circumstances in this case excluded evidence that indicated another possible source of the victim's hymenal damage, thereby significantly hampering Tague's efforts to rebut the inferences the state asked the jury to draw from the direct testimony of Dr. Hibbard. *Id.*

[130] *See id.* at 1139. The Seventh Circuit also recognized that the type of evidence excluded by rape shield statutes is considered to shift the balance of proof too far in favor of the rape defendant. *Id.* The court also found that Indiana's rape shield statute was enacted to prevent a general inquiry into the past sexual conduct of the victim to avoid embarrassing the victim and subjecting her to possible public denigration. *Id.* (citing Kelly v. State, 586 N.E. 2d 927, 929 (Ind. App. 1992)).

[131] *See Tague*, 3 F.3d at 1139.

[132] *See id.* Although the Seventh Circuit found that exclusion of the evidence violated Tague's Sixth Amendment confrontation rights, the court did not grant habeas relief because, in light of the other evidence at trial, the error did not have a substantial and injurious effect or influence on his trial. *Id.* at 1140. The court found that the victim testified with great detail about the occasions on which Tague attacked her and A.T.'s credibility and allegations were reinforced by the testimony of her mother, her school counselor, and the welfare department caseworker. *Id.* Furthermore, the court found that the evidence of A.T.'s infection with gardnella vaginitis supported her allegations that Tague molested her in the summer of 1986 because vaginal discharge, a symptom of the disease, appeared several months before A.T's examination in January 1987. *Id.* Accordingly, the court determined that the infringement on Tague's Sixth Amendment rights was harmless because exclusion of the evidence did not substantially prejudice the result of his trial. *See Tague*, 3 F.3d at 1140

[133] 957 F.2d 1544 (9th Cir. 1992).

victim in a rape trial violated the defendant's Sixth Amendment confrontation rights.[134] In *Wood,* the trial court excluded evidence that the victim had posed in Penthouse magazine, had acted in X-rated movies, had shown Wood the photographs and had discussed her experiences with Tague.[135] The court recognized that although a criminal defendant's Sixth Amendment rights guarantee him the ability to confront and cross-examine witnesses against him and to present a defense, those rights do not give him the right to present irrelevant evidence.[136] The court also found that trial courts retain the discretionary power to impose reasonable limits on cross-examination to prevent harassment, prejudice and confusion of the issues among other things.[137] Thus, the Ninth Circuit concluded that exclusion of the evidence did not violate Wood's Sixth Amendment confrontation rights because the low probative value of the evidence was substantially outweighed by its prejudicial effect.[138]

In *United States v. Payne*,[139] the Ninth Circuit also considered whether the trial court's exclusion of evidence under the federal rape shield statute violated Payne's Sixth Amendment confrontation rights.[140] The court examined the probative

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[134] *See id.* at 1545-1546.

[135] *See id.* at 1547. The Ninth Circuit agreed that the evidence that the victim posed in Penthouse and acted in pornographic movies was not relevant in itself. *Id.* at 1551. However, the Ninth Circuit found that the fact that she showed Wood the photos and discussed her acting experiences with him was relevant to establish the nature of their relationship. *Id.*

[136] *See Wood*, 957 F.2d at 1549. Relevant evidence consists of any evidence that has any tendency to make the existence of any fact that is of importance more or less probable than it would be without the evidence. *See generally* FED. R. EVID. 401.

[137] *See Wood*, 957 F.2d at 1549.

[138] *See id.* at 1552-1554. *See also infra* Part IV.C.1. The court found that the probative value of the evidence was low because introducing the evidence would confuse the issues and unduly prejudice the jury. *See Wood*, 957 F.2d at 1552. Furthermore the court found that because the victim's acting and modeling experiences were not relevant in themselves, the jury could be led to base its decision on irrelevant facts. *Id.* The court concluded that the evidence was highly prejudicial because if the jury considered the evidence it could feel hostility for the victim as an immoral woman and base its decision on that hostility rather than the facts. *Id.* The court also feared that the jury could conclude that a woman with the victim's past could not be raped or that she somehow deserved to be raped. *Id.* at 1552-1553.

[139] 944 F.2d 1458 (9th Cir. 1991).

[140] *See id.* at 1469. The alleged victim was Payne's 12-year old foster daughter. *See id.* at 1462. The trial court excluded evidence of the victim's past sexual conduct,

value of the prohibited cross-examination to determine whether Payne's confrontation rights had been violated.[141] The court reasoned that the evidence that Payne sought to elicit on cross-examination was of minimal probative to his claim about the victim's bias against him.[142] Therefore, the Ninth Circuit concluded that the trial court appropriately excluded the evidence because the incident had minimal, if any probative value that was outweighed by the potential prejudicial effect to the young victim.[143] Accordingly, exclusion of the evidence did not violate Payne's Sixth Amendment confrontation rights.[144]

4. Fourteenth Amendment Due Process Clause

The United States Supreme Court has held that the Fourteenth Amendment Due Process requires that the judicial process protect those rights that are the "very essence of the scheme of ordered liberty" or are "implicit in the concept of ordered liberty."[145] Due Process guarantees criminal defendants

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specifically that she had been found in a trailer, partially undressed, engaging in heavy petting with a boy. *See id.* at 1468. Payne contended that the evidence was admissible to show: (1) the victim's motivation to testify falsely against Payne based on discipline arising out of the trailer incident; (2) to demonstrate the victim's lack of credibility because of her allegedly inconsistent recounting of the incident; (3) to explain the medical evidence regarding the condition of the victim's hymen; and (4) to rebut testimony suggesting that the victim was a virgin. *Id.* at 1468-1469.

[141] *See Payne*, 944 F.2d at 1469.

[142] *See id.* The court further noted that the trial court prohibited a "sanitized cross-examination" about the trailer incident because the underlying facts of the incident were not relevant to the victim's purported motivation to fabricate the charges against Payne. *See id.* Furthermore, the court found that evidence of the incident was more prejudicial than probative regarding the issue of the medical evidence because Payne did not establish that any activity that took place during the incident could offer an alternative explanation of the medical evidence. *Id.*

[143] *See id.*

[144] *See Payne*, 944 F.2d at 1469. *See also infra* Part V.A.

[145] *See* Palko v. Connecticut, 302 U.S. 319, 324-326 (1937). In *LaJoie*, the Ninth Circuit limited its analysis to LaJoie's Sixth Amendment constitutional rights because the United States Supreme Court has held that whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *See LaJoie*, 217 F.3d at 668 (citing *Crane*, 476 U.S. at 690). *See also supra* note 4 and accompanying text.

that convictions are not brought about by methods that offend a sense of justice.[146]

These important principles derive from the Court's decision in *Rochin v. California*.[147] In *Rochin*, the Court considered whether use of evidence, which had been forcibly obtained from the person of Rochin, to convict Rochin violated the Due Process Clause of the Fourteenth Amendment.[148] The deputy sheriffs directed a physician at a hospital to pump Rochin's stomach, without his consent, to recover two capsules containing morphine that the defendant had swallowed in the deputy's presence.[149] The prosecutors used the capsules at trial to obtain Rochin's conviction for illegal possession of morphine.[150] The Court stated that the Due Process Clause requires the government to respect those personal rights that are so rooted in the traditions and conscience of the people of this Nation as to be considered fundamental.[151] Although the Court did not articulate a more precise definition of due process, the Court stated that due process means that convictions cannot be brought about by methods that offend a sense of justice.[152] Accordingly, the Court determined that the method used to obtain the capsules offended a sense of justice, therefore, Rochin's due process rights had been violated by use of the capsules to obtain his conviction.[153]

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[146] *See* Rochin v. California, 342 U.S. 165, 173 (1952).

[147] 342 U.S. 165, 173 (1952).

[148] *See id.* at 166-168.

