

A New Definition of “Clear Proof”

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The New Jersey Rape Shield Law provides that “[i]n prosecutions of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, human trafficking involving sexual activity . . . evidence of the victim’s previous sexual conduct shall not be admitted nor reference made to it in the presence of the jury except as provided in this section.”¹ The New Jersey legislature enacted the New Jersey Rape Shield Law to protect the admittance of a victim’s previous sexual conduct.² Under the New Jersey Rape Shield Law, New Jersey courts conduct a two-step analysis to determine whether to admit a

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¹ N.J. STAT. ANN. § 2C:14-7 (West 2013).

² State v. Perry, 137 A.3d 1130, 1136 (N.J. 2016).

victim's previous sexual act into evidence.³ First, the courts must determine whether the evidence is relevant and necessary to resolve a material issue.⁴ Second, if relevant, the courts must decide under New Jersey Rule of Evidence 403 whether the probative value of the evidence outweighs the prejudicial effect to the victim.⁵ Under this second step, the probative value of the victim's previous sexual act depends on "clear proof" that the act occurred, that the act is relevant to a material issue, and that it is necessary to a defense.⁶ When assessing the prejudicial effect of the evidence, New Jersey courts consider the trauma to the victim and the degree to which the admission would invade the victim's privacy.⁷

This Comment is divided into four parts. Part I of this Comment focuses on the history of the New Jersey Rape Shield Law, how it has been amended, and which kinds of "sexual activity" fall under the law. This section discusses how the New Jersey courts have applied the Rape Shield Law prior to its 1994 amendment. Part II of this Comment then looks at how New Jersey courts applied the Rape Shield Law after the 1994 amendment and how they determined whether the "clear proof" standard was satisfied or not. Part III discusses how courts in other states have determined what satisfies "clear proof" and whether such states have a workable definition of "clear proof." Finally, Part IV of this Comment proposes an amended definition of what "clear proof" should mean for New Jersey courts and how New Jersey courts should apply it. This section discusses the benefits and drawbacks of the proposed amendment, and how prior court decisions may have changed under the proposed amendment. Further, Part IV considers how adopting the amendment would lead to consistency in admission of a victim's previous sexual conduct.

I. HISTORY OF THE NEW JERSEY RAPE SHIELD LAW

In 1976, the New Jersey legislature passed the state's first Rape Shield Law for the express purpose of "protect[ing] rape victims from the humiliation of unwarranted public disclosure of the details of their

³ N.J. STAT. ANN. § 2C:14-7 (West 2013).

⁴ *State v. Budis*, 593 A.3d 784, 789 (N.J. 1991) (citing N.J. STAT. ANN. § 2C:14-7 (West 2013)).

⁵ *Id.*

⁶ *Id.* at 790 (citing *State v. Pulizzano*, 456 N.W.2d 325, 335 (Wis. 1990)).

⁷ *Budis*, 593 A.3d at 790.

prior sexual activities.”⁸ Further, the legislature enacted the statute to protect victims from excessive cross examination and improper use of the victim’s previous sexual experience, and also to preserve the integrity of trials.⁹ New Jersey’s first Rape Shield Law provided broad discretion to New Jersey’s trial courts as it had only one limit on the admittance of a victim’s previous sexual act; the statute “did not permit the introduction of any evidence of a victim’s past sexual conduct that occurred prior to one year before the date of the charge.”¹⁰ Other than this limitation, the statute neither provided any form of further protection to the claimant nor explicitly prohibited any form of sexual conduct evidence from being admitted.¹¹

Due to the overly simplistic assumptions that resulted from the admittance of a victim’s past sexual history, lobbyists pushed for reform.¹² In 1979, the New Jersey Rape Shield Law went through several changes, including the replacement of the term “rape” with “sexual assault,” mandating a defendant to apply for a court order before the trial or preliminary hearing, providing judges with stricter guidelines to follow when determining whether to admit the sexual conduct evidence, and additional restrictions on the admittance of previous sexual history under subsection (c).¹³ Subsection (c) provided that, “[e]vidence of previous sexual conduct shall not be considered relevant unless it is material to negating the element of force or coercion to proving that the source of semen, pregnancy or disease is a person other than the defendant.”¹⁴ Two issues that arose from the 1979 amendment were that (1) the standard of the evidence only needed to be “relevant” to be considered admissible and (2) the defendant’s right to confront the victim. Due to the low standard from the 1979 amendment, evidence of the victim’s previous sexual conduct was easily admitted. This issue will be discussed further within in the Comment. The following subsections within Part I will demonstrate how the New Jersey Rape Shield Law evolved and how the New Jersey courts applied the Rape Shield Law prior to the 1994 amendment.

⁸ Shacara Boone, *New Jersey Rape Shield Legislation: From Past to Present—the Pros and Cons*, 17 WOMEN’S RTS. L. REP. 223, 225 (1996).

⁹ *Budis*, 593 A.3d at 788.

¹⁰ Linda Robayo, *The Glen Ridge Trial: New Jersey’s Cue to Amend Its Rape Shield Statute*, 19 SETON HALL LEGIS. J. 272, 303 (1994).

¹¹ *See id.* at 303–04.

¹² Boone, *supra* note 8, at 224.

¹³ Robayo, *supra* note 10, at 304–05.

¹⁴ Boone, *supra* note 8, at 225.

*A. Former Rape Shield Law*1. *State v. Budis*

In *State v. Budis*,¹⁵ the defendant sought to admit evidence of the victim's previous sexual conduct to show that the victim acquired knowledge of sexual terms from a source other than the defendant.¹⁶ While staying with her father, the victim, T.D., told him that she had knowledge of oral sex because of incidents that occurred when her stepfather sexually abused her in 1987 and when the defendant sexually abused her in 1988.¹⁷ T.D. described similar sexual abuse incidents involving the stepfather, and the defendant.¹⁸ Both put their erect penises within the victim's mouth and vagina during separate incidents.¹⁹ At the defendant's trial, the judge precluded the defendant from eliciting testimony from the reporting detective regarding the sexual abuse committed by the victim's stepfather, and the jury found the defendant guilty.²⁰ The New Jersey Appellate Division held that the trial court erred by precluding the defendant from inquiring "details of the stepfather's prior sexual assault."²¹

On appeal, the New Jersey Supreme Court held that when a defendant attempts to admit evidence of a victim's previous sexual conduct, the probative value of the evidence must be weighed against its prejudicial effect towards the victim.²² N.J. STAT. ANN. § 2C:14-7(c) provides that evidence of prior sexual conduct is only relevant if it is negating the element of force or coercion, or proving that the source of semen, pregnancy or disease is from a person other than the defendant.²³ The defendant argued that the amended statute deprived him of a defense.²⁴ The evidence was relevant to rebut the inference that the victim learned the sexual terms from him, and the evidence did not prejudice the victim because she was a minor and incapable of consent.²⁵ On the other hand, the State argued that the evidence of the

¹⁵ *Budis*, 593 A.2d at 784.

¹⁶ *Id.* at 786.

¹⁷ *Id.* at 786.

¹⁸ *Id.* at 786–87 ("T.D.'s stepfather pled guilty to separate counts of sexual assault and aggravated sexual assault[.]").

¹⁹ *Id.* at 786–87.

²⁰ *Id.* at 787.

²¹ *Budis*, 593 A.2d at 787–88.

