



Supreme Court of Georgia

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SUMMARIES OF OPINIONS

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WHITE V. THE STATE (S18G0365)

The Supreme Court of Georgia has upheld a man's rape and aggravated sodomy convictions for crimes against three young girls in **Newton County**.

With today's opinion, however, the high court has ruled that under Georgia's Rape Shield Statute, state prosecutors may not introduce evidence of a victim's past sexual behavior for any purpose.

In November 2014, a Newton County jury found **Charles White** guilty of three counts of rape, one count of statutory rape, 10 counts of child molestation, three counts of aggravated sodomy, three counts of incest, and one count of enticing a child for indecent purposes. According to the facts at trial, White had periodically lived with his sister and brother-in-law, Monique and Royce Mitchell, who had a young daughter, S.M. In 2012, White's 18-year-old niece, D.P., disclosed to her mother that White had molested her multiple times beginning when she was 7 years old and continuing until she was 14. Her mother then called Royce Mitchell out of concern for S.M. When Mitchell asked his daughter if her uncle had ever acted inappropriately toward her, she said no.

By 2013, Royce Mitchell was involved with another woman who had two daughters, 4 and 5. That year, the two little girls said that S.M., by then 12, had molested them. When Mitchell asked his daughter if that were true, she admitted it was, then broke down and said "Uncle Charles" had molested her multiple times from the time she was in kindergarten until she entered the fourth grade. S.M. was interviewed by an expert in child sexual abuse who later testified that children who exhibit behavior that is "sexualized" or who are acting out sexually toward other children are exhibiting behavior consistent with a child who has been sexually

abused. A third victim, White's daughter, also testified that she had been molested by her father in 2013 when she was 9 and he once had had intercourse with her.

Prior to White's trial, his attorney filed a motion asking the court to exclude the evidence that S.M. had committed acts constituting sexual battery when she was 12 years old against her father's stepchildren, based on the Rape Shield Statute (Georgia Code § 24-4-412). The statute says that in prosecuting sexual offenses, "evidence relating to the past sexual behavior of the complaining witness shall not be admissible...except...evidence relating to the past sexual behavior of the complaining witness may be introduced if the court...finds that past sexual behavior directly involved the participation of the accused and...*supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of...*" The trial court denied White's motion, ruling that the statute did not exclude the evidence because it was relevant to a number of issues that had nothing to do with S.M.'s consent, including that the jury could infer from S.M.'s abnormal behavior that she was likely the victim of sexual abuse, and most likely at White's hands.

On appeal, the Georgia Court of Appeals – the state's intermediate appellate court – upheld the trial court's ruling. It concluded that Georgia's Rape Shield Statute "cannot be invoked by a defendant to prevent a victim from offering otherwise relevant evidence." White then appealed to the Georgia Supreme Court, which agreed to review the case to answer three questions, including whether a defendant may invoke the Rape Shield Statute to prohibit admission of evidence offered by the State of a witness's past sexual behavior.

In today's opinion, written by **Chief Justice Harold D. Melton**, "we conclude that the trial court erred by admitting into evidence testimony regarding S.M.'s sexual behavior." However, the high court finds that the admission of this evidence did not amount to "plain error" that would require reversal of White's convictions as "we do not find that the error here 'likely affected' the outcome of the trial court proceedings." As a result, the Court has upheld the Court of Appeals ruling, although it criticizes its basis.

"Regardless of the State's possible desire to introduce evidence of a complaining witness's past sexual history to support its theory of a case against a defendant (as was the case here) or for some other purpose, there is simply no additional exception written into the statute to allow the State to do so, and this Court cannot write such an exception into the statute for the State," the opinion says.

In a footnote, the Court explains that "the introduction of S.M.'s prior sexual behavior was not to further victimize her, but to expose potential wrongdoing by White." "However, the plain language of Georgia's Rape Shield law would not allow for the admission of such evidence because the State cannot introduce evidence of a victim's past sexual behavior." And while there may be policy reasons to "allow the State to introduce evidence of a victim's past sexual behavior in certain circumstances, we cannot rewrite Georgia's Rape Shield law to allow the State to do so," today's opinion says. "We must leave that job to the General Assembly."

The opinion points out that when the General Assembly adopted Georgia's new Evidence Code, which became effective in 2013, it did not adopt the federal counterpart to Georgia's Rape Shield law, as it did in other areas of the law. "Specifically, despite the fact that Georgia Code § 24-4-412 of the new Evidence Code has a federal counterpart in Federal Rule of Evidence 412, the Georgia statute contains no exception for the State to be excluded from its requirements, whereas the federal rule *does* contain such an exception for the prosecution."

“For example, in the context of a federal prosecution for a sex crime in which evidence existed to show that the victim had been involved sexually with the defendant in the past in a manner that was in some way relevant to proving the crimes at issue in the defendant’s trial, Federal Rule of Evidence 412 would allow the prosecutor to bring forth that evidence after following the appropriate procedures,” the footnote says.

With today’s opinion, the Supreme Court has overruled a number of prior Court of Appeals’s opinions to the extent that they “can be read to support the erroneous proposition that evidence of a victim’s past sexual behavior could be admissible under the Rape Shield Statute if relevant to an issue other than consent.”

In a special concurrence, **Justice Charles J. Bethel** writes that while he agrees with the outcome in this case, “I find myself unsettled and uneasy with the majority’s determination, in Division 3, that the error here did not likely affect the outcome of the trial court proceedings.”

“The majority is entirely correct in its assessment of defense counsel’s efforts to mitigate the impact of the evidence at issue,” the special concurrence says. “However, in the absence of that evidence, I cannot say with confidence that a jury would have returned the same verdict in regard to the allegations levied against White by S.M. What I can say with confidence is that White’s conviction does not seriously affect the fairness, integrity, or public reputation of judicial proceedings nor does upholding the conviction risk a miscarriage of justice. Georgia’s version of the Rape Shield Statute exists for the protection of the witness. Nothing about the admission of the evidence here threatened White’s right to a fair or constitutional trial.”

Attorneys for Appellant (White): Andrew Fleischman, Noah Pines

Attorney for Appellee (State): Layla Zon

IN OTHER CASES, the Supreme Court of Georgia has upheld **murder** convictions and life prison sentences for:

* Mark Birdow (Fulton Co.)

BIRDOW V. THE STATE (S18A1154)

* Jarmond Amere Curry (Spalding Co.)

CURRY V. THE STATE (S18A1302)

(The Supreme Court has upheld Curry’s life prison sentence for murder, but it has vacated his additional life prison sentence for armed robbery. The sentence was an error as the armed robbery conviction should have merged into the felony murder charge for sentencing purposes.)

* Gabriel Flannigan (Fulton Co.)

FLANNIGAN V. THE STATE (S18A1209)

* Joshua McKelvin (Turner Co.)

MCKELVIN V. THE STATE (S18A1031)

* Zion Wainwright (DeKalb Co.)

WAINWRIGHT V. THE STATE (S18A1221)

* Preston Marzette Young (Henry Co.)

YOUNG V. THE STATE (S18A1468)

(The Supreme Court has upheld Young’s conviction for the strangling murder of his estranged wife,

Sharon Sylvester. However, the high court has vacated his conviction and 20-year sentence for aggravated assault as that conviction should have been merged with the murder conviction for sentencing purposes.)

IN DISCIPLINARY MATTERS, the Georgia Supreme Court has **disbarred** the following attorney:

* Jack S. Jennings

IN THE MATTER OF: JACK S. JENNINGS (S19Y0498)