[149] *See id.* at 166.

[150] *See id.*

[151] *See id.* at 169. These fundamental rights include: the right to have an abortion, *Roe v. Wade*, 410 U.S. 113, 152-154 (1973); and the right to marry, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) and *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978). In *Rochin*, the officer's conduct violated Rochin's right to be free from unwanted and unwarranted intrusions into the privacy of his body. *See Rochin*, 342 U.S. at 172-174.

[152] *See Rochin*, 342 U.S. at 173. Because due process of law is a historic and generative principle, it "precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a "sense of justice." *Id.*

[153] *See id.* at 173-174. The Court concluded that the proceedings by which Rochin's conviction was obtained did "more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically." *Id.* at 172. The Court found that the officer's conduct shocks the conscience. *Id.* The officer's course of conduct which consisted of "illegally breaking into the privacy of the petitioner [Rochin], the struggle to open his mouth and remove what was there, [and] the

IV. NINTH CIRCUIT'S ANALYSIS

In *LaJoie v. Thompson*,[154] the Ninth Circuit considered whether suppressing evidence of the victim's past sexual abuse, for failure to give the required 15-day notice of intent to introduce such evidence,[155] violated LaJoie's Constitutional rights.[156] The court noted that Fourteenth Amendment and Sixth Amendment constitutional jurisprudence guarantees criminal defendants a meaningful opportunity to present a complete defense.[157] It evaluated LaJoie's appeal of the district court's denial of his petition for a writ of habeas corpus[158] in light of clearly established Sixth Amendment jurisprudence and determined that exclusion of the evidence violated LaJoie's Sixth Amendment compulsory process and confrontation

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forcible extraction of his stomach's contents . . . to obtain evidence is bound to offend even hardened sensibilities." See *Rochin*, 342 U.S. at 172. The Court described the officer's methods as "too close to the rack and the screw to permit of constitutional differentiation." *Id.*

[154] 217 F.3d 663 (9th Cir. 2000).

[155] *See supra* note 15 and accompanying text. LaJoie noticed his intent to present evidence of VN's past history of sexual abuse by other only 7 days in advance of trial, 8 days late under Rule 412's notice requirement. *See LaJoie*, 217 F.3d at 674, Moreover, because LaJoie's attorney learned of the evidence well in advance of the notice deadline, LaJoie did not meet the exceptions to the notice requirement under Rule 412(4)(a)(3). *Id.*

[156] *See id.* at 667. LaJoie claimed that the trial court's exclusion of evidence of the victim's past history of sexual abuse by others under Rule 412, violated his Fourteenth Amendment Due Process rights. *Id.* LaJoie further claimed that exclusion of the evidence violated his Sixth Amendment Compulsory Process and Confrontation Clause rights. *Id.* A criminal defendant is guaranteed, under the Fourteenth Amendment Due Process Clause and the Sixth Amendment Confrontation and Compulsory Process clauses, to put before the jury evidence that might influence the determination of guilt and to have a meaningful opportunity to present a complete defense. *See supra* notes 23-4 and accompanying text.

[157] *See LaJoie*, 217 F.3d at 668 (citing *Crane*, 476 U.S. at 690). *See also supra* Parts III.B.2-III.B.4.

[158] *See LaJoie*, 217 F.3d at 667. The Ninth Circuit noted that it reviews questions of law such as a district court's decision to grant or deny a §2254 habeas petition *de novo*. *See id.* at 667-668. Under the *de novo* standard of review, the court considers the issues before it anew. *See generally* BLACK'S LAW DICTIONARY 435 (6th ed. 1990). Accordingly, the Ninth Circuit reviewed the determination of what is "clearly established federal law, as determined by the Supreme Court of the United States," under 28 U.S.C. § 2254(d)(1), as a question of law which must be decided *de novo*. *See LaJoie*, 217 F.3d at 667 (citing Canales v. Roe, 151 F.3d 1226, 1228-1229 (9th Cir. 1998)); *see also* 28 U.S.C. § 2254(d)(1).

clause rights.[159] Accordingly, the court's majority opinion held that the district court erred in denying LaJoie's petition for a writ of habeas corpus.[160] Judge Ferguson authored a dissenting opinion.[161]

A. CRIMINAL DEFENDANT'S DUE PROCESS, CONFRONTATION AND COMPULSORY PROCESS RIGHTS

The Ninth Circuit emphasized that criminal defendants' right to a meaningful opportunity to present a complete defense is the same whether it is rooted in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment.[162]

The Ninth Circuit then discussed the constitutional rationale underlying the Compulsory Process and Confrontation clauses of the Sixth Amendment.[163] The court found that the Compulsory Process Clause mandates that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial as well as the right to put before a jury evidence that might influence the determination of guilt.[164] Furthermore, the court reasoned that the ends of criminal justice are not served if judgments are not founded on a full presentation of the facts.[165] The court further recognized that the Confrontation Clause of the Sixth Amendment ensures a criminal defendant the opportunity to cross-examine witnesses testifying against him.[166]

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[159] *See LaJoie*, 217 F.3d at 673.

[160] *See id. See supra also* note 29 and accompanying text.

[161] *See LaJoie*, 217 F.3d at 673.

[162] See id. at 668 (citing *Crane*, 476 U.S. at 690). *See also supra* note 145 and accompanying text.

[163] *See LaJoie*, 217 F.3d at 668.

[164] *See id.* The Ninth Circuit looked to the Court's decision in. *Ritchie*, 480 U.S. at 56, to determine the minimum rights guaranteed by the Compulsory Process Clause of the Sixth Amendment. *See LaJoie*, 217 F.3d at 668. *See also supra* Part III.B.3.

[165] *See LaJoie*, 217 F.3d at 668. The Ninth Circuit quoted *Taylor*, 484 U.S. at 411, in which the Supreme Court articulated that the "ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *See LaJoie*, 217 F.3d at 668. *See also Taylor*, 484 U.S. at 411; *supra* Part III.B.2.

[166] *See LaJoie*, 217 F.3d at 668. The Ninth Circuit looked to the Court's decision in *Van Arsdall*, 475 U.S. at 678-679, in articulating criminal defendants' constitu-

The Ninth Circuit stated that restrictions placed on a criminal defendant's right to present a complete defense, to put before the jury evidence that might influence the determination of guilt, and to confront witnesses may not be arbitrary or disproportionate to the purposes they are designed to serve.[167] The court noted that a criminal defendant's failure to comply with a rape shield law's notice requirement might in some cases justify the severe sanction of preclusion of the evidence.[168] However, it emphasized that whether a rape shield law's notice requirement justifies the severe sanction of preclusion must be determined by the courts on a case-by-case basis by balancing the relevance of the evidence with the interests served by the notice requirement.[169]

The Ninth Circuit scrutinized the Oregon Supreme

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tional right to cross-examine witnesses testifying against him. *See LaJoie*, 217 F.3d at 668. *See also supra* Part III.B.3.

[167] *See LaJoie*, 217 F.3d at 668. The Ninth Circuit relied on the Court's decision in *Lucas*, 500 U.S. at 146, 149-153, for the controlling constitutional Supreme Court precedent to determine whether the trial court unconstitutionally excluded the evidence under Rule 412, Oregon's rape shield statute, for failure to meet Rule 412's 15-day notice requirement. *See LaJoie*, 217 F.3d at 668. *See also supra* notes 84-85 and accompanying text.