²² *Id.* at 789.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

victim's ability to describe sexual acts should be precluded because such evidence is only relevant where a defendant has denied that any sexual contact occurred.²⁶ The New Jersey Supreme Court disagreed with the State's argument.²⁷ The victim and the defendant differed in their explanation of the nature of the sexual contact that the victim alleged, thus the victim describing the sexual acts, related to the defense.²⁸

In deciding the issues, the New Jersey Supreme Court put the Rape Shield Law aside and determined first whether the evidence was relevant to the defense.²⁹ The balance of relevance versus prejudicial effect requires a case-by-case analysis.³⁰ The age of the victim, the sources of material they watch, such as sexually explicit television, movies, and magazines, and the maturity of the child all play a role.³¹ The New Jersey Supreme Court found that the evidence of T.D.'s prior sexual abuse was relevant because it rebutted the inference that she acquired her sexual knowledge from the defendant, and showed that she had the knowledge to initiate the sexual acts described by the defendant.³²

The second issue the New Jersey Supreme Court addressed was whether, despite its relevance, the prejudicial effect of the evidence was so great as to outweigh its probative value.³³ When determining the prejudicial effect of evidence, New Jersey courts look at whether the evidence will "create unfair prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim."³⁴ The New Jersey Supreme Court acknowledged that the admission of evidence in this context may lead parents to be reluctant to allow their children to testify because it may be embarrassing, subject the children to more interrogation, or invade their privacy.³⁵ The jury may also misuse the evidence depending on the age of the victim; thus, the trial court should instruct the jury on the limited use of the evidence.³⁶ When determining the probative value of the prior acts, New Jersey courts look for "clear proof" that the victim's past sexual conduct had in fact occurred, is

²⁶ *Id.* at 791.

²⁷ *Budis*, 593 A.2d at 791.

²⁸ *See id.* at 791, 793.

²⁹ *Id.* at 790.

³⁰ *Id.* at 791.

³¹ *Id.*

³² *Id.*

³³ *Budis*, 593 A.2d at 793.

³⁴ *Id.* (citing N.J. STAT. ANN. § 2C:14-7 (West 2013)).

³⁵ *Id.* at 793.

³⁶ *Id.* at 794.

relevant to a material issue, and its inclusion is necessary to the defense.³⁷

In this case, the New Jersey Supreme Court found that the evidence may be admitted without undue prejudice to the victim, as the defense would have the opportunity to elicit the evidence through cross-examination of the detective without having to cross-examine the victim.³⁸ Further, if the defense did cross-examine the victim, the questioning would be limited to the victim's prior abuse.³⁹ While the New Jersey Supreme Court did acknowledge that the evidence of the victim's prior abuse may invade her privacy and cause embarrassment, those factors did not outweigh the probative value of the evidence.⁴⁰

2. Glen Ridge Trial Application

In *State in Int. of B.G.*,⁴¹ ("Glen Ridge case"), M.G., a seventeen-year-old female with limited intellectual ability reported to the police that a group of young men sexually assaulted her.⁴² In her statements to the police, M.G. described that C.A. approached her and enticed her into a basement, where a group of young men forced her to perform sexual acts.⁴³ At trial, the defendants argued that the victim was not forced or coerced into performing the sexual acts and that she consented to the sexual activity.⁴⁴ The defendants succeeded in partially lifting the New Jersey Rape Shield Law, portraying the victim as a girl who aggressively pursued men and needed sexual activities to satisfy herself.⁴⁵

To prove that the victim consented to the sexual acts, the defendants tried to elicit testimony of the victim's sexual history by providing evidence of other individuals who had engaged in consensual sexual acts with the victim.⁴⁶ The defendants contended that the victim's prior sexual history was relevant to show consent during these

³⁷ *Id.* at 790.

³⁸ *See id.* at 794.

³⁹ *Budis*, 593 A.2d at 794.

⁴⁰ *Id.* at 793

⁴¹ *State in Int. of B.G.*, 589 A.2d 637 (N.J. Super. Ct. App. Div. 1991).

⁴² *Id.* at 640-41.

⁴³ *Id.* at 641.

⁴⁴ Boone, *supra* note 8, at 227.

⁴⁵ Leslie Dreyfous, *Retarded Woman's Rape Put Character, Morality on Trial: Crime: The Case from a New Jersey Suburb Ended in Convictions and a Loss of Innocence. The Victim Wanted to be Accepted.*, L.A. TIMES (Mar. 21, 1993, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1993-03-21-mn-13475-story.html> (explaining how the defense was able to partially lift the rape shield law).

⁴⁶ Boone, *supra* note 8, at 227.

incidents.⁴⁷ The trial court admitted the evidence of the victim's previous sexual conduct, ruling that the defendants were attempting to negate the element of force in the sexual act under the New Jersey Rape Shield.⁴⁸ Further, the trial court admitted taped conversations between the victim and her friend.⁴⁹ The tapes described M.G. feeling "excited" after giving one of the defendants a "blow job," and how the forced sexual acts did not hurt her.⁵⁰ While this evidence was admitted, the New Jersey Appellate Division ultimately held that probable cause existed for charges that the defendants used force or coercion in these sexual acts.⁵¹ Further, the defendants were found guilty of first-degree sexual assault.⁵² The admittance of the victim's previous sexual conduct in the *Glen Ridge* case infuriated members of the New Jersey community, who called for a change to the law meant to protect victims of sexual assault, not invade their privacy.⁵³

B. 1994 Amendment

In 1994, after the *Glen Ridge* trial, the New Jersey Legislature amended the Rape Shield Law with more restrictions to protect the victim's right of privacy.⁵⁴ The amendment struck a balance between preserving the defendant's constitutional rights and shielding a victim from attacks on their character.⁵⁵ First, the amendment removed the section allowing evidence of the previous sexual conduct to be admissible if it is material "negating the element of force or coercion"⁵⁶ and added that evidence of the victim's "previous sexual conduct with persons other than the defendant . . . shall not be considered relevant unless it is material to proving the source of semen, pregnancy, or disease".⁵⁷ Before the amendment, New Jersey courts were allowed to admit evidence of the victim's previous sexual conduct if it was relevant and if its probative value outweighed any undue prejudice on the

⁴⁷ Boone, *supra* note 8, at 227.

⁴⁸ See *B.G.*, 589 A.2d at 643.

⁴⁹ *Id.* at 642.

⁵⁰ *Id.*

⁵¹ *Id.* at 644.

⁵² Robayo, *supra* note 10, at 277; see also Robert Hanley, *3 Are Sentenced to Youth Center Over Sex Abuse of Retarded Girl*, N.Y. TIMES (Apr. 24, 1993), <https://www.nytimes.com/1993/04/24/nyregion/3-are-sentenced-to-youth-center-over-sex-abuse-of-retarded-girl.html>.

⁵³ Robayo, *supra* note 10, at 306.

⁵⁴ Assemb. Judiciary, L. and Pub. Safety Comm. 677, 1994 (N.J. 1994).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ N.J. STAT. ANN. § 2C:14-7(c) (West 2013).

victim.⁵⁸ Under the 1994 amendment, evidence must be highly material as well as relevant, and its probative value must “substantially outweigh” the probability of prejudice.⁵⁹

In *State v. Cucolo*,⁶⁰ the New Jersey Appellate Division affirmed the preclusion of the defendant’s proffered evidence, finding that the evidence was neither relevant nor highly material.⁶¹ In this case, the defendant argued that the trial court should have admitted evidence of the victim’s history of venereal disease.⁶² The State argued that the evidence of the victim’s history of venereal disease should not have been released in discovery as it was privileged.⁶³ The defendant sought to admit this evidence to refute the victim’s claim that the victim had unprotected sex with the defendant.⁶⁴ The appellate court affirmed the denial of the evidence based on it not being highly material or relevant.⁶⁵ Although the appellate court did not provide a detailed explanation of its reasoning, it stated that the defendant’s arguments were merely speculative.⁶⁶ The appellate court noted that the defendant had not presented evidence to show how he knew about the victim’s venereal disease, and even if this evidence were offered, it did not preclude the defendant from still having sex with the victim.⁶⁷ Also, evidence was admitted that further showed that the defendant did in fact have sex with the victim, as the defendant’s own witness confirmed testimony by the victim that the “defendant had a distinctive mole or birthmark on his penis.”⁶⁸

From this analysis, it appears that for a defendant to meet the burden of establishing that evidence is “highly material and relevant,” the evidence must show that what the defendant is trying to prove happened or that it at least weighs in the defendant’s direction to prove his argument.

