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Criminal Law—A Formal Exercise of
Governmental Corruption: Applying the “Stream
Of Benefits” Theory to the Federal Bribery Statute.
McDonnell v. United States, 136 S. Ct. 2355
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CRIMINAL LAW—WHEN THE PILLOW TALKS: ARKANSAS’S RAPE SHIELD STATUTE BARS DNA EVIDENCE EXCLUDING THE DEFENDANT AS THE SOURCE OF SEMEN. *Thacker v. State*, 2015 Ark. 406, 474 S.W.3d 65.

I. INTRODUCTION

The jury is empaneled, seated numerically in its box. You are juror number eight, second row, second from the left. From testimony, you and your fellow jurors know that the victim was allegedly raped on her bed. The victim and eyewitness originally described the rapist as being 5’5” with blonde hair. After the media displayed the defendant’s driver’s license information, the victim and eyewitness changed their description of the rapist to being 6’0” with black hair.

The state calls an expert witness on DNA evidence. The expert testifies that it is not unusual for DNA evidence to be absent from a rape crime scene. The defense attorney asks whether the defendant’s DNA was found at the crime scene, and the expert answers, “No.” In your mind, the implication is that there is no DNA evidence at the crime scene and that is not unusual.

Would the fact that semen was present on the victim’s bedsheet and pillowcase make the question of whether the defendant was misidentified more or less probable in your mind? Suppose the state’s expert witness testified that semen was present on the victim’s bedsheets and pillowcase, where the rape occurred, and asserts that the semen did not match the defendant.

The defense points out that the state filed a motion to compel the defendant’s DNA sample to compare the DNA from the bed sheets and pillow case. Weeks before trial, the state filed two motions to exclude two state crime lab reports that conclusively exclude the defendant as the source of semen found on the victim’s bed sheets and pillow case. Would you be more or less likely to believe that the defendant was misidentified?

Part II of this note provides background on rape shield laws, concentrating on the tight line courts have to walk between protecting a rape victim’s prior sexual history and the defendant’s constitutional rights to confront witnesses and to present a defense.¹ Part III discusses the facts, procedural history, and the Arkansas Supreme Court’s analysis in *Thacker v. State*.² This note argues that the Arkansas Supreme Court was wrong in *Thacker*³ and posits that the Arkansas Supreme Court should have held that the probative value of DNA evidence in the form of another person’s semen

1. See *infra* Part II.

2. See *infra* Part III; 2015 Ark. 406, 474 S.W.3d 65.

3. See *infra* Part III; 2015 Ark. 406, 474 S.W.3d 65.

on the victim's bedsheets and pillowcase outweighed any inflammatory or prejudicial nature and that the trial court's failure to admit that evidence constituted clear error or abuse of discretion.⁴

II. BACKGROUND

This section begins by discussing the relevant history behind the enactment of rape shield statutes designed to protect victims of sex crimes from having their sexual past become the focus of trial.⁵ Next, this section analyzes the conflict that has developed between excluding evidence based on social policy justifications and protecting the defendant's constitutional rights to present a defense and to confront the witnesses against him.⁶ This section also dissects each Supreme Court of the United States opinion on this issue and discusses the framework that lower courts must use to balance the social policy behind rape shield statutes with protecting the accused's constitutional rights.⁷ This section then reviews the highest state-court decisions applying that framework to the issue of whether rape shield statutes that bar DNA evidence excluding the defendant as the source of semen violate that defendant's constitutional rights.⁸ Finally, this section concludes that Arkansas's rape shield statute is facially constitutional because it comports with the framework set forth by the Supreme Court of the United States.⁹

A. All United States Jurisdictions Have Enacted Rape Shield Statutes Based Upon Social Policy Justifications

Traditionally, a rape victim's sexual behavior was relevant and admissible in a rape prosecution.¹⁰ Prior to the adoption of rape shield statutes, American courts admitted evidence showing the alleged victim's sexual

4. See *infra* Part III.

5. See *infra* Part II.A.

6. See *infra* Part II.B.

7. See *infra* Part II.B.

8. See *infra* Part II.C.

9. See *infra* Part II.D.

10. See, e.g., Edward Imwinkelried, *Sex Crimes and Offenses in an Era of Reform, Should Rape Shield Laws Bar Proof that the Alleged Victim Has Made Similar, False Rape Accusations in the Past? Fair Symmetry with the Rape Sword Laws*, 47 U. PAC. L. REV. 709 (2016); Ya'ara Barnoon & Elena Sytcheva, *Rape, Sexual Assault and Evidentiary Matters*, 13 GEO. J. GENDER & L. 459, 460, n.7 (2012); Shawn J. Wallach, Note, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485, 487 (1997); David S. Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1, 5-8 (1976) (explaining that the common law rule favored admission of the alleged rape victim's past sexual history).

promiscuity because it was generally accepted that a promiscuous person was likely to be untruthful.¹¹ Societal mores at the time considered sexual promiscuity immoral, calling into question the individual's character.¹²

In response to criticism by a "well-publicized anti-rape movement," states began to change the common-law rule that permitted the introduction of evidence of the victim's sexual history by adopting some form of a rape shield statute.¹³ One justification that proponents of rape shield legislation advanced to restrict the admission of evidence of the alleged victim's sexual behavior was that rape victims were deterred from reporting sexually-charged crimes to avoid prosecutions that turned into an investigation of the victim's past sexual conduct.¹⁴ All United States jurisdictions accepted that argument as a justification in favor of adopting rape shield statutes.¹⁵

A woman's willingness to engage in sexual activities with one person tells the jury nothing about her willingness to consent to sexual activities with another partner.¹⁶ It is easy to defend the operation of rape shield statutes to exclude evidence that has little or no relevance to the case, such as when the accused argues that the evidence shows the alleged victim is mere-

11. See, e.g., Imwinkelried, *supra* note 10, at 713–14; Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 69 (2002).

12. Imwinkelried, *supra* note 10, at 713–14.

13. Anderson, *supra* note 10, at 54. The traditional rule that allowed such evidence was criticized by an anti-rape movement, which suggested that the rule unnecessarily subjected rape victims to public embarrassment and discouraged the reporting of rape incidents. See Rudstein, *supra* note 10, at 9 (stating "the ordeal faced by the [alleged victim] often was so harrowing that it seemed as if the alleged victim were on trial. Many critics of the traditional rules of evidence have suggested this traumatic experience is one of the reasons rape is such an under-reported crime.").

14. Imwinkelried, *supra* note 10, at 713 (adding that "[a]nother justification is that given modern sexual mores, the evidence has minimal probative value and, more specifically, sheds little light on the question of whether the alleged victim consented to intercourse with the accused."); Wallach, *supra* note 10, at 489.

15. *Rape Shield Statutes*, NAT'L DISTRICT ATTY'S ASS'N, NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE (2011), <http://ndaa.org/pdf/NCPCA%20Rape%20Shield%202011.pdf> (last visited Feb. 26, 2018) (compiling statutes for all fifty United States jurisdictions and the federal statute); see also Barnoon & Sytcheva, *supra* note 10, at 460 n.7 (quoting *People v. Summers*, 818 N.E.2d 907, 912 (Ill. App. Ct. 2004)).

The underlying policy of rape-shield statutes are to prevent the defendant from harassing and humiliating the complaining witness with evidence of either her reputation for chastity or specific acts of sexual conduct with persons other than the defendant, since such evidence has no bearing on whether she consented to sexual relations with the defendant.

Id. See generally Imwinkelried, *supra* note 10, at 713.

16. Imwinkelried, *supra* note 10, at 713.

ly promiscuous.¹⁷ Today, almost everyone would reject that argument as “antiquated and sexist.”¹⁸

There are situations where the decision of whether or not to apply a rape shield statute is difficult. Sometimes the proffered evidence is relevant to the facts of consequence in the case.¹⁹ In a rape case where the victim and the accused are strangers and the victim and an eyewitness gave prior inconsistent statements while describing the rapist, DNA evidence is relevant and crucial to the case because the source of semen could either potentially inculpate or exonerate the accused.²⁰ In these situations, it is more difficult to dismiss the defense evidence as immaterial and inconsequential.²¹ Any time there is an exclusionary rule blocking the accused’s ability to introduce critical, demonstrably reliable evidence, the accused’s constitutional rights are at stake.²²

B. Courts Balance Social Policy Justifications for Rape Shield Statutes with a Defendant’s Constitutional Rights

Commentators recognize that by restricting the admissibility of relevant evidence,²³ rape shield statutes collide with the accused’s constitutional right to present a defense.²⁴ The vast majority of courts have excluded evidence of the victim’s venereal diseases, prostitution, molestation, and general past sexual predisposition.²⁵

17. *Id.*

18. Pamela Lakes Wood, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 345 (1973) (commenting that most judges do not admit consent or chastity history as proof of character for truthfulness); see Imwinkelried, *supra* note 10, at 714.