[168] *See LaJoie*, 217 F.3d at 668-669. *See also Lucas*, 500 U.S. at 153. The Court in *Lucas* noted that this rule does not mean that all notice requirements pass constitutional muster. *See Lucas*, 500 U.S. at 151. Only notice requirements that are arbitrary or disproportionate to the purposes they are designed to serve will not pass constitutional muster. *See supra* note 84 and accompanying text. The Court upheld a Florida rule that required a criminal defendant to notify the State in advance of trial of any alibi witness that he intended to call. *See* Williams v. Florida, 399 U.S. 78, 84 (1970). The Court stated that the notice requirement in no way affected the defendant's decision to call alibi witnesses, rather, the rule only compelled the defendant to accelerate the timing of his disclosure. *Id.* at 85. The Court emphasized that accelerating the disclosure of the evidence did not violate a defendant's constitutional rights because "a criminal trial is not a poker game in which players enjoy an absolute right always to conceal their cards until played." *Id.* at 82. Similarly, in *Wardius v. Oregon*, 412 U.S. 470, 474 (1973), the Court described notice requirements as "a salutary development that, by increasing the evidence available to both parties, enhances the fairness of the adversary system." *See Wardius*, 412 U.S. at 474.

[169] *See LaJoie*, 217 U.S. at 669. The Ninth Circuit cited other Circuit Courts and state court decisions that demonstrate that *Lucas* requires case-by-case balancing. *Id.* (citing *Wood*, 957 F.2d at 1551-1554; *Agard*, 117 F.3d at 703; Stephens v. Miller, 13 F.3d 998, 1001 (7th Cir. 1994); State v. Cuni, 159 N.J. 584, 733 A.2d 414, 422 (1999); State v. Johnson, 123 N.M. 640, 944 P.2d 869, 876-878 (1997); People v. Lucas, 193 Mich. App. 298, 484 N.W. 2d 685, 687 (1992)).

Court's application of the *Lucas* test.[170] It held that the Oregon Supreme Court misapplied the *Lucas* test by finding that the trial court's preclusion of the evidence did not violate LaJoie's Sixth Amendment Confrontation and Compulsory Process rights.[171] The court determined that although the Oregon Supreme Court utilized the correct rule from *Lucas*,[172] the Oregon Supreme Court misapplied that rule to LaJoie's case.[173]

Accordingly, the Ninth Circuit concluded that the Oregon Supreme Court erred in its determination about whether the purposes of Oregon's rape shield law and its notice requirement justified preclusion as a sanction for non-compliance with the notice provision.[174] The court stated that had the Oregon Supreme Court properly applied the *Lucas* balancing test, that court only could have reasonably reached one conclusion: that the preclusion of the evidence of VN's past sexual abuse by others was extreme and violated LaJoie's Sixth Amendment rights.[175]

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[170] *See LaJoie*, 217 F.3d at 670. The *Lucas* test provides that restrictions on a criminal defendant's right to confront witnesses and to present relevant evidence may not be "arbitrary or disproportionate" to the purposes they are designed to serve. *See Lucas*, 500 U.S. at 151.

[171] *See LaJoie*, 217 F.3d at 670. The Oregon Supreme Court upheld the trial court's exclusion of evidence of VN's past sexual abuse by others. *See LaJoie*, 849 P.2d at 490. *See supra* note 84 and accompanying text.

[172] *See LaJoie*, 217 F.3d at 670. The Court held in *Lucas* that preclusion of evidence for violation of notice requirements of rape shield laws does not violate the Sixth Amendment if such a sanction is neither arbitrary nor disproportionate to the purposes of the notice requirement. *See Lucas*, 500 U.S. at 151.

[173] *See LaJoie*, 217 F.3d at 670. The Ninth Circuit stated that the Oregon Supreme Court articulated that Rule 412's notice requirement was designed to prevent surprise to the prosecution and the alleged victim, avoid undue trial delay, and protect the alleged victim from needless anxiety concerning the scope of the evidence to be produced at trial. *Id. See also LaJoie*, 849 P.2d at 489. The Ninth Circuit also found that the Oregon Supreme Court improperly concluded that the notice requirement was not arbitrary or disproportionate with respect to these intended purposes because the Oregon Supreme Court never considered or balanced the interests in LaJoie's particular case. *See LaJoie*, 217 F.3d at 670. Rather, the Ninth Circuit found that the Oregon Supreme Court determined that the balancing of the rights of defendants generally with the legitimate purposes of the notice requirement was inherent in the rule itself. *Id.* This, the Ninth Circuit held, constituted improper application of clearly established federal law as required by the *Lucas* test. *Id.*

[174] *See id.*

[175] *See id.* at 671. The Ninth Circuit found that the Oregon Supreme Court's conclusion was not objectively reasonable because of the highly probative value of the ev-

In balancing LaJoie's interests in presenting the evidence against the interests served by Rule 412's notice requirement, the Ninth Circuit found that none of the interests justifying the notice requirement of Rule 412 would have been abridged had LaJoie been allowed to use the evidence.[176] The court determined that the probative value of the evidence in LaJoie's case disproportionately outweighed the purposes of Rule 412's notice requirement, and that the evidence would not be unduly prejudicial.[177] Therefore, the Ninth Circuit concluded

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idence that LaJoie sought to introduce under Rule 412. *See LaJoie*, 217 F.3d at 671. Specifically, the Ninth Circuit agreed with the trial judge that the evidence that Watkins had been convicted of raping VN was relevant to provide an alternative explanation of the medical evidence offered by the State regarding injuries to VN's hymen, which invited the inference that LaJoie must have caused those injuries. *Id.* The Ninth Circuit further found that LaJoie could have presented evidence of the other sexual abuse to offer an alternative explanation for VN's hymenal injuries. *Id.* The Ninth Circuit also found that evidence about Watkin's conviction for raping VN was relevant to show an alternative source for VN's knowledge about sexual acts and male genitalia, other than through rape by LaJoie. *Id.* The Ninth Circuit concluded that had the evidence been admitted, the jury could have drawn the conclusion from this evidence that VN had obtained her sexual knowledge from her abuse by Watkins. *Id.* at 672.

[176] *See LaJoie*, 217 F.3d at 672. The Ninth Circuit evaluated the three interests served by Rule 412's notice requirement, which the Oregon Supreme Court relied upon in its analysis. *See id. See supra* notes 75, 76 and accompanying text.

[177] *See LaJoie*, 217 F.3d at 672. The court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. FED. R. EVID. 403. The Ninth Circuit held that the purposes of allowing time for the evidence to be carefully screened and avoiding undue trial delay would not have been affected by admission of the evidence in LaJoie's case because the trial court was able to screen the evidence within the time available and was able to decide which portions of the file were relevant. *See LaJoie*, 217 F.3d at 672. The prosecutor had arguments prepared two days after LaJoie filed his notice of intent to present the evidence for the hearing on why the evidence should be excluded. *Id.* Therefore, the Court's consideration of the prejudicial quality of the evidence would not have resulted in undue trial delay. *Id.* The Ninth Circuit also stated that the interest in preventing unfair surprise was not implicated in LaJoie's case because the prosecutor had just finished trying the rape case of Watkins and was fully familiar with all the details of VN's CSD case file and with all the details of VN's past sexual abuse. *Id.* The Ninth Circuit also found it persuasive that there existed no evidence that LaJoie's failure to give the 15 days' notice was willful or strategic, rather than neglectful. *Id.* The Ninth Circuit further recognized that although a State's interest in the protection of minor victims of sex crime from further trauma and embarrassment is a compelling one, in LaJoie's case this interest was outweighed by the high probative value of the excluded evidence. *See La-*

that the trial court violated LaJoie's Sixth Amendment rights since preclusion of the evidence was arbitrary and disproportionate to the purposes behind the 15-day notice requirement.[178]

B. HABEAS CORPUS

Once the Ninth Circuit decided that the Oregon Supreme Court violated LaJoie's Sixth Amendment rights, the court looked at whether the error warranted habeas corpus relief.[179] The court applied the "unreasonable application" test.[180] The court looked at whether the Oregon Supreme Court's decision that upheld the trial court's preclusion of the evidence, amounted to an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States.[181] In a federal habeas proceeding, the court

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Joie, 217 F.3d at 672. Furthermore, the Ninth Circuit determined that the excluded evidence had little potential for being unduly prejudicial to the VN, the alleged victim, because the evidence concerned non-consensual sexual abuse of a young child, therefore, the jury would be unlikely to draw an unfavorable and unwarranted impression of the alleged victim, VN. *Id.* at 673.