Further, the 1994 amendment provided that evidence of the defendant’s prior sexual conduct with a victim would only be relevant if

⁵⁸ Assemb. Judiciary, L. and Pub. Safety Comm. 677, 1994 (N.J. 1994).

⁵⁹ Robayo, *supra* note 10, at 308–09.

⁶⁰ *State v. Cucolo*, No. A-3599-03T2, 2007 N.J. Super. LEXIS 1055 (N.J. Super. Ct. App. Div. May 25, 2007).

⁶¹ *Id.* at *9–10.

⁶² *Id.* at *7.

⁶³ *Id.* at *9.

⁶⁴ *Id.* at *7.

⁶⁵ *Id.* at *11.

⁶⁶ *Cucolo*, 2007 N.J. Super. LEXIS 1055, at *11.

⁶⁷ *Id.* at *9, *11.

⁶⁸ *Id.* at *11.

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the previous sexual conduct could lead the defendant to reasonably believe that the sexual conduct complained of occurred with what a reasonable person would believe to be affirmative and freely given permission.⁶⁹ This provision followed the holding of *State in Interest of M.T.S.*,⁷⁰ in which the New Jersey Supreme Court held that “a defendant may be found guilty of sexual assault if he or she commits an act of sexual penetration without believing, as a reasonable person would, that the victim had freely given affirmative consent to the penetration.”⁷¹

While the amendment benefited victims by protecting aspects of their private life, it left open issues regarding a defendant’s constitutional right to confront witnesses. The Confrontation Clause of the Sixth Amendment of the U.S. Constitution provides a defendant with a right to confront witnesses against him during the litigation aspect of trial to assure the trial is fair and impartial.⁷² If a statutory law conflicts with this clause, the defendant’s right will prevail if the statutory law interferes by excluding relevant evidence.⁷³ A literal interpretation of the New Jersey Rape Shield Law can impinge a defendant’s right to confrontation under the state and federal constitutions.⁷⁴ While, under the New Jersey Rape Shield Law, the New Jersey courts only admit evidence that is highly material and substantially outweighs the prejudicial effect towards the victim, the New Jersey courts may admit evidence that is also relevant and necessary because of the confrontation issue.⁷⁵ To determine whether the admission of the previous sexual conduct is appropriate, New Jersey courts balance the competing factors between the victim’s previous sexual conduct and the defendant’s right to confrontation.⁷⁶

The New Jersey Rape Shield Law is broken down into six subsections.⁷⁷ Under subsection (a) the statute talks about the process that the defendant must go through if they want to offer this type

⁶⁹ N.J. STAT. ANN. § 2C:14-7(d) (West 2013); *see also* Assemb. Judiciary, L. and Pub. Safety Comm. 677, 1994 (N.J. 1994).

⁷⁰ *State in Int. of M.T.S.*, 609 A.2d 1266 (N.J. 1992).

⁷¹ Robayo, *supra* note 10, at 313–14.

⁷² U.S. CONST. amend. VI; *see* James B. Johnston, *How the Confrontation Clause Defeated the Rape Shield Statute: Acquaintance Rape, the Consent Defense and the New Jersey Supreme Court’s Ruling in State v. Garron*, 14 S. CAL. REV. L. & WOMEN’S STUD. 197, 211 (2005).

⁷³ Johnston, *supra* note 72, at 211–12.

⁷⁴ *State v. J.D.*, 48 A.3d 1031, 1038 (N.J. 2012); *see* U.S. CONST. amend. VI; N.J. CONST. Art. 1, para. 10.

⁷⁵ *J.D.*, 48 A.3d at 1038.

⁷⁶ *Id.*

⁷⁷ *See* N.J. STAT. ANN. § 2C:14-7 (West 2013).

evidence of the victim's previous sexual conduct.⁷⁸ Once the application is made, the court will conduct a hearing in camera to determine whether the evidence is admissible.⁷⁹ During this hearing, the court must decide whether the evidence is relevant and highly material, whether the probative value of the evidence substantially outweighs the prejudicial effect it may have on the jury, and whether the evidence satisfies subsections (c) and (d).⁸⁰

Under subsection (b), evidence of the victim's sexual conduct that has occurred more than one year prior to the date of the offense charged is inadmissible in the absence of clear and convincing evidence of the sexual conduct.⁸¹ Under subsection (c), evidence offered by an expert or lay witness of the victim's previous sexual conduct with persons other than the defendant "shall not be considered relevant unless it is material to proving the source of semen, pregnancy, or disease."⁸²

Under subsection (d), the evidence of the victim's previous sexual conduct with the defendant will be considered relevant if it is probative of "whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of."⁸³ Subsection (e) refers to how the victim was dressed.⁸⁴ Under this subsection, evidence of how the victim was dressed at the time of the offense is admissible if the court determines that it is relevant.⁸⁵ Subsection (f) is the final subsection, which defines what the term "sexual conduct" means within the statute.⁸⁶ Under this provision, sexual conduct is defined as "any conduct or behavior relating to sexual activities of the victim, including but not limited to previous or subsequent experience of sexual penetration or sexual contact, use of contraceptives, sexual activities reflected in gynecological records, living arrangement[,] and lifestyle."⁸⁷

⁷⁸ N.J. STAT. ANN. § 2C:14-7(a) (West 2013).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ N.J. STAT. ANN. § 2C:14-7(b) (West 2013).

⁸² N.J. STAT. ANN. § 2C:14-7(c) (West 2013).

⁸³ N.J. STAT. ANN. § 2C:14-7(d) (West 2013).

⁸⁴ N.J. STAT. ANN. § 2C:14-7(e) (West 2013).

⁸⁵ *Id.*

⁸⁶ N.J. STAT. ANN. § 2C:14-7(f) (West 2013).

⁸⁷ *Id.*

II. NEW JERSEY APPLICATION OF THE PRESENT RAPE SHIELD LAW

The subsections under this part will demonstrate how New Jersey courts have applied the present New Jersey Rape Shield Law. Further, the subsections will reveal how the ambiguous definition of “clear proof” has led to the inconsistent admittance and preclusion of evidence of a victim’s previous sexual conduct.

A. *State v. Davila-Izaguirre*

In *State v. Davila-Izaguirre*,⁸⁸ the defendant organized a bus outing for his wife’s birthday by inviting family and friends to a concert in Yankee Stadium.⁸⁹ After the concert, a bus drove around New York City, where everyone spent the evening drinking.⁹⁰ At around 4:00 a.m., the bus arrived back at the defendant’s home.⁹¹ The victim, Julie, slept at the defendant’s house as she was too drunk to drive home.⁹² While sleeping on the couch, she felt herself turn over and felt her legs go up, but thought nothing of it, believing she was dreaming.⁹³ Julie recalled hearing the defendant’s voice and when she woke up, she noticed blood when she felt herself and was later taken to the hospital.⁹⁴ The hospital administered a rape kit and collected semen, which determined that the defendant was the source of the DNA found on Julie’s underwear.⁹⁵

The defendant was charged with first- and second-degree aggravated sexual assault.⁹⁶ During the trial, the defendant attempted to offer past conversations about Julie’s previous extra-marital affairs through the testimony of the defendant’s wife.⁹⁷ The State argued that the testimony of Julie’s past extra-marital affairs fell within the protection of the New Jersey Rape Shield Law.⁹⁸ The trial judge concluded that the testimony was subject to the Rape Shield Law.⁹⁹ The trial judge allowed the defendant’s wife to testify regarding a conversation between the defendant’s wife and Julie, during which Julie

⁸⁸ *State v. Davila-Izaguirre*, No. A-2099-17T1, 2020 N.J. Super. LEXIS 1134 (N.J. Super. Ct. App. Div. June 12, 2020).

⁸⁹ *Id.* at *2.

⁹⁰ *Id.* at *3.

⁹¹ *Id.* at *3–4.

⁹² *See id.* at *4.

⁹³ *Id.* at *4–5.