19. Imwinkelried, *supra* note 10, at 714.

20. *Id.*

21. *Id.*

22. *Id.*

23. The exclusion of evidence under rape shield laws certainly does not offend the Constitution when such evidence is irrelevant. See, e.g., *United States v. Elbert*, 561 F.3d 771 (8th Cir. 2009) (deciding that, in a prosecution for sex trafficking of a minor, the exclusion of evidence pertaining to the alleged victim’s sexual behavior and other acts of prostitution did not violate the defendant’s due process rights because the disputed evidence was not relevant to any element of the crime charged).

24. E.g., Regan Kreitzer La Testa, *Rape Shield Statutes and the Admissibility of Evidence Tending to Show a Motive to Fabricate*, 46 CLEV. ST. L. REV. 489 (1999); Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L. J. 1245 (1989); Vivian Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 51 (1977).

25. Joel E. Smith, Annotation, *Constitutionality of “Rape Shield” Statute Restricting Use of Evidence of Victim’s Sexual Experiences*, 1 A.L.R. 4th 283 (1980) (collecting the cases); see, e.g., *United States v. Never Misses A Shot*, 781 F.3d 1017, 1029 (8th Cir. 2015) (evidence of another molestation); *United States v. Roy*, 781 F.3d 416 (8th Cir. 2015) (evidence of victim’s involvement in prostitution); *Logan v. Marshall*, 680 F.2d 1121 (6th Cir.

1. *United States Supreme Court Decisions on the Constitutionality of State Rape Shield Statutes*

The Supreme Court of the United States has decided two cases challenging the constitutionality of state rape shield statutes, *Michigan v. Lucas*²⁶ and *Olden v. Kentucky*.²⁷ In *Lucas*, the Court held that a state rape shield law was unconstitutional as applied because it adopted a *per se* rule prohibiting the admission of a victim's prior sexual conduct when the defendant failed to follow strict procedural requirements.²⁸ The Court recognized that states may enforce procedural requirements based on legitimate state interests, which may justify exclusion of the accused's proffered evidence.²⁹

In *Olden*, the Court held that judicial discretion to impose reasonable limits on the probative value of the defense evidence *must* bend its knee to the defendant's constitutional rights.³⁰ The Court has not answered the substantive question of where the line is drawn between protecting the alleged victim from disclosure of the victim's sexual history and the defendant's constitutional rights to present a defense and to confront the evidence and witnesses against him.³¹

- a. The Supreme Court of the United States did not address the key constitutional question of whether procedural requirements curtail the defendant's Sixth Amendment right to confront when it decided *Michigan v. Lucas*

In *Michigan v. Lucas*, the government charged the defendant with criminal sexual conduct after his ex-girlfriend alleged that he used a knife to force her into his apartment to engage in non-consensual sex acts.³² Michigan's rape shield statute permits a defendant to introduce evidence of the

1982) (evidence of victim's venereal disease); *Bell v. Harrison*, 670 F.2d 656, 659 (6th Cir. 1982) (excluding general request to inquire of the alleged victim about "what men she has gone out with and how long she has gone with them"); *Dunlap v. Hepp*, 436 F.3d 739, 745 (7th Cir. 2006) (evidence of child victim's sexual knowledge prior to the incident); *Hammer v. Karlen*, 342 F.3d 807 (7th Cir. 2003) (excluding evidence that children touched each other sexually prior to alleged child molestation incident); *Stephens v. Morris*, 756 F. Supp. 1137 (N.D. Ind. 1991) (hearsay testimony that rape victim had a reputation of liking sexual intercourse "doggy fashion"); *People v. Blackburn*, 128 Cal. Rptr. 864 (1976) (victim's alleged virginity and sexual predisposition).

26. *Michigan v. Lucas*, 500 U.S. 145 (1991).

27. *Olden v. Kentucky*, 488 U.S. 227 (1988).

28. *Lucas*, 500 U.S. at 153.

29. *Id.*

30. *Olden*, 488 U.S. at 232 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

31. See Lara English Simmons, Note, *Michigan v. Lucas: Failing to Define the State Interest in Rape Shield Legislation*, 70 N.C. L. REV. 1592 (1992).

32. *Lucas*, 500 U.S. at 147.

defendant's own sexual conduct with the victim, provided he files a written motion, he submits an offer of proof within ten days of arraignment, and the trial court holds an *in-camera* hearing to determine whether the evidence is admissible.³³ Lucas did not file a written motion or an offer of proof, as required by the statute.³⁴ At trial, Lucas's counsel requested that the trial court permit the defense to present evidence of a prior sexual relationship between the girlfriend and Lucas.³⁵

The trial court denied the motion due to the defendant's failure to comply with the statute's procedural requirements.³⁶ The Court considered the constitutionality of the policy behind rape shield statutes that prescribe special notice and hearing requirements for evidence of the victim's sexual history.³⁷ The Court noted that the statute did not prescribe the consequences of a defendant's failure to follow the notice requirements.³⁸ The trial judge construed the statute as authorizing the exclusion of evidence as a sanction for the accused's failure to comply with statutory notice and hearing requirements.³⁹ The Michigan Court of Appeals adopted a *per se* rule prohibiting the inclusion of evidence of a prior sexual relationship between a rape victim and a criminal defendant.⁴⁰

While the Court recognized that probative evidence may be precluded in certain circumstances when a criminal defendant fails to comply with a valid procedural rule, it held that a *per se* rule barring admission of the victim's prior sexual conduct is unconstitutional.⁴¹ The Court cited its rulings in *United States v. Nobles*⁴² and *Taylor v. Illinois*,⁴³ pointing to circumstances where the defense evidence was probative but appropriately excluded because the defendant failed to comply with a valid discovery rule.⁴⁴

In *Nobles*,⁴⁵ the defense hired an investigator who interviewed prosecution witnesses prior to trial.⁴⁶ The defendant relied on the investigator's written report to cross-examine prosecution witnesses for impeachment purposes.⁴⁷ When the defense called the investigator, the District Court ruled that,

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 145.

37. *Id.*

38. *Lucas*, 500 U.S. at 149.

39. *Id.*

40. *Id.* at 151, 153.

41. *Id.*

42. *United States v. Nobles*, 422 U.S. 225 (1975).

43. *Taylor v. Illinois*, 484 U.S. 400 (1988).

44. *Lucas*, 500 U.S. at 151-52.

45. *United States v. Nobles*, 422 U.S. 225 (1975).

46. *Id.* at 227.

47. *Id.*

at the end of the impeachment testimony, a copy of the report would have to be submitted to the prosecution.⁴⁸ Defense counsel stated that he did not intend to produce the report, and the District Court ruled that the investigator would not be permitted to testify about his interviews with the witnesses.⁴⁹ The Court upheld the District Court's ruling because the judiciary's compulsory processes may require the production of evidence necessary for "full disclosure of all the facts, within the framework of the rules of evidence."⁵⁰

The Court also held that failure to comply with procedural requirements or a court order, may warrant preclusion as a "proper method of assuring compliance with its order."⁵¹ The Court rejected the defendant's Sixth Amendment claim, explaining that "[t]he Sixth Amendment does not confer the right to present testimony free from the *legitimate demands* of the adversarial system."⁵²

The Court pointed out that the defendant was not deprived of his right to compulsory process or cross-examination because the District Court did not bar the investigator's testimony.⁵³ The District Court merely prevented the defendant from presenting to the jury "a partial view of the credibility issue by adducing the investigator's testimony," while at the same time refusing to disclose the report.⁵⁴ The Court noted that the Sixth Amendment does not confer the right to present testimony free from the demands of an adversarial system and cannot be invoked for presenting a half-truth.⁵⁵

In *Taylor*, the trial court sanctioned a defendant for "willful misconduct" that was designed to obtain "a tactical advantage" based on his violation of a state procedural rule.⁵⁶ The defendant failed to identify a defense witness in pretrial discovery, and the trial court refused to allow the witness to testify.⁵⁷ The Court rejected the defendant's Sixth Amendment claim that "preclusion is *never* a permissible sanction for a discovery violation."⁵⁸ The Court acknowledged that "alternative sanctions would be adequate and appropriate in most cases" but explained that there are some circumstances where preclusion is justified because a less severe penalty "would perpetuate rather than limit the prejudice to the State and the harm to the adversary

48. *Id.*

49. *Id.*

50. *Id.* at 230–231 (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)).

51. *Nobles*, 422 U.S. at 241.

52. *Id.* (emphasis in original).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Taylor v. Illinois*, 484 U.S. 400, 416–417 (1988).

57. *Id.* at 415.