[178] *See LaJoie*, 217 F.3d at 673. *See also supra* note 76 and accompanying text.

[179] *See LaJoie*, 217 F.3d at 673. The Ninth Circuit focused on whether the district court erred in denying LaJoie's petition for a writ of habeas corpus based on the district court's conclusion that the Oregon Supreme Court's decision was not an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. *Id.* The Court of Appeals reviews *de novo* a district court's decision to grant or deny a habeas petition. *See* Eslaminia v. White, 136 F.3d 1234, 1236 (9th Cir. 1998). A federal court may grant a writ of habeas corpus is the relevant state-court decision was either: (1) contrary to clearly established Federal law, as determined by the Supreme Court of the United States; or (2) involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. *See Taylor*, 529 U.S. at 428; AEDPA, 28 U.S.C. § 2254(d)(1). A state court's decision can be contrary to federal law either, 1) if it fails to apply the correct controlling authority, or 2) if it applies the controlling authority to a case involving facts "materially indistinguishable" from those in the controlling case but nonetheless reaches a different result. *See Williams*, 529 U.S. at 428-429. A state court's decision can involve an unreasonable application of federal law if it either: 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. *Id. See also supra* Parts III.A.1-III.A.3.

[180] *See LaJoie*, 217 F.3d at 673; *Williams*, 529 U.S. at 429. *See also supra* Part III.A.2; 28 U.S.C. § 2254(d)(1).

[181] *See LaJoie*, 217 F.3d at 673.

must also determine whether the State court's error had a substantial and injurious effect or influence on the jury's verdict.[182]

The Ninth Circuit concluded that even had the Oregon Supreme Court properly applied the *Lucas* test to the circumstances in LaJoie's case, the Oregon Supreme Court's decision amounted to an unreasonable application of clearly established Federal law as espoused by the Supreme Court of the United States.[183] The court further held that the exclusion of the evidence seriously damaged LaJoie's defense because the jury heard only that part of the story that implicated LaJoie and not the highly probative evidence of the past sexual abuse that VN had experienced.[184] Accordingly, the court held that the district court erred in holding that the Oregon Supreme Court's decision was a reasonable application of clearly established United States Supreme Court precedent, and

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[182] *See id.* The Ninth Circuit looked to United States Supreme Court authority to determine the standard for whether *habeas* relief must be granted in a federal *habeas* proceeding: whether the court's error had "substantial and injurious effect or influence in determining the jury's verdict." *See id.* (citing *Brecht*, 507 U.S. at 623).

[183] *See LaJoie*, 217 F.3d at 673. The clearly established federal law applied by the Ninth Circuit and the Oregon Supreme Court to LaJoie's case was the *Lucas* test: preclusion of evidence for violation of notice requirements of rape shield laws does not violate the Sixth Amendment if such a sanction is neither arbitrary nor disproportionate to the purposes of the notice requirement. *Id. See also Lucas*, 500 U.S. at 151. Clearly established federal law requires that courts undertake case-by-case balancing of the defendant's rights against those of the State and the victim under the *Lucas* test. *See LaJoie*, 217 F.3d at 669. *See also supra* note 84 and accompanying text. The Ninth Circuit did not consider whether the Oregon Supreme Court's application of the *Lucas* test was contrary to clearly established federal law because they concluded that it was an unreasonable application of clearly established federal law. *See LaJoie*, 217 F.3d at 669 n.13.

[184] *See LaJoie*, 217 F.3d at 673. The Ninth Circuit agreed with LaJoie's contention that the jury convicted him without the benefit of the evidence of the past sexual abuse that the jury could have determined was exculpatory because, in several ways, it tended to make it less likely that LaJoie had raped and sexually abused VN. *Id.* Accordingly, the Ninth Circuit concluded that exclusion of the evidence by the trial court had a substantial and injurious effect on the jury's verdict. *Id.* The excluded evidence which the jury could have found exculpatory was that: (1) Russell Watkins, one of VN's mother's boyfriends, had been convicted of raping VN which was relevant to rebut or explain the State's evidence of VN's hymenal injuries and to provide an alternate source of VN's ability to explain sexual acts; and (2) certain evidence was relevant to show the alleged motive or bias of VN because it tended to show that VN's allegations were false and were invited by CSD caseworkers. *Id.* at 666. *See also supra* note 12 and accompanying text.

therefore, erred in denying LaJoie's petition for a writ of habeas corpus.[185]

C. DISSENTING OPINION

Judge Ferguson dissented, stating that the majority made several fundamental errors.[186] First, he opined that the majority incorrectly determined that the evidence, which LaJoie sought to put before the jury, constituted relevant evidence.[187] Second, he believed that the majority incorrectly determined that LaJoie's interests in introducing the evidence outweighed those of the State in precluding it.[188] Third, he found that the majority opinion improperly carved out an exception to a rape shield statute's notice requirement whenever a defendant vic-

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[185] *See LaJoie*, 217 F.3d at 674.

[186] *See id.* Judge Ferguson began his dissent with a discussion of VN's history of sexual abuse from the time she was two until the time she was in the second grade and went to live with her aunt and LaJoie at his isolated farm. *See id.* The dissent also described in detail the abuse that VN claimed she suffered at the hands of LaJoie almost every night. *See LaJoie*, 217 F.3d at 674.

[187] *See id.* The dissenting opinion also discussed the evidence of five separate incidents of sexual abuse suffered by VN excluded by the trial court that LaJoie sought to introduce as evidence. *Id.* These five incidents were: (1) a teenaged boy had pulled down her pants once when she was five; (2) a man had sexually assaulted VN's brother; (3) her brother had inserted a plastic knife into her anus when she was three; (4) a relative had touched her genitals when she was about five; and (5) her mother's boyfriend had raped VN once when she was about eight. *Id.* at 675. LaJoie argued that this evidence would give the jury an alternative explanation for both the condition of VN's hymen and what LaJoie deemed her sophisticated awareness of sexual terminology. *Id.*

[188] *See LaJoie*, 217 F.3d at 674. Judge Ferguson described the trial court's determinations during the *in camera* hearing regarding the evidence that LaJoie sought to introduce under Rule 412. *Id.* at 675. He discussed the trial court's reasons for excluding the evidence which were: (1) the evidence was irrelevant and confusing; and (2) LaJoie had missed the deadline under Rule 412 and did not meet the exception under Rule 412 because the evidence was known to the defense well in advance of the notice deadline. *Id.* Specifically, the trial judge stated, "[l]et's narrow it to [the mother's boyfriend]. I don't think the other stuff is, first of all, relevant to this case, specifically when we go back years beyond." *See id.* The trial judge further ruled that even the evidence about the rape by VN's mother's boyfriend was too confusing to come before the jury on the issue of VN's awareness of sexual terminology. *Id.* As the trial judge explained, "I find that the information, if relevant, is in this situation so confusing as to the issue of crimes of Mr. LaJoie, as not to be admissible. I want to steer away from these matters involving [the mother's boyfriend]." *See LaJoie*, 217 F.3d at 675.

timizes a child.[189] Finally, he found that even if the majority correctly determined that the state courts committed constitutional error by excluding the evidence, the majority incorrectly identified the error as one that warranted habeas relief.[190]