⁹⁴ *Davila-Izaguirre*, 2020 N.J. Super. LEXIS 1134 at *5.

⁹⁵ *See id.* at *6–7.

⁹⁶ *Id.* at *13–14.

⁹⁷ *Id.* at *14–15.

⁹⁸ *Id.* at *11.

⁹⁹ *Id.*

admitted that if she had an affair, it would be via anal sex.¹⁰⁰ The trial judge, however, barred the wife's testimony regarding Julie's numerous affairs.¹⁰¹ On appeal, the defendant contested the trial judge's application of the Rape Shield Law, arguing that his wife's testimony about Julie's numerous affairs was "so probative to the defense, specifically on the issue of consent."¹⁰²

The appellate court focused on whether the evidence of the testimony was relevant and whether the probative value outweighed the prejudicial effect to Julie.¹⁰³ When looking at the probative value of the evidence, the appellate court focused on whether there was "clear proof" that Julie's previous sexual act occurred, whether the act was relevant to the issue in the case, and whether the act was necessary for the defense.¹⁰⁴ The appellate court acknowledged that the excluded testimony was relevant to the defendant's theory of the case.¹⁰⁵ But the defendant failed to show that the probative value of the testimony outweighed the prejudicial effect.¹⁰⁶ In determining whether there was "clear proof" of Julie's prior sexual affairs, the appellate court found that the defendant's wife failed to provide a timeframe of the statements and the defendant did not offer any additional witnesses regarding the testimony from Julie.¹⁰⁷ From this ruling, it seems that testimony from only one witness is insufficient to meet "clear proof" under the Rape Shield Law, and more evidence is needed from the defendant to satisfy it.

B. State v. P.S.

During the trial in *State v. P.S.*,¹⁰⁸ the victim testified that she was raped by her stepfather three different times on three separate occasions.¹⁰⁹ The victim described one incident where the defendant "'pushed [the victim] and then turned [the victim] over onto [her] stomach,' and then 'put his private part in [the victim's] butt.'"¹¹⁰ The second incident the victim described was that the defendant "'pushed

¹⁰⁰ *Davila-Izaguirre*, 2020 N.J. Super. LEXIS 1134, at *11.

¹⁰¹ *Id.*

¹⁰² *Id.* at *14–15.

¹⁰³ *Id.* at *19.

¹⁰⁴ *See id.* at * 20 (citing *Budis*, 593 A.3d at 790).

¹⁰⁵ *Id.* at *20.

¹⁰⁶ *Davila-Izaguirre*, 2020 N.J. Super. LEXIS 1134, at *20.

¹⁰⁷ *Id.* at *20–21.

¹⁰⁸ *State v. P.S.*, 997 A.2d 163 (N.J. 2010).

¹⁰⁹ *Id.* at 169.

¹¹⁰ *Id.*

[the victim] back on the bed and put his private in [the victim's] butt[,] and 'something—yellow stuff came out.'"¹¹¹ The third incident described was that the defendant "came in [the victim's] room and he put his private in [the victim's] front and in [the victim's] back."¹¹² The victim's mother brought the victim to the hospital after the victim told the mother that the defendant touched her.¹¹³

During the trial, the defendant sought to introduce evidence about the victim's prior sexual conduct that she disclosed at the hospital.¹¹⁴ The State argued that this evidence was barred by the New Jersey Rape Shield Law.¹¹⁵ The evidence was a notation in the hospital record which read, "[eleven]-year-old victim . . . had sex [three] months ago."¹¹⁶ The defendant argued that this evidence was necessary to: (1) explain the victim's mother's statement that when she looked at the victim's vaginal opening, it looked bigger than an average child; (2) shed light on the victim's credibility; (3) and explain how a child her age would know about ejaculation.¹¹⁷ The trial judge ruled that this evidence was inadmissible as it was speculative and lacked probative value.¹¹⁸ The trial judge also stated that the victim did not use any inappropriate language, which would indicate that she may have heard this language from someone else.¹¹⁹

In affirming the appellate court, the New Jersey Supreme Court emphasized that the Rape Shield Law protects against "unwarranted and unscrupulous foraging for character-assassination information about the victim."¹²⁰ The New Jersey Supreme Court applied the two-step process from *Budis*,¹²¹ and decided first whether the evidence was relevant to the defense.¹²² Second, the Court determined whether the probative value outweighed the prejudicial effect on the victim.¹²³ The defendant argued that the victim's prior sexual conduct was critical to explain how the victim knew what sexual penetration and ejaculation

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *P.S.*, 997 A.2d at 169.

¹¹⁵ *Id.* at 170.

¹¹⁶ *Id.* at 169–70.

¹¹⁷ *Id.* at 170.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *P.S.*, 997 A.2d at 181 (citing *State v. Garron*, 827 A.2d 243, 254 (N.J. 2003)).

¹²¹ *State v. Budis*, 593 A.3d 784, 789 (N.J. 1991).

¹²² *P.S.*, 997 A.2d at 181.

¹²³ *Id.*

were and to explain why the victim's mother made a statement that the victim's vaginal opening looked bigger than that of an average child.¹²⁴

The New Jersey Supreme Court agreed with the Appellate Division that the evidence offered was "too thin."¹²⁵ The New Jersey Supreme Court stated that the notation from the medical report did not satisfy the requirement of "clear proof" that the prior acts did occur, as the reference from the report may have been a typographical error.¹²⁶ Further, the New Jersey Supreme Court stated that there was no way to determine from the evidence whether the alleged prior sexual contact was similar to the defendant's abuse or separate from it.¹²⁷ From this ruling, even though the defendant had evidence of a medical report from the hospital, it was still not enough to satisfy "clear proof" that the prior sexual conduct occurred.

C. State v. J.A.C.

In *State v. J.A.C.*,¹²⁸ the defendant sought to introduce sexually explicit internet messages sent by the victim to adult men to demonstrate that the allegations against the defendant were fabricated.¹²⁹ The trial court allowed the defendant to introduce evidence that the victim engaged in sexually explicit internet messages online, and those messages led her parents to consider moving her out of state.¹³⁰ But the trial court limited the introduction of evidence to just the fact that the messages existed and excluded the actual content of the messages.¹³¹

The victim testified that the defendant had exposed himself twice to her.¹³² She recounted the first incident where defendant had her sit on his lap to watch a video game, and he put his hand under her pajamas and touched her chest.¹³³ The second incident occurred when the victim was laying down on the couch and the defendant called her over and had her lie down with him.¹³⁴ While laying down near the victim, the

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 181–82.

¹²⁷ *Id.* at 182.

¹²⁸ *State v. J.A.C.*, 44 A.3d 1085 (N.J. 2012).

¹²⁹ *Id.* at 1088.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 1089.

¹³³ *Id.* at 1089–90.

¹³⁴ *J.A.C.*, 44 A.3d at 1090.

defendant put his hands in her pants and felt around.¹³⁵ Two years after the second incident, the victim was caught engaging in internet message conversations with seventeen adult men; the communications of six of those included sexually explicit language.¹³⁶ While at a meeting where the victim, her parents, her guidance counselor, and her teacher were present, the teacher asked the victim whether anyone had touched her, to which the victim replied that the defendant had “fingered” her.¹³⁷

After the Appellate Division affirmed the trial court’s ruling, the New Jersey Supreme Court granted the defendant’s petition for certification regarding the issue of “whether the content of the instant messages was properly excluded[.]”¹³⁸ The defendant contended that, in limiting the admissibility of the victim’s messages, the trial court erred by hindering his effort to present a fabrication defense.¹³⁹ The defendant argued that these messages suggested the level of the victim’s sexual activity during the time they were written.¹⁴⁰ Conversely, the State argued that the trial court properly balanced the New Jersey Rape Shield Law and further argued that none of the instant messages were relevant as they referred to neither the defendant himself nor the victim’s allegations against the defendant.¹⁴¹ The New Jersey Supreme Court used the same two-prong test from prior cases in which the court looked at whether the evidence was relevant, and whether the probative value outweighed the prejudicial effect to the victim.¹⁴² However, the New Jersey Supreme Court started with a different first step and debated whether the instant messages constituted “sexual conduct” under the Rape Shield Law.¹⁴³ Under the Rape Shield Law, “sexual conduct” is defined as “any conduct or behavior relating to sexual activities of the victim[.]”¹⁴⁴ This conduct may also include speech.¹⁴⁵ The New Jersey Supreme Court held that the victim’s messages constituted sexual conduct because she suggested that she was sexually experienced to adult men.¹⁴⁶

¹³⁵ *Id.*

¹³⁶ *Id.* (finding also in these messages that the victim used sexual vulgarities that she learned online to try and impersonate a sexually experienced adult to encounter strangers).