58. *Id.* at 414 (emphasis in original).

process.”⁵⁹ The Court held that “regardless of whether prejudice to the prosecution could have been avoided” by a lesser penalty, “the severest sanction was appropriate” because the defendant’s actions were egregious.⁶⁰

The Court extended its analyses in *Nobles* and *Taylor* to *Lucas*.⁶¹ In *Lucas*, the Supreme Court held that these procedural requirements serve legitimate state interests of protecting the victim against surprise, harassment, and unnecessary invasions of privacy, which also protect the prosecution from surprise.⁶² The Court also held that these interests might justify exclusion of the accused’s proffered evidence in appropriate cases.⁶³

The Court did not decide whether Michigan’s statute authorized the remedy of preclusion or whether such a remedy would violate the accused’s Sixth Amendment rights.⁶⁴ *Lucas*’s significance is limited because it only establishes the principal of law that procedural statutory requirements serve legitimate state interests in protecting the victim, which can justify exclusion of the accused’s proffered evidence in appropriate cases.⁶⁵ *Lucas* does not explicitly state which types of evidence may be appropriately excluded, and it does not answer the key constitutional question of where the line is drawn between protecting the alleged victim from disclosure of the victim’s sexual history and the defendant’s constitutional rights to present a defense and to confront the evidence and witnesses against him.⁶⁶ *Nobles* may serve as a guide for determining which types of evidence are likely to be excluded for failure to follow procedural requirements, such as the preclusion of evidence that only permits a partial view or half-truth to the jury on a credibility issue.⁶⁷

59. *Michigan v. Lucas*, 500 U.S. 145, 152 (1991) (quoting *Taylor v. Illinois*, 484 U.S. 400, 413 (1988)).

60. *Id.* at 152.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* On remand, the Michigan court held that under certain circumstances, the state’s statute permits preclusion of evidence of the defendant’s past sexual conduct with the victim for failure to comply with statutory notice and hearings requirements. *People v. Lucas*, 193 Mich. App. 298, 484 N.W.2d 685 (1992); see also *Simmons*, *supra* note 31, at 1616–22 (criticizing the Supreme Court for failing to describe the nature of the state’s purpose in protecting complaining witnesses, a crucial factor in determining the proper balance between goals of rape shield laws and rights of accused).

65. *Lucas*, 500 U.S. at 152.

66. See *Simmons*, *supra* note 31, at 1616–22.

67. *United States v. Nobles*, 422 U.S. 225, 241 (1975).

- b. *Olden v. Kentucky* guides trial courts on how to find a balance between the defendant's Confrontation Clause rights and the justification behind state rape shield statutes

The Court provided some clarity in *Olden v. Kentucky*, where it was confronted with the question of whether the trial court erred when it refused to permit the accused to cross-examine the complaining witness regarding her cohabitation with her boyfriend.⁶⁸ In *Olden*, the defense claimed that the alleged victim fabricated the alleged sexual assault in order to protect herself from her live-in boyfriend discovering that she cheated on him.⁶⁹ The trial court judge prohibited questions designed to reveal to jurors the existence of a live-in relationship, based on the judge's concern that Kentucky jurors would be prejudiced against the white complaining witness if they learned that her live-in boyfriend was black.⁷⁰ The trial court prohibited defense counsel from cross-examining the witness about her living arrangements even after she lied on the witness stand by stating on direct examination that she was living with her mother.⁷¹

On appeal, Olden asserted that the trial court's refusal to allow him to impeach the complaining witness's testimony by introducing evidence supporting a motive to lie deprived him of his Sixth Amendment right to confront witnesses against him.⁷² The Kentucky Court of Appeals explicitly agreed with Olden that the fact that the complaining witness was living with her boyfriend at the time of trial was not barred by Kentucky's rape shield statute.⁷³ In spite of that finding, it held that the evidence was properly excluded because "'its probative value [was] outweighed by its possibility for prejudice.'"⁷⁴

The Supreme Court, acknowledging that the evidence was relevant to Olden's theory of defense and citing its holding in *Davis v. Alaska*, held that "[s]peculation as to the effect of jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the defendant's proffered] testimony."⁷⁵ The *Olden* Court held that the Confrontation Clause of the Sixth Amendment requires the defendant to be able to expose to the jury facts which may challenge the reliability of a witness.⁷⁶

68. *Olden v. Kentucky*, 488 U.S. 227 (1988).

69. *Id.*

70. *Id.* at 230–32.

71. *Id.* at 230.

72. *Id.*

73. *Id.* (citing KY. REV. STAT. ANN. § 510.145).

74. *Olden*, 488 U.S. at 230 (citing App. to Pet. for Cert. A6).

75. *Id.* at 231.

76. *Id.* at 232–33 (citing *Davis v. Alaska*, 415 U.S. 308, 315–17 (1974); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)).

The Court held that the Kentucky Court of Appeals failed to accord proper weight to Olden's Sixth Amendment right "to be confronted with the witnesses against him," which has been incorporated in the Fourteenth Amendment, and is available in state proceedings.⁷⁷ The Court noted that Olden's right to be confronted with witnesses against him includes the right to conduct reasonable cross-examination.⁷⁸ Reasonable cross-examination includes the right to impeach, subject to "the broad discretion of the trial court judge to preclude repetitive and unduly harassing interrogation."⁷⁹

The Court noted that a reasonable jury might have received a significantly different impression of the witness's credibility concerning whether the complaining witness had a motive to lie had defense counsel been permitted to pursue his proposed line of questioning on cohabitation.⁸⁰ Judicial discretion to impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, and to take account of factors such as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant,"⁸¹ must bow its knee to the defendant's constitutional rights.⁸²

The Court noted its holding in *Delaware v. Van Arsdall*, that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to . . . harmless error analysis."⁸³ The factors that courts must consider when reviewing for harmless error include:

the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case.⁸⁴

The Court held that the complaining witness's testimony was central and crucial to the prosecution's case; thus, the Court held that it was impossible to conclude "beyond a reasonable doubt" that the restriction on Olden's right to confrontation was harmless.⁸⁵

77. *Id.* at 231 (citing *Pointer v. Texas*, 380 U.S. 400 (1965)).

78. *Id.* (citing *Davis v. Alaska*, 415 U.S. 308 (1974)).

79. *Id.* (quoting *Davis*, 415 U.S. at 316) (explaining that "expos[ing] . . . 'a witness' motivation in testifying is a proper and important function of the [defendant's] constitutionally protected right of cross-examination.").

80. *Olden*, 488 U.S. at 232 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)).

81. *Id.* (quoting *Van Arsdall*, 475 U.S. at 680).

82. *Id.*

83. *Id.* at 232-33 (internal citations omitted).

84. *Id.* (citing *Van Arsdall*, 475 U.S. at 680).

85. *Id.*

c. There is no bright-line rule post-*Lucas* and *Olden*

The Court decided *Lucas*⁸⁶ on procedural grounds and not on the substantive question of where the line is drawn between protecting the victim from divulging sensitive information concerning her sexual history and the defendant's constitutional rights to present a defense and to confront witnesses against him.⁸⁷ *Lucas* establishes that procedural requirements serve legitimate state interests that can justify the exclusion of defense evidence in appropriate cases, which is a proposition of law that the defendant did not challenge.⁸⁸ *Lucas* is limited in that it does not establish which types of cases or which evidence may be appropriately excluded and failed to answer the constitutional question of where the line is drawn between protecting the alleged victim from disclosure of the victim's sexual history and the defendant's constitutional rights to present a defense and to confront the evidence and witnesses against him.⁸⁹ *Olden* extends the *Van Arsdall* factor test to cases where the defendant's constitutional confrontation rights are pitted against the state's rape shield statute.⁹⁰ *Olden* requires courts to conduct the *Van Arsdall* factor test⁹¹ to determine when courts unconstitutionally infringe on a defendant's constitutional rights to present a defense and to confront witnesses by excluding defense evidence pursuant to a rape shield statute.⁹²

C. The Majority of States Hold that Exclusion of DNA Evidence Excluding the Defendant as the Source of Semen Is Unconstitutional

Many states have held that a trial court abuses its discretion in violation of the defendant's constitutional rights when it excludes evidence of another person's semen found on the victim's clothing.⁹³ The highest courts in Florida,⁹⁴ Michigan,⁹⁵ and West Virginia⁹⁶ have been confronted with the issue of whether to admit evidence of another person's semen pursuant to their re-

86. *Michigan v. Lucas*, 500 U.S. 145 (1991).

87. *Id.*

88. *Id.* at 149 ("Lucas does not deny that legitimate state interests support the notice-and-hearing requirement.").

89. *See supra* Part II.B.1(a).

90. *Olden*, 488 U.S. at 232 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)).

91. *Id.*

92. *Id.*

93. *State v. Timothy C.*, 787 S.E.2d 888, 897–900 (W. Va. 2016); *People v. Command*, No. 259296, 2006 WL 1237093, *2–5 (Mich. Ct. App. 2006); *Teemer v. State*, 615 So.2d 234, 236 (Fla. Dist. Ct. App. 1993).

94. *Teemer*, 615 So.2d at 236.

95. *Command*, 2006 WL 1237093 at *2.

96. *Timothy C.*, 787 S.E.2d at 898.

spective rape shield statutes. Each state reversed and remanded the trial court's failure to admit the evidence as a violation of the defendant's constitutional rights to present a defense and to confront the evidence against him.