Judge Ferguson engaged in a two-part inquiry to determine the constitutionality of the exclusion of the evidence: (1) whether the evidence was relevant and (2) whether the State's interest in excluding the evidence outweighed LaJoie's interests in presenting it.[191] He analyzed the same issue addressed in the majority opinion, whether exclusion of the evidence LaJoie sought to put before the jury violated his Sixth Amendment Confrontation and Compulsory Process Clause rights.[192]

1. Lack of Relevant Evidence

Judge Ferguson's dissent asserted that the majority improperly held that the evidence, which LaJoie sought to intro-

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[189] *See id.*

[190] *See id.* at 674. Judge Ferguson found that despite the trial court's ruling to exclude the evidence, LaJoie essentially received what he wanted because the jury learned at several points during the trial that others had sexually assaulted VN. *Id.* at 675. The information received by the jury included: (1) a stipulation describing the abuse VN suffered at both the hands of her relative and the teenaged boy; (2) that VN had participated in group therapy for sexually abused children for several months and that LaJoie had nothing to do with that referral; (3) a CSD counselor testified that VN "said that her Uncle Clint was the first person who had done what she called a bad touch," this testimony revealed that others had molested VN; and (4) VN's aunt testified that she had spoken to two police officers about reports of abuse that did not relate to LaJoie at all. *Id.* Judge Ferguson stated that the jury did in fact learn that VN had an extensive history of sexual abuse by others but it nevertheless rejected LaJoie's defense of innocence and found him guilty of rape, sodomy, and sexual abuse all in the first degree. *See LaJoie*, 217 F.3d at 675-676.

[191] *See id.* at 676 (citing *Wood*, 957 F.2d at 1549-1550. In *Wood,* the Ninth Circuit found that if the evidence is not relevant then the defendant has no right to present it. *See Wood*, 957 F.2d at 1550. If the evidence is relevant, the court must inquire whether other legitimate interests outweigh the defendant's interests in presenting the evidence. *Id.* In *Wood,* the Ninth Circuit held that evidence of that the victim modeled in Penthouse and acted in pornographic movies was not relevant as to whether she consented to a sexual relationship with the defendant, therefore, the evidence was properly excluded. *Id.*

[192] *See LaJoie*, 217 F.3d at 676.

duce, was relevant.[193] LaJoie contended at trial that evidence of VN's history of sexual abuse was relevant to provide an alternative explanation for what he deemed VN's unusual knowledge of sexual terminology.[194] However, Judge Ferguson argued that VN was ten years old at the time of trial and her testimony displayed an awareness of sexual terminology consistent with her age.[195]

Judge Ferguson also noted that the Ninth Circuit rejected this same argument on indistinguishable facts in *United States v. Torres*.[196] In *Torres*, the defendant, who was convicted of aggravated sexual abuse of a child, argued on appeal that the trial court violated his confrontation rights when it refused to permit him to provide an alternative explanation for what he deemed was his nine-year old victim's sophisticated knowledge of sexual terminology.[197] The Ninth Circuit refused to reverse the trial court, noting that the victim's testimony did not demonstrate any unusual knowledge of sexual techniques or nomenclature, therefore any evidence that would provide an alternative explanation was irrelevant.[198] Judge Fergurson analogized VN's testimony to the young victim's testimony in *Torres* because it did not demonstrate that VN had an advanced knowledge of sexual terminology.[199] Ac-

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[193] *See id.*

[194] *See id.* Judge Ferguson observed that VN did not display a sophisticated knowledge of sexual terminology that triggered a constitutional right to present an alternative explanation for its source. *Id.* He pointed to the record which shows that only when the prosecutor handed VN an anatomically correct doll was she able to say, "he tried to make it fit but it just wouldn't fit." *Id.* However, soon after that VN reverted to telling the jurors that she couldn't verbalize the crimes LaJoie had committed. *See LaJoie*, 217 F.3d at 676.

[195] *See id.* Notably, Judge Ferguson described VN's testimony in which she used words like "bad touch," "rub," "my private," with "his private," "fingers," "tongue," "sore," and "hurt." *Id.* Moreover, when the prosecution prodded VN with questions about where LaJoie had put his "private," she initially responded that she couldn't remember and then stated that she could not put into words what LaJoie had done to her. *Id.*

[196] *See id. See also* United States v. Torres, 937 F.2d 1469, 1470 (9th Cir. 1991).

[197] *See Torres*, 937 F.2d at 1471-1472, 1474. In *Torres* the nine-year old victim's testimony was similar to VN's testimony in the *LaJoie* because like VN's testimony it was replete with simple references to "private spot," "private parts," and "private places." *Id.* at 1474.

[198] *See id.*

[199] *See LaJoie*, 217 F.3d at 677.

cordingly, Judge Ferguson concluded that LaJoie's argument that VN's testimony demonstrated an advanced knowledge of sexual terminology lacks merit, just as it did in *Torres*.[200] On this basis, Judge Ferguson concluded that evidence of VN's history of sexual abuse should have been deemed irrelevant and inadmissible.[201]

Similarly, Judge Ferguson contended that the evidence, which LaJoie attempted to introduce to provide an alternative explanation for VN's medical condition, was not relevant for this purpose.[202] He noted that the prosecutor sought to prove that LaJoie had caused VN's repetitive sexual injuries and none of the evidence offered by LaJoie could have provided an alternative explanation to the State's medical evidence because it was not indicative of repetitive sexual injuries.[203] Although the State's medical expert testified upon cross-examination that he could not rule out the Watkins' rape of VN as the cause of her injuries, Judge Ferguson contended that the majority took this testimony out of context.[204]

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[200] *See id.* Judge Ferguson disputed the majority's attempt to distinguish the facts of *Torres* from LaJoie's case. *See id.* Although the majority stated that *Torres* was different from LaJoie's case because in *Torres* the excluded evidence did not involve penetration, whereas LaJoie's proffered evidence did, Judge Ferguson maintained that in *Torres* the Ninth Circuit did not consider the nature of the evidence at all. *See id.* Rather, the Ninth Circuit in *Torres* only dealt with the preliminary question of whether the victim displayed an uncommon knowledge of sexual terminology, and finding that the victim did not, determining the relevance of the evidence was unnecessary. *Id.* Judge Ferguson insisted that the Ninth Circuit did not need to even consider the nature of the evidence in LaJoie's case because VN, like the victim in *Torres*, had knowledge of sexual terminology that fit her age. *See LaJoie*, 217 F.3d at 677.

[201] *See id. See also supra* note 19 and accompanying text.

[202] *See LaJoie*, 217 F.3d at 677. Judge Ferguson argued that the prosecution sought to convince jurors that VN's medical condition was consistent with repetitive sexual injuries. *Id.* Furthermore, the evidence that LaJoie offered did not match VN's medical condition because most of it did not involve penetration and could not have caused VN any sexual injury. *Id.* at 678. Judge Ferguson conceded that the rape of VN by Watkins did involve penetration, however, he contended that one rape could not have explained the repetitive injury. *Id.*

[203] *See id.*

[204] *See LaJoie*, 217 F.3d at 667 n.4, 677. Judge Ferguson argued that the expert's testimony, considered in context, shows that he responded in this way because he had not reviewed VN's file and he could not remember the details of VN's history of abuse and therefore could not rule out Watkins' role in causing her injuries. *Id.* at 677.