¹³⁷ *Id.* at 1091.

¹³⁸ *Id.* at 1088.

¹³⁹ *Id.* at 1093.

¹⁴⁰ *J.A.C.*, 44 A.3d at 1093.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1095–96.

¹⁴³ *Id.* at 1097.

¹⁴⁴ N.J. STAT. ANN. § 2C:14-7(f) (West 2013).

¹⁴⁵ *J.A.C.*, 44 A.3d at 1097.

¹⁴⁶ *Id.* at 1097–98.

The New Jersey Supreme Court determined that while there was “clear proof” that the explicit text messages did occur, the probative value of this evidence did not outweigh the prejudice to the victim.¹⁴⁷ Here, although the trial court excluded the actual internet messages, the defendant was able to produce evidence that the victim was engaging in sexually explicit internet messages with adult men during the time she accused the defendant.¹⁴⁸

In this case, the New Jersey Supreme Court adopted the view that even if there is “clear proof” that the victim’s prior sexual conduct occurred, its introduction as evidence may be limited to fulfill the goal of the Rape Shield Law: protecting the victim’s privacy.¹⁴⁹ This was not a case in which the substance of the internet messages needed to be admitted, however, as the defendant’s evidence was able to show that the victim did engage in sexually explicit internet messages.¹⁵⁰

D. State v. B.C.S.

In *State v. B.C.S.*,¹⁵¹ the defendant was convicted of sexual assault.¹⁵² While speaking to the victims’ mother on the phone,¹⁵³ the defendant admitted to touching the mother’s seven- and six-year-old daughters, stating that he “slipped and hurt [the youngest child] a couple of times’ when giving her a bath but that ‘it was nothing on purpose.’”¹⁵⁴ Further, the defendant stated that “[w]hen I was cleaning [her] . . . I had hurt her a couple times, but I never touch[ed] her in that way . . . maybe . . . my finger slipped in there, but . . . it wasn’t on purpose.”¹⁵⁵ The defendant also said that he “just touched” the older daughter “by using his hands to touch her privates but ‘did not put [his] fingers inside of her.’”¹⁵⁶ Regarding the mother’s son, the defendant stated that he “might have put [his] penis up . . . [her son’s] butt but when [the child] told [him] to stop, [the defendant] stopped.”¹⁵⁷ The defendant further admitted that

¹⁴⁷ *Id.* at 1100; *see id.* at 1096 (quoting *Budis*, 593 A.2d at 790 (stating that “probative value . . . ‘depends on clear proof that [the conduct] occurred, that [it is] relevant to a material issue in the case, and that [it is] necessary to a defense’”).

¹⁴⁸ *See id.* at 1100.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *State v. B.C.S.*, No. A-3043-15T3, 2019 N.J. Super. LEXIS 1511 (N.J. Super. Ct. App. Div. July 3, 2019).

¹⁵² *Id.* at *4.

¹⁵³ *Id.* at *9–12.

¹⁵⁴ *Id.* at *12.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at *12–13.

¹⁵⁷ *B.C.S.*, 2019 N.J. Super. LEXIS 1511, at *13.

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he put “‘lube’ on one time, and would ‘jerk [her son] off.’”¹⁵⁸ Defendant argued on appeal that the “trial court erred by excluding evidence of the childrens’ prior sexual knowledge.”¹⁵⁹ Here, the defendant was attempting to introduce this evidence to refute the mother’s claim that her children could not have described the alleged incidents unless the abuse actually occurred because they had not been exposed to such sexual acts in the past.¹⁶⁰

The evidence the defendant sought to admit was contained within the Division of Child Protection and Permanency records and revealed that “the Division twice responded to allegations of sexual activity by the oldest child.”¹⁶¹ The first allegation stated that the brother had touched the older sister in her “‘crouch’ . . . with his hand and touched the youngest child in the same place.”¹⁶² The allegations also stated that the brother “‘was going up and down on [the older sister] and her sister and her mom made him stop.’”¹⁶³ The second allegation was from one of the child’s aunts who reported that “[the oldest child] had put his penis in his six-year-old male cousin’s buttocks while they were in a bedroom, and he had put his penis in his cousin’s mouth.”¹⁶⁴

The trial court ruled that this evidence was inadmissible because it was not relevant to the girls’ claims.¹⁶⁵ Further, the trial court found that the State never brought forth previous sexual knowledge of the children at issue within the case.¹⁶⁶ Neither child used unusual language when describing the allegations against the defendant and the language the children used when describing the allegations were not identical to the division records.¹⁶⁷ For the boy’s allegations, the trial court focused on the language in the division records and determined that the defendant’s alleged acts and the acts in the division records were not described in similar language.¹⁶⁸

On appeal, the appellate court affirmed the trial court’s decision, as the trial court found that the division records regarding the previous activity concerning the girls had little to no probative value, as it was not

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at *26.

¹⁶⁰ *Id.* at *16.

¹⁶¹ *Id.* at *16–17.

¹⁶² *Id.* at *17.

¹⁶³ *B.C.S.*, 2019 N.J. Super. LEXIS 1511, at *17.

¹⁶⁴ *Id.* at *18.

¹⁶⁵ *Id.* at *26.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at *26–27.

¹⁶⁸ *Id.* at *27.

based on any “clear proof” that the acts had occurred.¹⁶⁹ The appellate court also found the same for the nine-year-old boy, regarding the allegations from the aunt as she was reporting these acts based on the account of her six-year-old son.¹⁷⁰ The appellate court noted that the alleged report did not “closely resemble” the acts to which the defendant admitted.¹⁷¹

Looking at how the New Jersey courts have interpreted “clear proof,” there seems to be an inconsistency as to how much evidence is considered enough to satisfy “clear proof.” For example, in *Davila-Izagirre*,¹⁷² it appeared that the appellate court wanted additional witnesses and more specific details of the previous sexual conduct to satisfy “clear proof.” In *State v. P.S.*,¹⁷³ there was a hospital record that indicated that the victim engaged in previous sexual conduct; however, the court still found that the record was too thin to establish “clear proof.” Similarly, in *State v. B.C.S.*,¹⁷⁴ while there were authenticated records of the victim’s previous sexual conduct, the appellate court found that, these records did not satisfy “clear proof” under the Rape Shield Law. Further, in *State v. J.A.C.*,¹⁷⁵ while there was “clear proof” that the instant messages existed, the court precluded the defendant from admitting the substance of the messages into evidence.

III. OTHER STATES’ INTERPRETATION OF THE RAPE SHIELD LAW

This part of the comment will examine how other states interpret the meaning of “clear proof” and whether any state provides a clear definition of how much evidence is needed to satisfy this element.

A. Wisconsin: *State v. Marston*

In *State v. Marston*,¹⁷⁶ the defendant claimed that the trial court improperly prevented him from cross-examining the victim about an ongoing sexual relationship with an unidentified man.¹⁷⁷ The defendant

¹⁶⁹ *B.C.S.*, 2019 N.J. Super. LEXIS 1511, at *27–28.

¹⁷⁰ *Id.* at *33.

¹⁷¹ *Id.* at *33.

