South Carolina Law Review

Volume 60
Issue 5 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 12

Summer 2009

Barbe v. McBride

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BARBE V. MCBRIDE

The Confrontation Clause of the Sixth Amendment sets forth that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[1] The United States Supreme Court has interpreted the Confrontation Clause to provide defendants with the right to cross-examine the witnesses against them.[2] The right to confront and cross-examine witnesses is essential to providing criminal defendants with a fair trial.[3] However, exercising this right often comes into conflict with rape shield statutes designed to protect victims of sexual abuse from further humiliation and anguish.[4] This conflict puts courts in the conundrum of deciding which interest outweighs the other: the defendant's interest in being able to cross-examine witnesses to put forth an effective defense or the State's interest in protecting victims of sexual abuse and encouraging them to bring their claims. It is in this context that the United States Court of Appeals for the Fourth Circuit recently decided *Barbe v. McBride*.[5] In an attempt to provide a fair and workable standard for courts to use in dealing with this conflict, the Fourth Circuit forbid per se exclusion of evidence of a victim's prior sexual abuse and instead set forth a number of factors for courts to consider on a case-by-case basis when determining the admissibility of such evidence.[6]

Prior to the Fourth Circuit's decision in *Barbe*, the United States Supreme Court had established that per se exclusion of evidence under a rape shield statute is constitutionally impermissible.[7] In *Rock v. Arkansas*,[8] decided in 1987, the Supreme Court reversed an Arkansas court's decision that excluded as unreliable all of a defendant's hypnotically induced testimony.[9] The Court found that the trial court's ruling excluding the testimony violated the defendant's constitutional right to testify.[10] Specifically, while restrictions on such testimony are permissible, the Court declared that a per se exclusionary rule that disallows all hypnotic testimony is unconstitutional.[11] The Court held that any restrictions a state places on a defendant's right to testify cannot be per se exclusions, and the restrictions "may not be arbitrary or disproportionate to the purposes they are designed to serve."[12] In *Michigan v. Lucas*,[13] the Court extended this holding to

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1. U.S. CONST. amend. VI.
2. Pointer v. Texas, 380 U.S. 400, 404 (1965).
3. Chambers v. Mississippi, 410 U.S. 284, 294 (1973).
4. *See, e.g.*, Michigan v. Lucas, 500 U.S. 145, 149–50 (1991) (observing that Michigan's rape shield statute "unquestionably implicates the Sixth Amendment").
5. 521 F.3d 443, 449 (4th Cir. 2008).
6. *Id.* at 458.
7. *Id.* (citing *Lucas*, 500 U.S. at 153).
8. 483 U.S. 44 (1987).
9. *Id.* at 61–62.
10. *Id.* at 62.
11. *Id.* at 61–62.
12. *Id.* at 55–56.

situations involving the Confrontation Clause and rape shield statutes, proclaiming that "[r]estrictions on a criminal defendant's right[] to confront adverse witnesses . . . 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'"[14] Consequently, these two decisions morphed into the "*Rock-Lucas* Principle," which disallows per se exclusions of evidence under a rape shield statute and instead requires a case-by-case analysis.[15]

Adopting the Supreme Court's framework, the Fourth Circuit has warned that courts should use the *Rock* and *Lucas* decisions when determining whether to exclude a defendant's line of questioning under a rape shield statute.[16] The Fourth Circuit added teeth to this warning in *Barbe v. McBride*. In *Barbe*, decided on April 7, 2008, the Fourth Circuit found that a West Virginia court violated a defendant's right to confront the witnesses against him when, based on a rape shield statute, it prohibited the defendant from cross-examining an expert witness on the possibility that sexual abuse by other men caused the victim's psychological profile.[17]

The State of West Virginia charged the defendant, Donald Barbe, with committing various sexual offenses against three victims.[18] The charges against Barbe for one of the victims, whom the court referred to as "J.M.," included "three counts of sexual assault, three counts of incest, and three counts of sexual abuse by a custodian."[19] Despite having previously asserted that the defendant never sexually abused her, J.M. testified at trial that Barbe had sexually abused her continuously from when she was four until she was twelve.[20] To support J.M.'s claims, the State introduced expert testimony by a licensed clinical counselor.[21] The expert testified that, in her opinion, J.M. had been sexually abused as a child because J.M. fit the psychological profile for post-traumatic stress disorder.[22] This created the inference that the defendant had sexually abused her.[23] On cross-examination, the defense counsel questioned the expert about the possibility that sexual abuse by other men could explain the same psychological profile.[24] In fact, the defense counsel had witnesses prepared to

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13. 500 U.S. 145 (1991).