Notably, Judge Ferguson found that LaJoie's case fell squarely under a previous Ninth Circuit case where the state convicted the defendant of carnal knowledge of a female less than sixteen years of age.[205] In *Payne,* the court rejected Payne's argument that the exclusion of this evidence violated the Sixth Amendment because the court determined that the evidence was more prejudicial than probative.[206] Judge Ferguson reasoned that the Ninth Circuit's holding in *Payne* stands for the proposition that if the proffered evidence (in LaJoie's case, a one time sexual injury; in *Payne* heavy petting) does not provide an alternative explanation for a medical condition (in LaJoie's case, repetitive sexual injury; in *Payne*, multiple episodes of sexual intercourse), the trial court does not violate the defendant's constitutional rights in refusing to admit the evidence.[207] Thus, Judge Ferguson concluded that the evidence offered by LaJoie at trial was irrelevant.[208]

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[205] *See United States v. Payne,* 944 F.2d 1458, 1461 (9th Cir. 1991). The trial court refused to allow Payne to present evidence that the victim had engaged in heavy petting in a trailer with someone else. *Id.* at 1468. Similar to LaJoie's case, an expert testified, at the trial in *Payne*, that the condition of the twelve-year-old victim's vagina was consistent with multiple episodes of sexual injury. *Id.* at 1470.

[206] *See id.* at 1469-1470. In *Payne,* the Ninth Circuit explained that at trial, the defendant offered no expert testimony in support of his argument that possible digital penetration during the petting incident could explain the condition of the victim's hymen and vagina. *Id.* at 1469. Therefore, the incident had minimal, if any, probative value as rebuttal to the State's medical evidence, and excluding it did not violate Payne's confrontation rights. *See Payne*, 944 F.2d at 1470. Judge Ferguson asserted that other circuits have also held that where the evidence the defendant offers does not alternatively explain the State's medical evidence, it is not error to exclude such evidence. *See LaJoie*, 217 F.3d at 678-679. *See, e.g.,* Jones v. Goodwin, 982 F.2d 464, 469-470 (11th Cir. 1993) (held that petitioner did not have a constitutional right to introduce evidence of the victim's prior sexual conduct when the State did not rely on evidence of virginity); United States v. Eagle Thunder, 893 F.2d 950, 954 (8th Cir. 1990) (held that trial court did not err when it refused to admit evidence of a non-recent hymenal tear because it could not provide alternative explanation for a recent one).

[207] *See LaJoie*, 217 F.3d at 679. Judge Ferguson further concluded that the proffered evidence was irrelevant as to the question of VN's credibility because the jury had sufficient information to determine VN's credibility. *Id.* LaJoie professed his innocence when he took the stand, two teachers testified for the defense that VN was not honest and LaJoie was able to vigorously cross-examine VN regarding her motives in reporting him for rape. *Id.*

[208] *See id.* He concluded that the evidence was irrelevant because, (1) it would not provide an alternative explanation for VN's knowledge of sexual vocabulary because her vocabulary was normal for her age, (2) it would not give jurors an alterna-

2. The Oregon Supreme Court Properly Applied the Lucas *Test*

Judge Ferguson believed that the majority incorrectly concluded that the Oregon Supreme Court failed to fulfill its constitutional duty under *Michigan v. Lucas*.[209] He noted specific references in the Oregon Supreme Court's opinion that demonstrate that the Oregon Supreme Court properly considered the facts in LaJoie's case to determine whether the exclusion of the evidence violated LaJoie's Sixth Amendment rights.[210] Accordingly, Judge Ferguson reasoned that the Oregon Supreme Court fulfilled its duty under *Lucas* by considering the specific facts in LaJoie's case.[211]

3. Proper Exclusion of the Evidence

Judge Ferguson also maintained that the Oregon Supreme Court properly upheld the trial court's exclusion of the evidence.[212] After balancing the interests of the State, the victim, and LaJoie, he concluded that exclusion of the evidence of VN's past history of sexual abuse did not violate LaJoie's

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tive explanation for her medical condition, and (3) it was inadmissible to attack VN's credibility. *Id.* at 679. Although the dissent asserts that the inquiry should end with the determination that the proffered evidence was irrelevant, the dissent nonetheless analyzes whether the State's interests in excluding it outweighed LaJoie's interests in presenting it. *See LaJoie*, 217 F.3d at 679-680.

[209] *See id.* at 680. The Ninth Circuit, in line with other circuits, has held that *Lucas* requires case-by-case balancing by the court of the particular facts in the petitioner's case to determine whether restrictions on a criminal defendant's rights are arbitrary or disproportionate to the purposes the restrictions are designed to serve. *See supra* note 169 and accompanying text. Contrary to the majority's assertions, Judge Ferguson's opinion asserted that the Oregon Supreme Court did not analyze LaJoie's case in the abstract. *See LaJoie*, 217 F.3d at 680.

[210] *See LaJoie*, 217 F.3d at 680. The specific parts of the Oregon Supreme Court opinion noted by the dissent in which that court discussed the particular facts in LaJoie's case are: (1) "under the specific facts presented here, we hold that such a failure [to comply with the statute's notice provision] does . . . require [preclusion] and that the requirement is constitutional"; and (2) "[w]e next consider the subconstitutional question whether OEC 412 required preclusion as a mandatory sanction under the facts of this case." *Id.*

[211] *See id.* at 680. Judge Ferguson reasoned that the majority's finding that the Oregon Supreme Court failed to address the facts in LaJoie's case, pursuant to its duty under *Lucas*, could not be squared with the language in the Oregon Supreme Court's opinion. *Id.*

[212] *See id.*

constitutional rights.[213] Judge Ferguson contended that the State had valid reasons for excluding the evidence and its interests in doing so substantially outweighed LaJoie's interests in admitting the evidence.[214] He noted that the 15-day notice period serves several compelling interests and that the Oregon rape shield statute constituted a valid legislative determination that child rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.[215]

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[213] *See LaJoie*, 217 F.3d at 680.

[214] *See id.* Judge Ferguson took strong exception to the majority's broad assertion that "because the alleged victim was a ten-year old at the time of trial . . . the interest of the victim in eight extra days of repose is far outweighed by the probativeness of the excluded evidence." *Id.* at 680-681. Judge Ferguson declared that this broad statement about ten-year old children creates an "unprincipled exception to the notice requirement whenever defendants have victimized children. *Id.* Notably, Judge Ferguson stated that the majority failed to cite any authority for this general proposition about children and their interests in repose. *Id.* To the contrary, Judge Ferguson pointed to United States Supreme Court authority, also acknowledged by the majority, that the well being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his accusers in court. *See LaJoie*, 217 F.3d at 680-681 (citing Maryland v. Craig, 497 U.S. 836, 853 (1982)). *See also* New York v. Ferber, 458 U.S. 747, 756-757 (1982) (held that it is evident that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling).

[215] *See LaJoie*, 217 F.3d at 680-681. The compelling interests enumerated by Judge Ferguson were: (1) permitting children to stop worrying about whether they will be forced to describe experiences of sexual abuse; (2) protecting the child from the additional emotional trauma of having to prepare to recount details of sexual abuse so close to trial; (3) offering the child's guardian the opportunity to seek professional help to assist in coping with the added trauma of having to describe painful events in the courtroom; and (4) giving the State an opportunity to discuss with the victim the truthfulness of the evidence the defendant seeks to put before the jury. *Id.* For further examples of the interests served by the rape shield statute's notice requirement, the dissent cites authority from other circuits. *Id.* In *Tague v. Richards* the Seventh Circuit explained that "elimination of the risk of embarrassment furthers the state's interests in encouraging children to report cases of molestation so that perpetrators can be prosecuted." *Id.* at 681 (citing *Tague v. Richards*, 3 F.3d 1133, 1139 (7th Cir. 1993)). Similarly, in *Richmond v. Embry* the Tenth Circuit recognized that "allowing the defense to inquire as to the condoms and the male visitor would not only have subjected the [12 year old] victim to embarrassment and humiliation, but could have had the effect of deterring future victims from reporting sexual assaults." *See* Richmond v. Embry, 122 F.3d 866, 874 (10th Cir. 1997). Judge Ferguson noted that the *Lucas* Court specifically explained that Michigan's notice and hearing requirement in its rape shield statute "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and

In addition, Judge Ferguson stated that LaJoie's failure to comply with the 15-day notice requirement, even though he was aware of this evidence well in advance of the notice deadline, must be considered in weighing all the relevant interests.[216] Because LaJoie did not fulfill the 15-day notice requirement, Judge Ferguson concluded that the State and VN's interests in excluding the evidence outweighed LaJoie's interests.[217] Therefore, Judge Ferguson would have affirmed the Oregon Supreme Court.[218]

4. Any Error Did Not Sufficiently Prejudice LaJoie to Grant Habeas Relief

Judge Ferguson stated that even if the lower court committed constitutional error by excluding the evidence offered by LaJoie, the error was not so prejudicial to warrant a writ of habeas corpus.[219] He also asserted that the evidence against LaJoie was overwhelming.[220] He observed that all of the testi-

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unnecessary invasions of privacy." *See LaJoie*, 217 F.3d at 681. *See also Lucas*, 500 U.S. at 149-150.