¹⁷² *State v. Davila-Izagirre*, No. A-2099-17T1, 2020 N.J. Super. LEXIS 1134 (N.J. Super. Ct. App. Div. June 12, 2020).

¹⁷³ *State v. P.S.*, 997 A.2d 163 (N.J. 2010).

¹⁷⁴ *State v. B.C.S.*, No. A-3043-15T3, 2019 N.J. Super. LEXIS 1511 (N.J. Super. Ct. App. Div. July 3, 2019).

¹⁷⁵ *State v. J.A.C.*, 44 A.3d 1085 (N.J. 2012).

¹⁷⁶ *State v. Marston*, No. 91-0341-CR, 1991 Wisc. App. LEXIS 1411, at *1 (Wis. Ct. App. Oct. 29, 1991).

¹⁷⁷ *Id.* at *2.

wanted to admit this evidence to further their defense theory that the victim had consensual sex with the unidentified man, not the defendant.¹⁷⁸

Under Wisconsin law, “[t]here are five proofs needed to present otherwise excluded evidence of a child-complainant’s prior sexual conduct for the purpose of proving an alternate source.”¹⁷⁹ The defendant must show: “(1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant’s case; and (5) that the probative value of the evidence outweighs its prejudicial effect.”¹⁸⁰

While looking at these five factors, the Wisconsin Appellate Court determined there was no “clear proof” that the prior acts occurred, as evidence that the victim was having an ongoing sexual relationship with another adult male was from the defendant’s own statements.¹⁸¹ Similar to the holding of the New Jersey Appellate Division in *State v. Davila-Izaquirre*, the Wisconsin Appellate Court held that mere statements from one witness were not enough to satisfy the “clear proof” standard.¹⁸² More evidence is needed. The appellate court held the statements were clearly insufficient to establish the events that occurred.¹⁸³

B. Wisconsin: State v. Pulizzano

In *State v. Pulizzano*,¹⁸⁴ the defendant argued that the trial court erred by not allowing the defendant to cross-examine the victim in holding that the evidence was precluded under the Rape Shield Law.¹⁸⁵ The defendant asserted that the evidence of the prior sexual conduct of the victim would rebut the inference that the victim could only have possessed the sexual knowledge he had from being sexually assaulted by the defendant.¹⁸⁶ The evidence the defendant sought to admit was a report of a psychiatrist who treated the victim for emotional problems that were caused by an earlier sexual abuse incident.¹⁸⁷ The report indicated that after the prior sexual abuse incident, the victim became

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at *4.

¹⁸⁰ *Id.* at *4–5 (citing *State v. Pulizzano*, 456 N.W.2d 325 (Wis. 1990)).

¹⁸¹ *Id.* at *5.

¹⁸² *Marston*, 1991 Wisc. App. LEXIS 1411, at *5–6.

¹⁸³ *Id.* at *5.

¹⁸⁴ *State v. Pulizzano*, 456 N.W.2d 325 (Wis. 1990).

¹⁸⁵ *Id.* at 327.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 327–28.

abnormally interested in sexual material.¹⁸⁸ The State argued that its interests in prohibiting the evidence should outweigh the defendant's right to present the evidence.¹⁸⁹ The Court of Appeals of Wisconsin reversed the trial court's decision since the defendant's offer of proof established good cause to cross-examine the victim.¹⁹⁰

On appeal, the Wisconsin Supreme Court examined the legislative history of the Rape Shield Law within the state.¹⁹¹ While the Wisconsin Supreme Court acknowledged that most times the evidence of a victim's prior sexual conduct would either be irrelevant or relevant but prejudicial, there are cases in which the prior sexual conduct may be relevant and probative such that the defendant's right to present the evidence is constitutionally protected.¹⁹²

The Wisconsin Supreme Court held that to establish a constitutional right to present excluded evidence of a victim's prior sexual conduct for the limited purpose of proving an alternative source, the defendant must make an offer of proof showing: "(1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect."¹⁹³ The defendant's offer of proof was held to be sufficient and the right to present was paramount to the state's interest in excluding it.¹⁹⁴

While the court did not rule on whether the evidence would be admitted as it still needed to be balanced against the state's interest, it did satisfy "clear proof."¹⁹⁵ This case appears to be the opposite of *State v. P.S.*, in which the New Jersey Supreme Court held that there was no "clear proof" that the victim had a previous sexual act even though it was stated in a medical report that the victim had sex three months earlier.¹⁹⁶ Here, the Wisconsin court held that the report of the victim's psychiatrist report satisfied "clear proof."¹⁹⁷

The Wisconsin Rape Shield Law differs from the New Jersey Rape Shield Law, as the standard to admit evidence under the former is less

¹⁸⁸ *Id.* at 328.

¹⁸⁹ *Id.* at 333–34.

¹⁹⁰ *Pulizzano*, 456 N.W.2d at 329.

¹⁹¹ *See* WIS. STAT. § 972.11 (2016).

¹⁹² *Pulizzano*, 456 N.W.2d at 330–31.

¹⁹³ *Id.* at 335.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *State v. P.S.*, 997 A.2d 163, 181–82 (N.J. 2010).

¹⁹⁷ *Pulizzano*, 456 N.W.2d at 333–34.

strict.¹⁹⁸ Under the Wisconsin statute, any reputation or opinion testimony regarding the witness's prior sexual conduct and any "evidence concerning the complaining witness's prior sexual conduct" is subject to WIS. STAT. § 971.31.¹⁹⁹ The standard to admit the evidence under the Wisconsin statute is that the probative value of the evidence must outweigh the inflammatory and prejudicial nature of the evidence.²⁰⁰ If the evidence meets that standard, the evidence is limited to the following three instances of conduct:

First, evidence of the complaining witness's past conduct with the defendant; second, evidence of specific instances of sexual conduct, showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered; [and] third, evidence of prior untruthful allegations of sexual assault made by the complaining witness.²⁰¹

On its face, the language of Wisconsin's Rape Shield Law is different from New Jersey's Rape Shield Law. Under the Wisconsin Rape Shield Law, the probative value of the victim's previous sexual conduct must only outweigh the prejudicial effect of the evidence.²⁰² In comparison, the New Jersey standard is stricter, as the probative value of the victim's previous sexual conduct must "substantially" outweigh the prejudicial effect towards the victim.²⁰³ While the difference between the statutes is slight, the New Jersey Rape Shield Law provides more protection for the victim as the evidence of the victim's previous sexual conduct must "substantially" outweigh the prejudicial effect, while with the Wisconsin statute the evidence must only "outweigh" the prejudicial effect.

C. Ohio

In *State v. King*,²⁰⁴ the defendant, King, argued that the trial court erred by excluding evidence that the victim had been sexually abused by her brother.²⁰⁵ In this case, King and his wife received custody of the victim, however, four years later the victim was removed and placed in foster care due to the alleged sexual abuse.²⁰⁶ While at the foster care

¹⁹⁸ WIS. STAT. § 972.11 (2016).

¹⁹⁹ WIS. STAT. § 972.11(2)(b) (2016).

²⁰⁰ WIS. STAT. § 971.31(11) (2016).

²⁰¹ WIS. STAT. § 972.11(2)(b) (2016).

²⁰² WIS. STAT. § 971.31(11) (2016).

²⁰³ N.J. STAT. ANN. § 2C:14-7(a) (West 2013).

²⁰⁴ *State v. King*, No. CA2018-04-047, 2019 Ohio App. LEXIS 876, at *1 (Ohio Ct. App. Mar. 11, 2019).

²⁰⁵ *Id.* at *7-8.