1. *The Florida Supreme Court Held its Rape Shield Statute Unconstitutional as Applied for Barring Evidence of Another Person's Semen Found in the Victim's Rape Kit*

In *Teemer*, the victim reported that she was penetrated anally and that the rapist ejaculated;⁹⁷ however, the rape kit revealed no evidence of trauma or semen in the victim's anal cavity, but semen was removed from the victim's vagina and cervix.⁹⁸ The state sought an order to compel the defendant's DNA sample, which was granted.⁹⁹

After receiving the results from the state crime lab excluding the defendant as the source of semen, the state sought to exclude the results of the DNA test.¹⁰⁰ The state argued the DNA test results were irrelevant because the victim reported that she was penetrated anally.¹⁰¹ It further argued that any semen found in her vaginal cavity or cervix was not probative of the identity of her attacker, but was only probative of her prior sexual conduct.¹⁰² The defense argued that it was not seeking to admit the evidence to delve into victim's prior sexual conduct;¹⁰³ rather, the DNA test results excluding the defendant as the source of semen were crucial to its defense of misidentification.¹⁰⁴

The Florida Supreme Court aptly noted that if Florida's rape shield statute precludes a defendant from presenting a full and fair defense, then "the statute would have to give way to these constitutional rights."¹⁰⁵ The court accepted the defense's argument that the DNA test results were relevant to the defense of misidentification, even though the victim reported that she had been penetrated anally and that the perpetrator ejaculated.¹⁰⁶ The court held that the trial court's exclusion of the DNA test result was an un-

97. *Teemer*, 615 So.2d at 235.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 235.

103. *Teemer*, 615 So.2d at 235.

104. *Id.*

105. *Id.* at 236 (quoting *Roberts v. State*, 510 So.2d 885, 892 (Fla. 1987) (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973), *cert. denied*, 485 U.S. 943 (1988)); *Lewis v. State*, 591 So.2d 922, 925 (Fla. 1991)).

106. *Id.* at 236.

constitutional limitation on the defendant's ability to present a full and fair defense.¹⁰⁷ The court reversed and remanded the case for a new trial.¹⁰⁸

2. *The Michigan Supreme Court Held its Rape Shield Statute Unconstitutional as Applied when it Barred Evidence of Another Person's Semen on the Victim's Underwear*

In *People v. Command*,¹⁰⁹ the defendant argued that the trial court improperly excluded evidence that semen from someone other than the defendant was found in the complainant's underwear only fourteen hours after the alleged assault.¹¹⁰ The Court of Appeals noted that prohibiting a defendant from questioning a victim encourages the reporting and prosecution of sexual offenses and protects legitimate expectations of privacy;¹¹¹ however, the arbitrary application of the state's rape shield statute may interfere with a defendant's Sixth Amendment right to confront the witnesses against him¹¹² because "[t]he extent that [the rape shield statute] operates to prevent a criminal defendant from presenting relevant evidence, the defendant's ability to confront adverse witnesses and present a defense is diminished."¹¹³

The Court of Appeals held that the defendant's right to due process of law is implicated by application of a rule that would exclude relevant, exculpatory evidence.¹¹⁴ The Court of Appeals stated that, "[d]efendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment."¹¹⁵ The Court of Appeals reasoned that it would be an abuse of discretion to exclude potentially exculpatory evidence on the basis of the Michigan's rape shield statute because a defendant has a constitutional right to present exculpatory evidence.¹¹⁶

The Court of Appeals held that the trial court abused its discretion in applying the rape shield statute to exclude exculpatory DNA evidence because the evidence was relevant to whether someone other than the defend-

107. *Id.*

108. *Id.*

109. *People v. Command*, No. 259296, 2006 WL 1237093, *2–*5 (Mich. Ct. App. 2006), *rev'd on other grounds*, *People v. Command*, 722 N.W.2d 427 (Mich. 2006) (reversing only portion of the Court of Appeals judgment that precluded on retrial evidence that the defendant previously committed a non-consensual sexual penetration of a prior complainant).

110. *Id.* at *2.

111. *Id.* (citing *People v. Arenda*, 330 N.W.2d 814 (Mich. 1982)).

112. *Id.* at *5 (citing *People v. Adair*, 550 N.W.2d 505 (Mich. 1996)).

113. *Id.* (quoting *Michigan v. Lucas*, 500 U.S. 145 (1991)).

114. *Id.* at *4 (citing *People v. Stanaway*, 446 Mich. 643, 662–680 (Mich. 1994)).

115. *Command*, 2006 WL 1237093 at *11 (quoting *Stanaway*, 446 Mich. at 662–680, citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

116. *Id.* at *11–*12 (citing *People v. Barrera*, 547 N.W.2d 280 (Mich. 1996)).

ant was responsible for the victim's injuries, and the court reversed and remanded the case for a new trial.¹¹⁷ On appeal, the Michigan Supreme Court reversed only the portion of the Court of Appeals decision excluding evidence of the defendant's prior bad acts.¹¹⁸ The Michigan Supreme Court upheld the Court of Appeals decision holding the state's rape shield statute unconstitutional as applied.¹¹⁹

3. *The Supreme Court of Appeals of West Virginia Held its Rape Shield Statute Unconstitutional as Applied when it Barred Evidence of Another Person's Semen on the Victim's Shirt*

The Supreme Court of Appeals of West Virginia reversed and remanded a trial court's decision to exclude evidence of another person's semen on the alleged victim's shirt.¹²⁰ The state filed two motions to compel the defendant's DNA sample, noting that the presence of semen was consistent with the alleged victim's statement that the defendant made her perform oral sex on him.¹²¹ The trial court granted the motion.¹²²

After receiving the test results excluding the defendant as the source of semen, the state filed a motion *in limine* seeking to exclude the evidence as being irrelevant, overly prejudicial, and violative of the state's rape shield law.¹²³ In response, the defendant "maintained [that] the absence of his DNA was relevant to support his defense of innocence; was crucial to his defense; was potentially exculpatory evidence; and was crucial to his receipt of a fair trial."¹²⁴ The trial court excluded the DNA test result pursuant to the state's rape shield statute.¹²⁵

The West Virginia Supreme Court held that, because the defendant's defense was his innocence, identity-related information was critical to his defense and fell outside the purpose of the state's rape shield law.¹²⁶ The court stated that "the [defendant's] purpose . . . does not thwart the goal of [the state's rape shield statute], which '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 factfinding (sic) process.'"¹²⁷ The

117. *Id.* at *8–*10.

118. *People v. Command*, 722 N.W.2d 427, 428 (Mich. 2006).

119. *Id.*

120. *State v. Timothy C.*, 787 S.E.2d 888, 892 (W.Va. 2016).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Timothy C.*, 787 S.E.2d at 898.

127. *Id.*

court held that excluding evidence of another person's semen on the alleged victim's shirt violated the defendant's due process right to a fair trial.¹²⁸

D. Arkansas's Rape Shield Statute Is Facially Constitutional because it Permits Defendants to Admit Relevant and Probative Evidence of the Alleged Victim's Prior Sexual Conduct

The purpose of Arkansas's rape shield statute is to protect victims of rape or sexual abuse from the humiliation of having their personal conduct, unrelated to the charges pending, paraded before the jury and public when the conduct is irrelevant to the defendant's guilt.¹²⁹ Under Arkansas's rape shield statute, evidence of a victim's prior sexual conduct is not admissible by the defendant to attack the credibility of the victim, to prove consent or any other defense, or to assert any other reason.¹³⁰

Arkansas's rape shield statute grants an exception where the circuit court, at an *in camera* hearing, makes a written determination that such evidence is relevant to a fact at issue and that its probative value outweighs its inflammatory or prejudicial nature.¹³¹ The statute is not a complete bar to evidence of a victim's prior sexual conduct, but rather makes admissibility discretionary with the circuit court pursuant to procedures set out in the statute.¹³² That being said, the Arkansas Supreme Court treats the introduction of prior sexual conduct to attack the credibility of the victim unfavorably.¹³³ Circuit courts are vested with wide discretion in deciding whether evidence is relevant and admissible, and the Arkansas Supreme Court will not overturn a decision without "clear error or manifest abuse of discretion."¹³⁴

III. ARGUMENT

The facts and procedural history of *Thacker* contribute to the result reached by the Arkansas Supreme Court. At trial, Thacker sought to admit evidence of another person's semen on the victim's bedsheets and pillowcase, where the alleged rape occurred, to support his defense of misidentifi-

128. *Id.* at 899.

129. *Stewart v. State*, 2012 Ark. 349 at *5, 423 S.W.3d 69, 72.

130. ARK. CODE ANN. § 16-42-101(b) (2017).

131. ARK. CODE ANN. § 16-42-101(c) (2017).

132. *Id.*

133. *State v. Kendall*, 2012 Ark. 262, at *5, 428 S.W.3d 486, 489–90.