[216] *See LaJoie*, 217 F.3d at 682. *See generally* Montana v. Egelhoff, 518 U.S. 37, 53 (1996). The Court has recognized the principle that "the introduction of relevant evidence can be limited by the State for a 'valid' reason . . . " *See Egelhoff*, 518 U.S. at 53.

[217] *See LaJoie*, 217 F.3d at 682-683. Judge Ferguson stated that the State's interests consist of protecting the child victim from revealing her tragic history, encouraging victims to report abuse, and ensuring that defendants like LaJoie comply with notice provisions when they know well in advance of trial the evidence they seek to introduce. *Id.* On the other hand, LaJoie's only interest was placing before the jury evidence that Judge Ferguson regarded as minimally relevant, if at all, and confusing. *Id.*

[218] *See id.* Judge Ferguson found that the Oregon Supreme Court reasonably upheld the trial court's exclusion of the evidence of VN's past history of sexual abuse offered by LaJoie and this exclusion did not violate LaJoie's constitutional rights. *Id.*

[219] *See LaJoie*, 217 F.3d at 682. *See also supra* Part III.A.3. Applying the "substantial and injurious effect or influence" standard articulated by the United States Supreme Court in *Brecht v. Abrahamson*, Judge Ferguson concluded that if the court committed constitutional error, the error did not warrant habeas relief. *See LaJoie*, 217 F.3d at 682. *See also Brecht*, 507 U.S. at 623. The majority applied the same standard. *See LaJoie*, 217 F.3d at 682. Judge Ferguson contended that the majority erroneously concluded that the error committed by the trial court required habeas corpus relief. *Id.*

[220] *See LaJoie*, 217 F.3d at 682. The evidence adduced at trial which Judge Ferguson regarded as overwhelming was: (1) VN's testimony that LaJoie molested and raped her almost everyday; (2) the testimony of three Children Services Division

mony at trial supported the expert's medical evidence indicating that VN had suffered repetitive sexual injuries.[221] Accordingly, he concluded that in light of the minimal probative value of the excluded evidence, and the fact that the jury learned at several points about VN's extensive history of sexual abuse by others, the exclusion of the evidence did not have a substantial and injurious effect or influence on LaJoie's defense.[222] As a result, Judge Ferguson would not have granted LaJoie a writ of habeas corpus.[223]

V. CRITIQUE

In *LaJoie v. Thompson,*[224] the Ninth Circuit improperly granted habeas relief because the trial court's exclusion of evidence of VN's past history of sexual abuse by others did not substantially undermine LaJoie's defense.[225] The United States Supreme Court in *Michigan v. Lucas* offered no definitive guidance for balancing the State's and the victim's interests against the defendant's constitutional interests under rape shield laws.[226] Even in the absence of such guidance, the prejudicial effect of the evidence, which LaJoie sought to introduce at trial, substantially outweighed its probative

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counselors about VN's consistent out-of-court statements; (3) the testimony of a police officer and a doctor that VN offered them substantially similar descriptions of LaJoie's crimes against her; and (4) the testimony of a teacher of VN during the time she lived with LaJoie that VN frequently complained that it "hurt down there." *Id.*

[221] *See id.*

[222] *See id.* at 683. Judge Ferguson argued that had the trial court permitted LaJoie to introduce the evidence of VN's history of sexual abuse, the jurors would have learned that three people assaulted her but never penetrated her and about the rape by Watkins that could only account for one sexual injury, not the repetitive sexual injuries demonstrated by the medical evidence. *Id.* Moreover, Judge Ferguson reasserted that the majority failed to address the fact that the jury learned at several points during the trial about VN's extensive history of sexual abuse by others. *See LaJoie*, 217 F.3d at 683.

[223] *See id.*

[224] 217 F.3d 663 (9th Cir. 2000).

[225] *See id.* at 673.

[226] *See Lucas*, 500 U.S. at 153. The Court remanded the case for the Michigan courts to address whether on the facts of Lucas' case preclusion violated his rights under the Sixth Amendment. *Id.* The Court expressed no opinion as to whether preclusion was justified in *Lucas* because the only issue before the Court was the per se rule adopted by the Michigan Court of Appeals that preclusion was unconstitutional in all cases where the victim had a prior sexual relationship with the defendant. *Id.*

value.[227]

A. IMPROPER APPLICATION OF THE *MICHIGAN V. LUCAS* TEST

Several Ninth Circuit decisions demonstrate that the Ninth Circuit's failure to find that the prejudicial effect of the evidence offered by LaJoie substantially outweighed its probative value is inconsistent with Ninth Circuit precedent.[228] For example, in *Wood v. Alaska*,[229] the Ninth Circuit held that evidence that the victim showed the defendant nude photographs of herself from men's magazines and that she discussed her pornographic acting experiences with him was more prejudicial than probative and was therefore inadmissible in a rape trial.[230] Although the Ninth Circuit determined that the evidence excluded in *Wood* was relevant, the Ninth Circuit concluded that the prejudicial effect of the evidence greatly outweighed its probative value because Wood presented direct evidence that he had a sexual relationship with the victim.[231]

Furthermore, the Ninth Circuit found it highly probable that the jury would improperly consider this evidence and draw conclusions that the victim was an immoral woman or that a woman with her sexual past could not be raped.[232] Accordingly, the Ninth Circuit concluded that the trial court properly excluded the evidence because the potential prejudi-

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[227] *See LaJoie*, 217 F.3d at 673.

[228] *See Wood*, 957 F.2d at 1544; *Payne*, 944 F.2d at 1458. The Ninth Circuit applied the *Lucas* balancing test in accordance with United States Supreme Court and Ninth Circuit precedent, however, the Ninth Circuit should not have granted LaJoie habeas relief because the exclusion of the evidence did not substantially undermine his defense. *See LaJoie*, 217 F.3d at 673. Although the constitutionality of the application of a rape shield statute is determined on a case-by-case basis in accordance with Ninth Circuit precedent, the Ninth Circuit's finding in *LaJoie* cannot be squared with *Wood* and *Payne*. *See* discussion *infra* Part V.A.

[229] *See* 957 F.2d 1544, 1546 (9th Cir. 1992). *See also supra* notes 137-138 and accompanying text.

[230] *See id.* at 1554.

[231] *See id.* at 1553. The Ninth Circuit found that the evidence was relevant to whether the victim had a previous sexual relationship with the defendant *Id.* The Ninth Circuit noted that the defendant himself testified that he previously had sex with the victim and he presented witnesses who testified that he and the victim were affectionate, that they went into the defendant's bedroom often and once they came out of the bedroom partially undressed. *Id. See also* text accompanying note 66.