²⁰⁶ *Id.* at *1.

home, the victim told her foster mother that King had sexually abused her.²⁰⁷ During the trial, the victim stated that King would lure her into his bedroom by promising her that she could play her favorite game on his television.²⁰⁸ While inside the room, the victim testified that “King would remove her clothing and touch her ‘front private’ and ‘back private’ with his hands ... and touch[] her ‘front private’ with his mouth.”²⁰⁹

Under the Ohio Rape Shield Laws:

Evidence of specific instances of the victim’s sexual activity, opinion evidence of the victim’s sexual activity, and reputation evidence of the victim’s sexual activity shall not be admitted ... unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim’s past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.²¹⁰

The Ohio courts have ruled that statutes are not always applied literally as they may infringe upon a defendant’s constitutional right to confront witnesses.²¹¹ The evidence of a prior sexual abuse of the child victim may be used to show the source of the victim’s sexual knowledge.²¹² To admit evidence of a child’s prior sexual abuse there must be “clear proof” that the acts have occurred.²¹³ Here, the defendant sought to admit allegations that the victim’s brother was discovered “naked, or just wearing underwear, while on top of” the victim.²¹⁴ The court found this evidence inadmissible because it did not come from a known source, and the victim’s brother had not been adjudicated or charged on the alleged conduct.²¹⁵ While King filed an additional brief that named his wife as the source, the trial court held there was nevertheless no evidence that the victim’s brother was charged, adjudicated, or investigated.²¹⁶

²⁰⁷ *Id.* at *1-2.

²⁰⁸ *Id.* at *2.

²⁰⁹ *Id.* at *2-3.

²¹⁰ OHIO REV. CODE ANN. § 2907.02(D) (LexisNexis 2021); OHIO. REV. CODE. ANN. § 2907.05(E) (LexisNexis 2021).

²¹¹ *King*, 2019 Ohio App. LEXIS 876, at *8.

²¹² *Id.* at *9.

²¹³ *Id.*

²¹⁴ *Id.* at *10.

²¹⁵ *Id.*

²¹⁶ *Id.* at *11.

Unlike the New Jersey Rape Shield Law, the Ohio Rape Shield Law places a lower standard on the admissibility of the evidence.²¹⁷ Under the New Jersey Rape Shield Law, the court may admit the evidence of the victim's previous sexual conduct, if the evidence is considered "relevant and highly material," the evidence is material to proving the source of semen, pregnancy or disease, and if the evidence is probative of whether a reasonable person would have believed that the victim freely permitted the sexual behavior complained of.²¹⁸ Further, the probative value of the evidence must "substantially outweigh" the probability that its admission will be used for the wrong reasons, such as: unfair prejudice, invasion of privacy to the victim, and confusion of the issues.²¹⁹ In contrast, under the Ohio Rape Shield Law, the evidence may be admitted if it evidences the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and the court finds that it is material to a fact at issue.²²⁰ Also, the inflammatory or prejudicial nature of the evidence must not outweigh its probative value.²²¹

IV. PROPOSED AMENDMENT

This section proposes to amend the New Jersey Rape Shield Law with a specific definition of what encompasses "clear proof," to address the inconsistency with the amount and type of evidence needed to satisfy the "clear proof" standard. This section will further discuss the benefits and drawbacks of the proposed amendment and illustrate the proposed standard by applying it to recently decided New Jersey rape shield cases. This section does not argue that this proposed amendment should apply to other states, but rather how it should apply to New Jersey specifically.

The New Jersey courts still must determine if the evidence is highly relevant for the defense. If the evidence is not highly relevant, the proposed three factors described below will not be considered. When

²¹⁷ OHIO REV. CODE ANN. § 2907.02(D) (LexisNexis 2021).

²¹⁸ N.J. STAT. ANN. § 2C:14-7(a) (West 2013); *see* N.J. STAT. ANN. § 2C:14-7(c) (West 2013) ("Evidence of previous sexual conduct with persons other than the defendant which is offered by any lay or expert witness shall not be considered relevant unless it is material to proving the source of semen, pregnancy or disease."); *see also* N.J. STAT. ANN. § 2C:14-7(d) (West 2013) ("Evidence of the victim's previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.").

²¹⁹ N.J. STAT. ANN. § 2C:14-7(a) (West 2013).

²²⁰ OHIO REV. CODE ANN. § 2907.02(D) (LexisNexis 2021).

²²¹ *Id.*

determining whether the probative value of the evidence substantially outweighs the prejudicial effect towards the victim, courts decide if there is “clear proof” that the previous sexual conduct occurred. This Comment proposes that “clear proof” is satisfied when: (1) direct or circumstantial evidence implicates that the victim’s previous sexual conduct occurred; (2) more than one witness can testify to the victim’s previous sexual conduct; or (3) an authenticated document from the victim, experts, or any official agency confirms that the previous sexual conduct occurred. Under this test, the first factor, and either the second or third factor, must be met. These factors will provide courts with a guideline on how to decide if there is “clear proof” that the victim’s previous sexual act did occur.

Under the proposed first factor, New Jersey courts must determine if there is any direct or circumstantial evidence that the victim’s previous act did occur. Similar to *King*, the courts will ask whether anyone witnessed the victim’s previous acts, whether it could be inferred that the victim engaged in prior sexual conduct, or whether there was an investigation into the victim’s previous sexual conduct.²²² Under this factor, a defendant may not argue that the victim is fabricating the story without evidence that the act occurred. This factor is the most lenient as compared to the other two, which is why more than one of the above factors must be met.

Under the proposed second factor, New Jersey courts will consider whether there is more than one witness of the victim’s previous sexual conduct. Under this factor, a witness does not have to be someone who observed the victim’s previous sexual conduct, but it can be someone who the victim relayed information regarding their prior sexual conduct to. Most cases where a defendant attempted to admit the victim’s previous sexual conduct relied on a single witness of victim’s previous conduct.²²³ In those cases, the courts did not allow the evidence of the victim’s previous sexual conduct based on one person’s testimony. Adding this second factor will save the courts time since defendants will not bring claims that the previous conduct occurred if they only have one witness. This requirement is also consistent with the purpose of the 1994 amendment to New Jersey’s Rape Shield Law, which intended to

²²² See generally *State v. King*, No. CA2018-04-047, 2019 Ohio App. LEXIS 876, at *9 (Ohio Ct. App. Mar. 11, 2019).

²²³ See *Davila-Izaguirre*, 2020 N.J. Super. LEXIS 1134, at *10–11; *J.D.*, 48 A.3d at 1038; *State v. A.W.*, No. A-4343-10T4, 2014 N.J. Super. LEXIS 480, at *5 (App. Div. Mar. 10, 2014).

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further protect the victim's privacy.²²⁴ Allowing only one witness to satisfy the "clear proof" standard would be unfair for the victim because any prejudicial effect stemming from the admittance of the evidence will likely lead to trauma and embarrassment. Lastly, having multiple witnesses testifying to the victim's previous conduct will lead to greater evidential reliability and more proof that the defendant is not furthering an unscrupulous claim against the victim.

Under the third proposed factor, the New Jersey courts will determine if there is an authenticated document from the victim, experts, or an official agency indicating that the previous sexual conduct occurred. An authenticated document should be applied broadly, thus it may be more than a piece of paper. The evidence can be anything from a single document to any form of electronic communication. For an authenticated document from a victim, courts may look to see if any writing or text messages exist which show that the previous act did occur. The victim does not need to have signed it. However, there must be clear evidence that it came from the victim, whether in their handwriting, from their phone, or from someone else's phone; something that indicates the messages were from the victim. In this section, "experts" refer to any type of medical experts; this would include any medical reports, notes, or files written by any medical professional. Also, an "official agency," whether private or public, may include any official department such as child services, police department, fire department, etc.

A. Applying the Proposed Standard

Under the proposed amendment, if the defendant in *State v. Davila-Izaquirre* were to take an appeal from the New Jersey Appellate Division decision arguing that the court erred by excluding the testimony of his wife concerning the victim's multiple affairs, the New Jersey Supreme Court should affirm the decision. The only evidence that the defendant had regarding the victim's previous sexual conduct was his wife's testimony that the victim told her this information.²²⁵ Under the proposed amendment, the only part of the test that would be met would be factor one, as there is direct evidence from the defendant's wife that the victim's previous sexual conduct did occur. However, because at least two of the proposed factors need to be met and the evidence does not meet either the second or third factor, there is no "clear proof." Under the second factor, the defendant would need at least one more

²²⁴ N.J. STAT. ANN. § 2C:14-7 (West 2013); see also Assemb. Judiciary, L. and Pub. Safety Comm. 677, 1994 (N.J. 1994).