134. *Allen v. State*, 374 Ark. 309, 313, 287 S.W.3d 579, 582 (2008) (holding that "[Arkansas appellate] court[s] will not reverse the circuit court's decision as to the admissibility of rape-shield evidence unless its ruling constituted clear error or a manifest abuse of discretion."). *But see* Robert Steinbuch & Esther Seitz, *Unscrambling the Confusion: Applying the Correct Standard of Review for Rape-Shield Evidentiary Rulings*, 34 AM. J. TRIAL ADVOC. 281, 289 (2010) (arguing that the "clear error or abuse of discretion" standard does not exist).

cation.¹³⁵ The trial court determined that another person's semen on the victim's bedsheets and pillowcase was protected by the rape shield statute and excluded the evidence.¹³⁶

The Arkansas Supreme Court issued a plurality opinion in *Thacker*, which is not entitled to precedential weight.¹³⁷ The plurality opinion held that (1) semen stains belonging to someone other than the defendant are not probative; (2) at best, the semen stains show that the victim had sex prior to the rape, which is a clear violation of the rape shield statute and the purpose for which it exists; and (3) the prejudicial effect of embarrassing and humiliating the victim is high and outweighs the slight probative value of the evidence.¹³⁸

This section argues that the Arkansas Supreme Court's plurality opinion misconstrues the trial record to arrive at its conclusion, that the concurring opinion's procedural concerns are misguided, and that the dissenting opinion reached the correct conclusion but failed to conduct the constitutional analysis required by *Lucas*,¹³⁹ *Olden*,¹⁴⁰ and *Van Arsdall*.¹⁴¹

A. A Combination of the Facts and Procedural History of *Thacker v. State* Contributed to the Court's Divided Analysis

1. *The Statement of Facts in Thacker v. State Are Gripping*

In 2012, Crystal Hilborn woke up to a man's hands gripping her neck and choking her,¹⁴² hissing "yeah, you bitch. Yeah, you fucking bitch."¹⁴³ Hilborn tried to fight off the rapist, but was restrained.¹⁴⁴ The man told Hilborn that he "need[ed] [her] to get [him] hard."¹⁴⁵ He "started to masturbate and he told [her] to turn around and bend over on top of the bed."¹⁴⁶ Hilborn

135. *Thacker v. State*, 2015 Ark. 406, 474 S.W.3d 65.

136. *Id.* at *5-*6, 474 S.W.3d at 68.

137. *See* *Neil v. Biggers*, 409 U.S. 188 (1972) (an affirmance by an equally divided Court is not entitled to precedential weight); *accord* *Jones v. State*, 83 Ark. App. 186, 119 S.W.3d 48 (Ark. 2003) (citing *France v. Nelson*, 292 Ark. 219, 221, 729 S.W.2d 161, 163 (1987)). Only the results of a plurality decision are considered authoritative. *See, e.g.*, Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Opinions*, 42 DUKE L. J. 419, 420–21 (1992).

138. *See infra* Part III.A.3(a).

139. *Michigan v. Lucas*, 500 U.S. 145 (1991).

140. *Olden v. Kentucky*, 488 U.S. 227 (1988).

141. *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).

142. *Thacker v. State*, 2015 Ark. 406, at *1, 474 S.W.3d 65, 66.

143. Trial Tr., 690-691, July 2, 2014, *Thacker*, 2015 Ark. 406, 474 S.W.3d 65 [hereinafter Transcript of Record].

144. Transcript of Record, *supra* note 143, at 691.

145. *Id.* at 692.

146. *Id.* at 691.

bent over on top of the bed on all fours.¹⁴⁷ The man began to penetrate Hilborn digitally.¹⁴⁸ He forced Hilborn to perform oral sex.¹⁴⁹ The man stated, “I can’t believe I’m doing this. My DNA is all over this place.”¹⁵⁰ Hilborn stated that the man had trouble maintaining an erection.¹⁵¹ The man pushed Hilborn into the bathroom and forced her to engage in anal intercourse.¹⁵² When he stopped to reach for a lubricant, Hilborn jumped out of an open bathroom window, ran across the street to a neighbor’s house, and called 911.¹⁵³

On the night of the incident, Hilborn told Officer Johnson that “she could not see very well but could tell her attacker was a white male, but was unsure of any other physical description.”¹⁵⁴ At trial, Hilborn testified that “no man comes in my house . . . [t]here is no company in my house. It’s just me and my daughter. We do not have anyone else that come (sic) into my home. I do not have any platonic guy friends. No, that—that’s it.”¹⁵⁵ She testified that she was in the early stages of dating a man, but that they “hadn’t even been intimate.”¹⁵⁶

Police found Thacker’s wallet in Hilborn’s bedroom.¹⁵⁷ When asked who Jonathan Thacker was, Hilborn stated that she “didn’t have any earthly idea who it was.”¹⁵⁸ Police showed Hilborn Thacker’s driver’s license photograph on the night of the incident, but she did not recognize him.¹⁵⁹ It was not until after a local media outlet displayed the same photo of Thacker and labeled him as a person of interest in the rape that Hilborn told the police that Thacker was the man that raped her.¹⁶⁰ The state asked Hilborn if she

147. *Id.*

148. *Id.* at 691.

149. *Id.* at 693.

150. Transcript of Record, *supra* note 143, at 694.

151. *Id.* at 695.

152. *Id.* at 696–98.

153. *Id.* at 699–701.

154. *Id.* at 691.

155. *Id.* at 707.

156. Transcript of Record, *supra* note 143, at 711 (“[j]ust flirting with each there (sic), yeah, and stuff like that.”).

157. Thacker v. State, 2015 Ark. 406, at *2, 474 S.W.3d 65, 66.

158. Transcript of Record, *supra* note 143, at 287–311.

159. *Id.* at 286–87.

160. *Id.* at 297 (“That’s when Channel 4 News was there and they showed me his picture. And from the minute they showed me his picture, I immediately recognized him from the bathroom. It’s like when you guys showed it to me at first . . . I didn’t.”). Indeed, this case garnered significant attention from the media from the time it was first reported to police until the Arkansas Supreme Court released this opinion. See Megan Reynolds, *Police Seeking Man in Connection with Friday Morning Rape*, THE CABIN (Sept. 17, 2012), <http://thecabin.net/news/local.2012-09-17/police-seeking-man-connection-friday-morning-rape?page=3> (displaying Thacker’s driver’s license photograph); Megan Reynolds, *Police Arrest Suspect in Rape Case*, THE CABIN (Sept. 18, 2012), <http://thecabin.net/news/>

believed that the defendant ejaculated that night, and she answered, “I do not believe he did.”¹⁶¹ Gary Eoff, Hilborn’s neighbor, saw a man exit Hilborn’s house moments after she escaped.¹⁶² Eoff originally described the man as being 5’5” with blondish hair.¹⁶³ Eoff originally identified the man who exited Hilborn’s house as one of his co-workers, someone other than Thacker, but then changed his statement after the media released Thacker’s information.¹⁶⁴

The state’s expert witness on forensic serology testified that numerous items were tested, and it was not abnormal for DNA to not be present.¹⁶⁵ The defense was only permitted to elicit testimony that the defendant’s DNA was not present at the crime scene but was not permitted to introduce evidence that another person’s semen was found on the victim’s bed sheets and pillow case.¹⁶⁶

2. *The Procedural History of Thacker v. State Silenced All Pillow Talk*

Early on, the state filed a motion to compel the defendant’s DNA sample to test the semen stains found on the victim’s bedsheets and pillowcase.¹⁶⁷ Pursuant to *Brady*,¹⁶⁸ the state turned over the Arkansas State Crime

local/2012-09-18/police-arrest-suspect-rape-case-0 (displaying Thacker’s booking photograph); Joe Lamb, *Conway Man Sentenced to 18 Years for Rape*, THE CABIN (July 4, 2014) (displaying Thacker’s booking photograph); Spencer Willems, *Rapist Loses Appeal on Excluded Trial DNA*, FORENSIC MAG (Nov. 06, 2015), <https://www.forensicmag.com/news/2015/11/rapist-loses-appeal-excluded-trial-dna>; Spencer Willems, *Rapist Loses Appeal on Excluded Trial DNA*, ARK. ONLINE (Nov. 6, 2015), <http://www.arkansasonline.com/news/2015/nov/06/rapist-loses-appeal-on-excluded-trial-d-1/?f=crime&#//>.

161. Transcript of Record, *supra* note 143, at 736.

162. *Id.* at 560, 570.

163. *Id.* at 617–18, 691 ([H]e’s about 5’7”-5’5” . . . “[t]he hair was short and it says blondish.”).

164. *Id.* at 599–600 (“I said at first I thought it might have been John the dishwasher . . . I thought – cause John, the dishwasher, hungout back there a lot and . . . he’s wearing the [same type of clothing]”).

165. On direct examination of its expert forensic serologist, the State went through a litany of evidence collection, storage, and testing procedures. *Id.* at 662, 677. The State asked the expert whether she tested certain swabs for blood or semen, and the expert answered, “[o]n the vaginal, oral, or rectal swabs, I did not locate any semen (sic) blood on any of those.” *Id.* at 664. The expert testified that she examined a peach pillow case for blood and semen, and stated, “I did not find blood or semen on that either.” Transcript of Record, *supra* note 143, at 665. The State asked “if an (sic) allegations in a case do not include that someone had ejaculated, it is surprise not to find semen, just in general? I’m not talking specifically to this case.” The expert stated, “It can go both ways. If—if you hear that information, you probably wouldn’t find anything. But it’s—from case to case it changes . . . Somebody might have memory or something. Somebody might not have memory.” *Id.* at 667.

166. *Thacker v. State*, 2015 Ark. 406, at *1, 474 S.W.3d 65, 73 (Wynne, J., dissenting).