[232] *See Wood*, 957 F.2d at-1552-1553.

cial effect substantially outweighed its slight probative value.[233]

Similarly, the Ninth Circuit in *United States v. Payne*,[234] held that evidence of the young victim's prior involvement in a "heavy petting" incident with another person was more prejudicial than probative on the issue of medical evidence of injury to the victim's hymen.[235] The Ninth Circuit noted that the defendant failed to establish any likelihood that the victim's alleged prior sexual activity could provide an alternative explanation for the medical evidence.[236] Although the defendant asserted that digital penetration of the victim possibly occurred during the "heavy petting" incident and that this penetration could explain the condition of the victim's hymen, the defendant offered no expert testimony in support of this argument.[237] Again, the Ninth Circuit concluded that the trial court appropriately excluded the evidence because the incident had minimal, if any probative value, which was outweighed by the potential prejudicial effect to the young victim.[238]

In light of Ninth Circuit precedent, the Ninth Circuit in *LaJoie* erred in concluding that the probative value of the evidence of VN's past history of sexual abuse by others out-

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[233] *See id.* at 1553-1554. The Ninth Circuit stated that this evidence would be more probative in cases where the excluded evidence would establish the bias of a crucial prosecution witness and thereby might undermine the witness' credibility and the strength of the state's entire case. *Id.* at 1554. As an exemplar of this type of situation, the Ninth Circuit noted the United States Supreme Court's holding in *Olden v. Kentucky*, 488 U.S. 227, 232-233 (1988), where the Court found a Sixth Amendment violation when the trial court excluded evidence of the rape victim's relationship with another man because the rape victim was a crucial prosecution witness and the evidence would have explained why she had a motive to lie. *See Wood*, 957 F.2d at 1554.

[234] 944 F.2d 1458 (9th Cir. 1991).

[235] *See id.* at 1469. The victim in *Payne* was the 12-year old foster daughter of the defendant. *Id.* at 1462.

[236] *See id.* at 1469.

[237] *See id.* The victim's examining physician at trial testified that the condition of the victim's vagina was consistent with multiple episodes of sexual intercourse. *See Payne,* 944 F.2d at 1470. The examining physician also testified that digital manipulation could tear the hymen but it wouldn't be expected to change the size of the vaginal canal. *Id.* Furthermore, the defense expert did not testify that digital manipulation could account for the medical evidence presented by the State. *Id.*

[238] *See id.*

weighed the danger of unfair prejudice.[239] The court maintained that because the prosecution relied on medical evidence of injuries to VN's hymen, and thereby invited the inference that LaJoie must have caused those injuries, evidence that her mother's boyfriend had raped VN became probative.[240] However, the court did not declare that the other incidents of sexual abuse included in the excluded evidence are probative on the issue of the medical condition of VN's hymen.[241]

The Ninth Circuit's conclusion in *LaJoie*, that the evidence of other acts of sexual abuse in VN's past was more probative than prejudicial, is questionable. Those acts of sexual abuse simply did not offer an alternative explanation for the presence of VN's injuries stemming from the repetitive sexual abuse by LaJoie.[242] Moreover, evidence of the one incident of rape cannot be characterized as highly probative because it similarly did not offer an alternative explanation for the medical evidence, which pointed to repetitive sexual abuse.[243] In addition VN did not display a sophisticated knowledge of sexual terminology that triggered a constitutional right to present an alternative explanation for its source.[244] Accordingly, the Ninth Circuit should not have characterized the evidence of VN's past history of sexual abuse as highly probative on the issue of VN's knowledge of sexual terminology.[245] Considering the low probative value of the excluded evidence, the Ninth Circuit should not have concluded that the jury would remain unlikely to draw an unfavorable and unwarranted impression of the young victim simply because the evidence in this case concerned non-consensual sexual abuse of a young child.

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[239] *See Wood*, 957 F.2d at 1544; *Payne*, 944 F.2d at 1458.

[240] *See LaJoie*, 217 F.3d at 671. The majority reasoned that rape is a crime that requires proof of penetration. *Id.*

[241] *See id. See also supra* note 12 and accompanying text.

[242] *See LaJoie*, 217 F.3d at 678. *See also supra* note 12 and accompanying text. The only act of abuse documented in VN's CSD case file, which involved penetration, was the rape of VN by her mother's boyfriend. *See LaJoie*, 217 F.3d at 678. *See also supra* note 202 and accompanying text.

[243] *See LaJoie*, 217 F.3d at 678.

[244] *See id.* at 676-679. *See also supra* Part IV.C.

[245] *See LaJoie*, 217 F.3d at 676-679.

B. EVEN IF THE TRIAL COURT IMPROPERLY EXCLUDED THE EVIDENCE, NO SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE RESULTED TO GRANT HABEAS CORPUS RELIEF

The Ninth's Circuit should not have concluded that a 10-year old child is less entitled to the extra eight days of repose.[246] This conclusion stands in stark contrast to the Ninth Circuit's decision in *United States v. Payne,* which held that evidence of the young victim's alleged involvement in a heavy petting incident with a person other than the defendant had low probative value and that the prejudicial effect of an obviously embarrassing situation outweighed the low probative value.[247] Even if VN was young at the time of trial, the Ninth Circuit ignored its own precedent by failing to acknowledge the highly prejudicial effect that introduction of the evidence could have on VN.[248] Judge Ferguson, who dissented, properly concluded that the majority's broad generalizations about young victims of sexual crimes created an exception to the rape shield statute's notice requirement whenever a defendant victimizes a young child.[249] As a young child, VN did not become less entitled to the protections provided by rape shield statutes from undue embarrassment and harassment. To the contrary, these protections were of great importance to VN because evidence of the prior incidents of sexual abuse in VN's past could have possibly caused the jury to improperly conclude that VN was the type of child who somehow brought this sexual abuse upon herself.[250] Thus, the Ninth Circuit should have concluded that exclusion of the evidence did not have a substantial and injurious effect on LaJoie's defense and did not warrant habeas relief.

VI. CONCLUSION

The Ninth Circuit's decision in *LaJoie* demonstrates the difficulty courts have in balancing the interests of the state, the victims and the Constitutional interests of a criminal

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[246] *See id.* at 672-673. LaJoie filed his notice eight days late under Oregon Rule 412's 15-day notice requirement. *See id.* at 665.

[247] *See Payne*, 944 F.2d at 1469.

[248] *See supra* Part V.A.

[249] *See supra* notes 177, 214 and accompanying text.

[250] *See Payne*, 944 F.2d at 1469; *Wood*, 957 F.2d at 1544.

defendant under rape shield laws. Although the Ninth Circuit properly utilized the *Lucas* balancing test to determine whether the trial court's exclusion of the evidence violated LaJoie's constitutional rights, it improperly concluded that LaJoie's interests in presenting that evidence to the jury substantially outweighed the young victim's interests in excluding it.[251]

Accordingly, the Ninth Circuit should not have granted LaJoie habeas relief since the trial court did not commit constitutional error by excluding evidence. Even if the trial court violated LaJoie's due process and Sixth Amendment confrontation and compulsory process rights, this error did not have a substantial and injurious effect or influence on LaJoie's defense. Furthermore, the Ninth Circuit improperly determined that young victims of sex crimes have less interest in remaining free from the undue harassment and embarrassment that rape shield statutes serve to prevent.[252] As a result, the Ninth Circuit improperly carved out an exception to a rape shield statute's notice requirement when the victim so happens to be a young child. The United States Supreme Court should not develop rigid guidelines to aid the circuit courts in applying the *Lucas* balancing test because the unique circumstances of every case would not permit this. Rather, to aid the circuit courts, especially in sexual assault cases involving children, the Court should entitle young victims to the same protection under rape shield statutes as adults. All young victims are entitled to this protection regardless of their age or ability to understand the court proceedings because all young victims are entitled to be shielded from any further unnecessary trauma.

*Crystal Dykman**

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[251] *See Lucas*, 500 U.S. at 151-153. *See also supra* Part III.B.1.b., note 177 and accompanying text.

[252] *See supra* notes 177, 214 and accompanying text.

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