²²⁵ *Davila-Izaquirre*, 2020 N.J. Super. LEXIS 1134, at *10-11.

witness to testify about the victim's prior conduct. While under the third factor, there is no authenticated document from the victim, any expert, or any official agency regarding the victim's previous sexual conduct.

Under the proposed amendment, if the defendant in *State v. B.C.S.* were to take an appeal from the New Jersey Appellate Division decision regarding the admission of allegations within the Division records, the New Jersey Supreme Court could rule that "clear proof" was indeed satisfied. Factor three, in this case, would easily be satisfied. In *State v. B.C.S.*, there was an authenticated document from an official agency, as the previous sexual conduct allegations were within the records of the Division of Child Protection and Permanency.²²⁶ Thus, the defendant would only need to satisfy one of the other factors. If the defendant can have one of the daughters, or even the aunt, testify to the allegations in the record, then the second factor would be satisfied. However, because the defendant is arguing the matter on appeal, he would not be able to present witnesses now who did not testify at the trial level.²²⁷ Lastly, the defendant would easily meet the first factor requiring direct or circumstantial evidence regarding the incident. The evidence used here could be the authenticated document from the Division to satisfy this factor, thus the defendant would meet the standard of "clear proof" evidence of previous sexual acts. If the court were to find that the evidence meets the "relevant and highly material" standard and the probative value substantially outweighs the prejudicial effect, then the court may overturn the Appellate Division's ruling.

B. Advantages and Disadvantages of Proposed Amendment

If the proposed amendment is not adopted by the New Jersey Legislature, the New Jersey courts will continue to give inconsistent rulings on admitting and precluding evidence of a victim's previous sexual conduct. While the current New Jersey Rape Shield Law offers great protection for the victim, it may also put the defendant at a disadvantage, as there is a high standard to meet to admit a victim's previous sexual conduct and there is no specific meaning of "clear proof." Due to the lack of clarity of "clear proof" within the New Jersey Rape Shield Law, the probative value of the defendant's evidence is uncertain. Further, defendants are placed in a situation where they may not get a chance to confront the witness during their trial. While other

²²⁶ *B.C.S.*, 2019 N.J. Super. LEXIS 1511, at *16-17.

²²⁷ N.J. STAT. ANN. § 2:5-4(a).

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states have not specified what “clear proof” means, they have placed a lower burden on defendants to admit the evidence of the victim’s previous sexual conduct. If the proposed amendment were to be adopted by the New Jersey Legislature, it would provide defendants with a more lenient standard for seeking to have trial courts admit evidence of a victim’s previous sexual conduct. However, the tradeoff is that the proposed amendment may revert to the original Rape Shield Law where New Jersey courts were admitting more evidence than need be, putting more pressure on the victim’s private life.

With every proposed statute or regulation, there will be both benefits and drawbacks. The proposed amendment adds more specific factors that the New Jersey courts can use to determine the admittance of evidence. Using these factors will lead the New Jersey courts to have a more consistent balance on which types of evidence courts are precluding. Having the proposed factors at the court’s hands will also lead to consistent verdicts, since admitting or precluding previous sexual conduct evidence may be the reason a defendant is considered guilty or not guilty. Also, the addition of the factors will save the courts time since defendants will not bring claims that do not meet the factors and not just rely on their own alleged testimony.

The cases within this Comment indicate that most of the defendants’ arguments were based on testimony by only one witness. The proposed second factor will ensure that defendants have more reliable sources regarding their defense. While this may seem to benefit the victim since the defendant would need more than one witness to testify to the previous sexual conduct, this also may be a drawback for the victim’s mental health. The second factor does not specify whether the witness had to observe the victim’s previous sexual conduct or just has to be able to testify that the victim’s previous sexual conduct occurred. This factor leaves the victim unable to relay information regarding the victim’s previous sexual conduct to more than one person. If the victim does so, the second factor under the proposed amendment could be satisfied, as the defendant would then be able to show that more than one witness can testify to the victim’s previous sexual conduct.

The biggest drawback from the proposed amendment is that it may cause more stress to the victim by invading their private life. The legislature amended the first New Jersey Rape Shield Law because it gave the courts broad power to admit evidence of the victim’s previous sexual conduct, which led jurors to make assumptions regarding the evidence. The first factor is easily met as to any evidence that is brought before the court that the victim’s precious act did occur. The proposed

factors, while giving the court a more consistent approach when admitting evidence, may lead the courts to admit more evidence than it would if they followed the present statute.

The proposed factors may also lead to a decrease in the prosecution of sex crimes. The main reason for amending the previous New Jersey Rape Shield Law was to give more protection to the victim's privacy. As seen with the proposed factors, this may revert to allowing the court access to the victim's private life. Victims who realize that their private life will be discussed in court may not report to the police or try to have this case prosecuted if they know they can risk having the public open the door to their life. This may lead to an endless circle of sex crimes for which no one is held liable, since the proposed amendment discourages victims to speak up.

The proposed factors may also seem to be broad which can put a victim at a disadvantage. Contrary to Federal Rule of Evidence 803(8), the third factor is vague, as an official agency is not clearly defined.²²⁸ An official agency can encompass several different agencies including both private and public. Regarding the third element, especially in the present time, everything is communicated through text messages, social media, the internet, etc., making it easier for a defendant to satisfy this element. Here, if the victim were to reach out to anyone regarding the sexual conduct that occurred, through a cell phone, that could satisfy the third element. It also may be argued that these factors go against the main goal of the Rape Shield Law, which is to protect the victim's privacy.

Whenever there is a chance that a defendant may not be able to confront the witness against him in a trial, a confrontation issue is raised. The proposed amendment does provide a benefit for the defendant's right to confront the witness. When courts are looking to admit evidence of previous sexual conduct, they examine whether the probative value of the evidence substantially outweighs the prejudicial effect. The "clear proof" standard falls under the "probative value" of the evidence and because the proposed amendment seems to be more relaxed with satisfying the factors, the probative value of the evidence will be met if "clear proof" is satisfied. Also, when the New Jersey Rape Shield Law and Confrontation Clause conflict, the New Jersey courts relax the standard from admitting only evidence that the probative value "substantially" outweighs the prejudicial effect to the victim, to

²²⁸ FED. R. EVID. 803(8) (classifying a public record as a trustworthy document or statement that sets out an office's activities and matters observed while under a legal duty to report, and factual findings from authorized investigations).

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also looking at evidence that is “relevant and necessary.”²²⁹ This makes it less restrictive for the courts to admit evidence of the victim’s previous sexual conduct.

V. CONCLUSION

This comment proposes a new amendment that the New Jersey Legislature should adopt under the New Jersey Rape Shield Law.²³⁰ New Jersey courts have not distinctly defined what constitutes “clear proof” under the Rape Shield Law. Since no clear guidelines or factors exist to determine admissibility, New Jersey courts continue to inconsistently admit evidence of a victim’s previous sexual conduct.

This comment argues that a proposed amendment setting forth the factors for determining whether there is “clear proof” that a previous sexual act has occurred will help guide the courts to be more consistent regarding admissibility. Under the proposed amendment to satisfy “clear proof,” a court must find that the evidence meets two out of the three factors: (1) direct or circumstantial evidence that implies that the victim’s previous sexual conduct did occur; (2) more than one witness can testify to the victim’s previous sexual conduct; or (3) an authenticated document from the victim, experts, or any official agency that confirms that the previous sexual conduct did occur. By focusing on these factors, courts will be able to consistently determine which types of evidence satisfy “clear proof.”

²²⁹ *J.D.*, 48 A.3d at 1038.

²³⁰ N.J. STAT. ANN. § 2C:14-7 (West 2013).