167. Transcript of Record, *supra* note 143, at 23.

Lab results that excluded Thacker as the source of semen found on the victim's bed sheets and pillowcase.¹⁶⁹

Thacker filed a motion *in limine* to admit the DNA evidence of semen on the victim's bedsheet.¹⁷⁰ The court denied the motion.¹⁷¹ Days before trial, the state tested an additional semen sample on a pillowcase and determined it did not contain Thacker's DNA.¹⁷² The state filed a motion *in limine* to exclude evidence of this semen.¹⁷³ Thacker orally amended his prior motion to include the DNA found on the pillowcase, arguing that the evidence was relevant to his defense theory of misidentification because it could lead the jury to conclude someone else committed the rape.¹⁷⁴ The court granted the state's motion and denied Thacker's motion to admit the DNA evidence, only permitting the defense to make reference to the fact that his DNA was not located on any items the police submitted to testing.¹⁷⁵

Thacker's sole issue on appeal to the Arkansas Supreme Court was "whether the circuit court erred in excluding evidence of DNA from semen samples found on the victim's bedsheet and pillow that were inconsistent with his DNA."¹⁷⁶ On appeal, the defendant argued (1) that the evidence of another person's semen on the sheets and pillowcase that were on the bed during the incident was relevant because it makes it more probable that someone other than him was the rapist and (2) that the semen's probative value—evidence of an alternative rapist—outweighs any embarrassment or humiliation that the victim will suffer.¹⁷⁷

The state argued that the evidence has minimal probative value because the testimony at trial was that the defendant was the rapist.¹⁷⁸ The state also argued that the semen found in the bedroom is not probative because there is nothing in the record to support an argument that the assailant left semen in the bedroom and that the prejudicial effect would require the victim to testify about her prior sexual history to explain the semen left by someone other than Thacker.¹⁷⁹

168. *Brady v. Maryland*, 373 U.S. 83 (1963).

169. Transcript of Record, *supra* note 143, at 25.

170. *Id.* at 119–120.

171. *Thacker*, 2015 Ark. 406 at *2–*3, 474 S.W.3d at 66–67.

172. Transcript of Record, *supra* note 143, at 140–41.

173. *Id.*

174. *Thacker*, 2015 Ark. 406 at *2–*3, 474 S.W.3d at 66–67.

175. *Id.*, 474 S.W.3d at 67.

176. *Id.* at *1, 474 S.W.3d at 66.

177. *Id.* at *4, 474 S.W.3d at 67.

178. *Id.*, 474 S.W.3d at 67. The State pointed to the victim's identification of Thacker as her rapist, and the victim's neighbor testified that he saw Thacker, who was his coworker at the Cracker Barrel, walking through the victim's yard, and Thacker's wallet was found inside the victim's bedroom.

179. *Id.* at *4–*5, 474 S.W.3d at 68.

3. *The Arkansas Supreme Court's Analysis in Thacker v. State Was Splintered*

The Arkansas Supreme Court had a difficult time determining how far the courts should go in protecting victims from the potential embarrassment and humiliation of delving into their prior sexual history versus protecting criminal defendants' constitutional rights to present a defense and to confront witnesses against them. The struggle is made evident by a plurality opinion based on a faulty grasp of the trial court record, the concurrence's unwarranted procedural concerns, and a strongly worded dissent.

a. The Arkansas Supreme Court's Plurality Opinion in *Thacker v. State* Is Incorrect and Should Not Be Afforded Any Deference

Justice Rhonda Wood, unconvinced that the probative value of evidence of another person's semen on the victim's bed outweighed the prejudicial effect, declared that the plurality could not say that it was clear error or a manifest abuse of discretion for the circuit court to exclude it.¹⁸⁰

First, the plurality found that Thacker failed to show a link between the semen samples found on the victim's bed sheets and the charges of burglary and rape.¹⁸¹ Because the victim testified that the rapist "had difficulty obtaining, and was unable to maintain, an erection and did not ejaculate," the plurality found it "unlikely that the rapist left semen on the bed sheet or pillowcase."¹⁸² Finding that it was unlikely that the rapist left semen, the plurality held that the semen samples were not probative to Thacker's defense of misidentification.¹⁸³ The plurality stated that evidence of another person's semen at the crime scene would insinuate that the victim had consensual sexual intercourse with someone other than the defendant prior to the incident, which falls within the policy justifications for excluding the evidence.¹⁸⁴

Second, the plurality found that the prejudicial effect of the victim's prior sexual history is great when compared to the probative value because, if admitted, the presentation of the semen would not be limited to a few questions.¹⁸⁵ It would require the victim to explain her prior sexual history. The plurality concluded that the impact of the evidence on the victim and the perceived inappropriate character evidence outweighed "the slight pro-

180. *Thacker*, 2015 Ark. 406 at *5, 474 S.W.3d at 68.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

bative value of the evidence.”¹⁸⁶ The plurality held that the trial court did not commit a manifest abuse of discretion when it denied Thacker the opportunity to present evidence of another person’s semen at the crime scene.¹⁸⁷

Although *Thacker* is a plurality opinion not entitled to any precedential weight,¹⁸⁸ a lower court may afford it deference because it is the only Arkansas Supreme Court case applying Arkansas’s rape shield statute to exclude DNA evidence excluding the defendant as the source of semen. If a future Arkansas trial court is faced with a factually similar case and decides to apply *Thacker*, the court would likely follow the plurality’s analysis as persuasive. The trial court would center its analysis on whether the defendant showed a link between the DNA evidence in the form of semen samples and the crime charged and whether that relevant evidence is unduly prejudicial.¹⁸⁹ The trial court would likely conduct a fact-centered inquiry like the Arkansas Supreme Court conducted in *Thacker*.¹⁹⁰ In *Thacker*, the Arkansas Supreme Court underscored the alleged victim’s testimony that the rapist “had difficulty obtaining, and was unable to maintain, an erection and did not ejaculate.”¹⁹¹ Writing for the plurality, Justice Rhonda Wood found that it was “unlikely that the rapist left semen on the bed sheet or pillowcase.”¹⁹² That is a very fact-driven analysis that lends itself to a great amount of judicial discretion and leaps in analysis.

If a trial court found that there was a link between the DNA evidence and the crime charged, the trial court would likely conduct an inquiry weighing the probative value of the evidence versus any unfair prejudice.¹⁹³ The trial court would likely place significant weight on factors, such as whether admission would require the victim to explain her prior sexual history, the potential humiliation and embarrassment to the victim, and the danger of unfairly prejudicing her character before the jury.¹⁹⁴

186. *Thacker*, 2015 Ark. 406 at *5, 474 S.W.3d at 68.

187. *Id.*, 474 S.W.3d at 68.

188. See cases cited *supra* note 137. See, e.g., Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Opinions*, 42 DUKE L. J. 419, 420-421; Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 763 (1980) (stating “[o]ne way to determine the ‘narrowest grounds’ is to look for the opinion ‘most clearly tailored to the specific fact situation before the Court, which would be applicable to the fewest cases, in contrast to an opinion that takes a more absolutist position or suggests more general rules.’”).

189. See *Thacker*, 2015 Ark. 406 at *5, 474 S.W.3d at 68.

190. *Id.*, 474 S.W.3d at 68 (focusing on the alleged victim’s testimony that the rapist had difficulty obtaining and maintaining an erection).

191. *Id.*, 474 S.W.3d at 68.

192. *Id.*

193. *Id.*

194. *Id.*, 474 S.W.3d at 68.

In *Thacker*, the plurality placed significant weight on whether questioning regarding the evidence would require the alleged victim to testify in detail about her prior sexual history and whether doing so would subject her to embarrassment or harassment concerning her sexual history.¹⁹⁵

The plurality mischaracterized the facts and took many leaps in logic to conclude that the evidence was not relevant. First, the plurality states that the alleged victim testified that the rapist “had difficulty obtaining, and was unable to maintain, an erection and did not ejaculate;” thus, the plurality found it “unlikely that the rapist left semen on the bed sheet or pillowcase.”¹⁹⁶ This statement glosses over the testimony and stands in stark contrast to the alleged victim’s trial testimony. Hilborn testified that the assailant had an erection on the night of the alleged rape.¹⁹⁷ At trial, the state asked Hilborn if she believed that the assailant ejaculated that night, and she answered, “I do not believe he did.”¹⁹⁸

Whether or not the alleged victim *believes* that the rapist ejaculated is irrelevant; the correct inquiry is whether there was a reasonable probability that the rapist left behind any sperm or semen.¹⁹⁹ Here, there was a reasonable probability that the rapist left behind sperm or semen. The victim testified that the rapist obtained an erection, forced her to perform oral, vaginal, and anal sex, moving from one room to another.²⁰⁰ Thus, there is a reasonable probability that the rapist left behind sperm or semen because the rapist had an erection and forced the victim to engage in oral, vaginal, and anal intercourse.²⁰¹

The high probative value of this evidence outweighs any prejudicial effect of admitting evidence of the victim’s prior sexual conduct that would require the victim to explain her prior sexual history and any potential humiliation and embarrassment to the victim.²⁰² Semen stains on the victim’s bedsheets and pillowcase, where the rape occurred, are highly probative because they establish that the defendant was excluded as the source of semen at the crime scene, which bolsters his defense of misidentification.²⁰³

DNA evidence itself is not inflammatory because it does not have the tendency to arise anger, animosity, or indignation.²⁰⁴ Certainly, if *Thacker* sought to admit evidence of another person’s semen to show that the victim

195. *Thacker*, 2015 Ark. 406 at *5, 474 S.W.3d at 68.

196. *Id.*, 474 S.W.3d at 68.

197. Transcript of Record, *supra* note 143, at 695.

198. *Id.* at 736.

199. *Thacker*, 2015 Ark. 406 at *5, 474 S.W.3d at 68.

200. Transcript of Record, *supra* note 143, at 736.

201. *Id.*

202. *Thacker*, 2015 Ark. 406 at *5, 474 S.W.3d at 68.

203. *Id.*, 474 S.W.3d at 68.

204. *Id.*

was promiscuous to cast doubt on her credibility, the rape shield statute would bar admission of that evidence.²⁰⁵ The record is clear; that was simply not the case. Thacker did not seek to admit evidence of another person's semen to show that the victim was promiscuous or to cast doubt on whether she was raped; rather, Thacker sought to admit the evidence of another person's semen found on the bed sheets and pillow case where the rape occurred to show that his semen did not match semen found at the crime scene that the state purported to be evidence of the assailant's identity in its own motion to compel Thacker's DNA sample.²⁰⁶

Admission of the exculpatory DNA test result that conclusively eliminates the defendant as the source of semen does not require the victim to testify about any prior sexual history.²⁰⁷ The purpose for admitting the evidence was not to call into question the sexual behaviors and practices of the victim in an effort to paint a scarlet letter on her.²⁰⁸ The defense's sole purpose for admitting the DNA test that conclusively excluded him as the source of semen was to show that he was misidentified and that he was not the perpetrator of this offense.²⁰⁹

Exclusion of the DNA evidence that has a high probability of exculpating the defendant was a violation of Thacker's constitutional rights to present a defense, to confront the witnesses against him, and to present evidence that is crucial to his defense.²¹⁰ The Arkansas Supreme Court failed to conduct the proper constitutional inquiry in *Thacker* because it did not analyze whether exclusion of the DNA evidence excluding the defendant as the source of semen violated the defendant's constitutional rights and, if so, whether the exclusion was harmless.²¹¹ The Arkansas Supreme Court failed to accord proper weight to Thacker's Sixth Amendment right "to be confronted with the witnesses against him," which is incorporated into the Fourteenth Amendment and is available in state court proceedings.²¹² The Supreme Court noted in *Olden* that the defendant's constitutional right to confront witnesses against him includes the right to conduct reasonable cross-examination.²¹³

205. ARK. CODE ANN. § 16-42-101(b) (2017).

206. *Thacker*, 2015 Ark. 406 at *14–*16, 474 S.W.3d at 73 (Wynne, J., dissenting).

207. *Id.*, 474 S.W.3d at 73.

208. *Id.*, 474 S.W.3d at 73.

209. *Id.*, 474 S.W.3d at 73.

210. *See supra* Part II.B.

211. *See supra* Part II.B; *see also* Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986).

212. *Olden v. Kentucky*, 488 U.S. 227, 230 (1988) (quoting App. to Pet. For Cert. A6).

213. *Id.* at 231 (citing *Davis v. Alaska*, 415 U.S. 308 (1974)).

b. The Concurring Opinion's Procedural Concerns Are Misplaced and Attempts to Place an Unconstitutionally Burdensome Weight on Criminal Defendants

The thrust of the concurring opinion, written by Justice Karen R. Baker and joined by Justice Josephine L. Hart, was that the defense did not make a proper proffer of the DNA evidence that excluded the defendant as the source of semen.²¹⁴ The concurrence pointed out that “[a] careful review of the record demonstrates that Thacker presented arguments solely of counsel. Simply put, Thacker did not proffer any evidence or offer any witness testimony [concerning the DNA test he now contends the circuit court erroneously refused to admit].”²¹⁵

The concurrence's concern is misplaced because the defense made a proper proffer to admit evidence of the victim's prior sexual conduct under Arkansas's rape shield statute.²¹⁶ The record shows that both the defense and the state filed respective written motions *in limine* prior to trial.²¹⁷ The record reflects that those motions were argued at an *in camera* hearing well before trial.²¹⁸ The trial court denied the defense's motion *in limine* to admit evidence of the victim's prior sexual conduct in the form of an Arkansas State Crime Laboratory Report excluding the defendant as the source of semen collected from the victim's bedsheets.²¹⁹

The concurrence also takes issue with the probative value of the semen found on the victim's bedsheets that excludes the defendant.²²⁰ The concurrence stated that evidence of another man's semen on the bed sheets would only be relevant if the defendant had presented evidence of the timeframe of the semen deposits on the bed.²²¹

The concurrence is incorrect. Arkansas's Rules of Evidence provide that even relevant “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.”²²² In evaluating whether the probative value is substantially outweighed by the danger of unfair prejudice so as to warrant exclusion of the evidence, the critical inquiry is “the degree of unfairness of prejudicial evidence and whether it

214. *Thacker*, 2015 Ark. 406 at *9–*10, 474 S.W.3d at 70 (Hart, J., concurring).

215. *Id.*, 474 S.W.3d at 70.

216. ARK. CODE ANN. § 16-42-101 (2017).

217. *See infra* Part III.A.2.

218. *See infra* Part III.A.2.

219. *See infra* Part III.A.2.

220. *Thacker*, 2015 Ark. 406 at *9–*10, 474 S.W.3d at 70 (Hart, J., concurring).

221. *Id.*, 474 S.W.3d at 70.

222. ARK. R. EVID. 403.

tends to support a decision on an improper basis.²²³ The fact that evidence is harmful or prejudicial to a party is not a reason to exclude the evidence.²²⁴

The purpose for which the defendant sought to admit the DNA evidence was only to demonstrate that he is not a match to the semen collected on the victim's bedsheets immediately after the crime.²²⁵ Counsel for defendant outlined that purpose for which the defendant sought to introduce the evidence to showing that the defendant's DNA did not match the semen found on the victim's bedsheets immediately following the rape.²²⁶

The concurrence sought to require the defendant to put on evidence showing the timeframe of the semen deposit on the victim's bedsheets for evidence of another person's semen to be relevant.²²⁷ Arkansas State Crime Laboratory Executive Director, Kermit B. Channell II, stated that it is impossible to "apply a specific date to when a semen stain was deposited."²²⁸ Thus, the concurrence seeks to require criminal defendants to make a proffer that is scientifically impossible in an effort to establish that potentially exculpatory evidence is relevant to their defense.²²⁹ Such a blanket requirement places a scientifically impossible burden on the defendant in violation of his constitutional right to present a defense and to confront the evidence against him in violation of *Davis*²³⁰ and *Olden*.²³¹ The concurring opinion's procedural concerns are misplaced, and its probative value analysis is incorrect.

c. The Dissenting Opinion Reached the Correct Conclusion, but Its Analysis Needs Polishing

The conclusion reached by the dissenting opinion, written by Justice Robin F. Wynne and joined by Justice Paul E. Danielson, is correct, but its analysis needs to be refined. The dissent begins by pointing out that evidence of semen on the victim's bedsheets and pillowcase belonging to someone other than the defendant only falls under the rape shield statute if it

223. *United States v. Frost*, 234 F.3d 1023, 1025 (8th Cir. 2000) (quoting *United States v. Payne*, 119 F.3d 637, 645 (8th Cir. 1997)). Examples of evidence that would support a decision on an unfair basis include evidence of bad character and extrinsic evidence. *Id.* (citing FED. R. EVID. 404(b)); *United States v. Maddix*, 96 F.3d 311, 315 (8th Cir. 1996)).

224. *Branstetter v. State*, 346 Ark. 62, 72, 57 S.W.3d 105, 113 (Ark. 2001).

225. *Thacker*, 2015 Ark. at *14, 474 S.W.3d at 73 (Wynne, J., dissenting).

226. *Id.* at *9, 474 S.W.3d at 70 (Hart, J., concurring).

227. *Id.*, 474 S.W.3d at 70.

228. Email from Kermit B. Channell II, Executive Director, Arkansas State Crime Laboratory, to Lacon Marie Smith (Oct. 6, 2016, 09:29 CST) (on file with author).

229. *Jones v. Coker*, 90 Ark. App. 151, 159, 204 S.W.3d 554, 561 (Ark. Ct. App. 2005) (holding that the probative value of evidence correlates inversely to the availability of other means of proving the issue for which the allegedly prejudicial evidence is offered).

230. *Davis v. Alaska*, 415 U.S. 308 (1974).

231. *Olden v. Kentucky*, 488 U.S. 227 (1988).

belongs to someone other than the rapist because the rape shield statute only protects evidence of *prior* sexual conduct of the victim.²³²

Here, the dissent correctly points out whether or not that semen belonged to the rapist was the single fact in dispute at trial.²³³ The defense sought to admit the evidence to show that the semen belonged to the real perpetrator and that he was simply misidentified.²³⁴ The state sought to exclude the evidence because it believed that the semen was evidence of a prior sexual encounter of the victim, which should be excluded pursuant to rape shield.²³⁵

The dissent concluded that the evidence of another person's semen on the victim's bedsheets collected immediately after the rape was relevant to the defendant's defense of misidentification.²³⁶ The evidence of another person's semen was relevant to a fact at issue, namely the identity of the person who raped the victim, and evidence of another person's semen is potentially exculpatory for the defendant.²³⁷ This is particularly true in light of other ample evidence supporting the defendant's defense of misidentification, including the discrepancies between two major eye-witnesses, the victim and the neighbor, and the lack of any DNA evidence linking the defendant to the crime.²³⁸

The dissent astutely noted that the state elicited testimony from its DNA experts regarding why DNA might not be found at the crime scene, implying that no DNA was found at the crime scene.²³⁹ The dissent was critical of the trial court permitting the state to leave the jury with the false impression that there was no DNA evidence found at the crime scene, which was exacerbated by the trial court barring the defendant from confronting that theory with the Arkansas State Crime Laboratory Report that excluded the defendant as the source of semen found on the victim's bed sheets and pillow case.²⁴⁰

The dissent reached the correct conclusion that the trial court committed clear error or a manifest abuse of discretion,²⁴¹ but failed to conduct the appropriate *Lucas*,²⁴² *Olden*,²⁴³ and *Van Arsdal*²⁴⁴ analyses to conclude that the state's rape shield statute was unconstitutional as applied.

232. *Thacker*, 2015 Ark. at *14, 474 S.W.3d at 72 (Wynne, J., dissenting).

233. *Id.*, 474 S.W.3d at 72.

234. *Id.*, 474 S.W.3d at 72.

235. *Id.*, 474 S.W.3d at 72.

236. *Id.* at *14–*15, 474 S.W.3d at 72–73.

237. *Id.*, 474 S.W.3d at 73.

238. *Thacker*, 2015 Ark. 406 at *15–*16, 474 S.W.3d at 73 (Wynne J., dissenting).

239. *Id.*, 474 S.W.3d at 73.

240. *Id.*, 474 S.W.3d at 73.

241. *Id.*

242. *Michigan v. Lucas*, 500 U.S. 145 (1991).

243. *Olden v. Kentucky*, 488 U.S. 227 (1988).

B. Trial Courts Should Apply the Correct Analytical Framework to Admit the Pillow Talk into Evidence

Had the Arkansas Supreme Court conducted the appropriate inquiry, it would have begun with the *Lucas v. Michigan* analysis.²⁴⁵ *Lucas* establishes that evidence that would otherwise violate the defendant's constitutional rights may be excluded when it shows only a half-truth to the jury.²⁴⁶ Here, Thacker sought to admit evidence of another person's semen found at the crime scene, which would show the whole picture of the incident. As the dissent points out, the trial court permitted the state to present a partial truth to the jury by leaving the jury with the false impression that no DNA evidence was found at the crime scene and that was not unusual.²⁴⁷ By excluding the DNA evidence that excludes Thacker as the source of semen pursuant to the rape shield statute, the trial court violated his constitutional rights to confront this evidence and to present a full defense.²⁴⁸

The next step of the analysis is to analyze the case under *Olden*.²⁴⁹ *Olden* establishes that trial courts must analyze whether judicial discretion to impose reasonable limits on the probative value of defense evidence must bow its knee to the constitutional rights of the defendant.²⁵⁰ The correct analysis is to apply the *Van Arsdall* factors.²⁵¹ The Arkansas Supreme Court should have weighed the factors set forth by the Supreme Court of the United States in *Delaware v. Van Arsdall*,²⁵² to consider whether denying Thacker the right to cross examine the DNA expert on the exculpatory DNA test violated his Sixth Amendment right to confrontation.²⁵³

First, the Arkansas Supreme Court should have fully appreciated the damaging potential of denying cross-examination of the state's expert witness concerning the DNA test result.²⁵⁴ Second, the Arkansas Supreme Court should have weighed: (1) the importance of the witness's testimony to the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of material testimony corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-

244. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

245. *Lucas*, 500 U.S. 145 (1991).

246. *Id.* at 151–52 (citing *United States v. Nobles*, 422 U.S. 225, 241 (1975)).

247. *Thacker v. State*, 2015 Ark. 406, at *15–*16, 474 S.W.3d 65, 72–73 (Wynne, J., dissenting).

248. *Lucas*, 500 U.S. at 151 (citing *United States v. Nobles*, 422 U.S. 225 (1975)).

249. *Olden v. Kentucky*, 488 U.S. 227 (1988).

250. *Id.* at 232–33 (citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)).

251. *Id.*

252. *Van Arsdall*, 475 U.S. at 684 (1986).

253. *Id.*

254. *Id.*

examination otherwise permitted; and (5) the overall strength of the prosecution's case.²⁵⁵

The most pertinent factors for this case are the extent to which judicial restriction of other cross-examination is permitted and the overall strength of the prosecution's case.²⁵⁶ The prosecution had a weak case against Thacker because both the victim and the eyewitness gave prior inconsistent statements regarding the rapist's description. Both originally described the rapist as being 5'5" tall with blonde hair, but Thacker stood 6'0" with black hair.²⁵⁷ The only link between the defendant and the victim was that his wallet was found in the victim's house.²⁵⁸ The victim and eyewitness could not identify the defendant until the media displayed his driver's license information on local news stations.²⁵⁹

The prosecution's case was built on weak circumstantial evidence and confidence in the judge strictly applying the state's rape shield statute against the defendant to prevent him from challenging the state's weak circumstantial case.²⁶⁰ The only way to defend a case where the defendant claims misidentification is by heavy cross-examination of the witnesses against him.²⁶¹ Denying Thacker the opportunity to question the witnesses against him on facts that are relevant and crucial to his defense of misidentification is unduly prejudicial and violates his constitutional rights to present a defense, to confront the witnesses against him, and to present evidence that is crucial to his defense.²⁶²

The trial court committed clear error or an abuse of discretion by placing improper weight on whether the victim may be harassed or embarrassed or whether the evidence would only be "marginally relevant."²⁶³ The trial court did not have the discretion to limit Thacker's constitutional right to confront the witnesses against him based on marginal relevance or harassment, and those limitations should have bowed their knees to Thacker's constitutional rights.²⁶⁴

255. *Id.*

256. *Id.*

257. Transcript of Record, *supra* note 143, at 616 (he's about 5'7"-5'5" . . . "[t]he hair was short and it says blondish.").

258. *Thacker v. State*, 2015 Ark. 406, at *2, 474 S.W.3d 65, 66.

259. Transcript of Record, *supra* note 143, at 297 ("That's when Channel 4 News was there and they showed me his picture. And from the minute they showed me his picture, I immediately recognized him from the bathroom. It's like when you guys showed it to me at first . . . I didn't.").

260. *Thacker*, 2015 Ark at *15, 474 S.W.3d at 73 (Wynne, J., dissenting).

261. *See Olden v. Kentucky*, 488 U.S. 227, 231 (1988) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)).

262. *See supra* Part II.B.

263. *See Olden*, 488 U.S. at 232 (quoting *Van Arsdall*, 474 U.S. at 680).

264. *Id.*

Had the Arkansas Supreme Court conducted the relevant inquiry under *Lucas*,²⁶⁵ *Olden*,²⁶⁶ and *Van Arsdall*,²⁶⁷ the Arkansas Supreme Court would have given due consideration to Thacker's constitutional rights to present a defense and to confront the witnesses against him. When Arkansas trial courts are faced with a factually similar case of whether to admit evidence of another person's semen found at the crime scene pursuant to the rape shield statute, the trial court should conduct the relevant inquiry of *Lucas*,²⁶⁸ *Olden*,²⁶⁹ and *Van Arsdall*.²⁷⁰

IV. CONCLUSION

In *Thacker v. State*,²⁷¹ the Arkansas Supreme Court failed to consider Thacker's Sixth Amendment argument that excluding evidence of another person's semen when the defense argues misidentification is a violation of his rights to present a defense and to confront witnesses against him.²⁷² When a future defendant's DNA is excluded as the source of semen at the scene of a rape, the trial court should be cautious not to afford *Thacker v. State*²⁷³ precedential value. The trial court should apply the tests established by the Supreme Court of the United States in *Lucas*,²⁷⁴ *Olden*,²⁷⁵ and *Van Arsdall*²⁷⁶ to admit the pillow talk into evidence for it to be evaluated by the jury.

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265. *Michigan v. Lucas*, 500 U.S. 145 (1991).

266. *Olden*, 488 U.S. 227.

267. *Van Arsdall*, 475 U.S. 673.

268. *Lucas*, 500 U.S. 145.

269. *Olden*, 488 U.S. 227.

270. *Van Arsdall*, 475 U.S. 673.

271. *Thacker v. State*, 2015 Ark. 406, at *2, 474 S.W.3d 65, 65.

272. *Thacker*, 2015 Ark. 406, 474 S.W.3d 65.

273. *Id.*, 474 S.W.3d at 65.

274. *Michigan v. Lucas*, 500 U.S. 145 (1991).

275. *Olden v. Kentucky*, 488 U.S. 227, 231 (1988).

276. *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).

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