14. *Id.* at 151 (quoting *Rock*, 483 U.S. at 56).

15. *See* Barbe v. McBride, 521 F.3d 443, 456–57 (4th Cir. 2008) (citing *Lucas*, 500 U.S. at 148–49, 151; *Rock*, 483 U.S. at 55–56.).

16. *See* Quinn v. Haynes, 234 F.3d 837, 848–50 (4th Cir. 2000) ("[T]he Supreme Court has established an analytical framework that courts should use when evaluating Confrontation Clause challenges based upon the exclusion of evidence. Pursuant to this framework, courts must determine whether the rule relied upon for the exclusion of evidence is 'arbitrary or disproportionate' to the 'State's legitimate interests.'" (quoting *Lucas*, 500 U.S. at 151)).

17. *Barbe*, 521 F.3d at 443, 445, 448.

18. *Id.* at 446.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 459–60.

24. *Id.* at 446.

testify that J.M. had previously accused other men of sexual abuse.[25] The defense counsel intended to show that abuse by other men, not by the defendant, caused J.M.'s psychological profile.[26] However, before the expert could respond, the State objected on the ground that West Virginia's rape shield statute "precluded . . . questioning the . . . expert about J.M.'s alleged sexual abuse by other men."[27] The defense counsel argued that the defendant would not be able to receive a fair trial if he could not cross-examine the expert witness on other possible explanations for the victim's psychological profile.[28]

The trial judge sustained the State's objection, ruling that West Virginia's rape shield statute prohibited the line of questioning concerning other sexual abuse.[29] The relevant portion of West Virginia's rape shield statute reads as follows:

> In any prosecution under this article [for a sexual offense] evidence of specific instances of the victim's sexual conduct with persons other than the defendant, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible: Provided, That such evidence shall be admissible solely for the purposes of impeaching credibility, if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto.[30]

Previously, in *State v. Quinn*,[31] the Supreme Court of Appeals of West Virginia established a falsity exception to the rape shield statute.[32] Before this exception allows a defendant to introduce any evidence of previous allegations of sexual abuse by the victim, the defendant must show the trial judge, without the jury present, that "there is a strong probability" that the previous allegations were false.[33] Relying on *Quinn*, the trial court in *Barbe* ruled that because the defendant was unable to show that the victim's previous allegations of sexual abuse were false, he could not introduce the evidence under the falsity exception.[34] Because the defendant did not meet the falsity exception, the trial court held that "the rape shield statute applies, period."[35] Furthermore, the trial court refused to acknowledge any other exception to the rape shield statute.[36]

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25. *Id.*
26. *Id.* at 447.
27. *Id.* at 446–47.
28. *Id.* at 447.
29. *Id.* at 448.
30. W. VA. CODE § 61-8B-11(b) (1976).
31. 490 S.E.2d 34 (W. Va. 1997).
32. *Id.* at 39–40.
33. *Id.* at 40.
34. *Barbe*, 521 F.3d at 448.
35. *Id.* (internal quotation marks omitted).
36. *See id.* n.8.

Thus, the defense counsel was unable to cross-examine the expert on the possibility that sexual abuse by someone other than the defendant caused the victim's psychological profile.[37]

The jury found the defendant guilty of six of the nine sexual assault charges pertaining to J.M.[38] He appealed the trial court's rape shield ruling to the Supreme Court of Appeals of West Virginia, but the court denied his petition.[39] He then filed petitions for habeas corpus in both West Virginia and federal courts.[40] In these petitions, the defendant argued that the trial court's rulings violated his Sixth Amendment rights to effective counsel and to confront the witnesses against him.[41] The state courts denied his petitions.[42] At the federal level, the district court adopted a magistrate's recommendation to dismiss the case with prejudice but granted the defendant's certificate of appealability because the issues "could . . . be deemed debatable by reasonable jurists."[43] The case presented two issues to the Fourth Circuit: (1) whether the defendant's Sixth Amendment right to effective counsel had been violated and (2) whether the defendant's Sixth Amendment right to confront his witnesses had been violated.[44]

With respect to the first issue, the Fourth Circuit quickly affirmed that the defendant's Sixth Amendment right to effective counsel had not been violated.[45] In the district court, the defendant argued that his counsel was ineffective for "fail[ing] to procure an expert witness, fail[ing] to object to the testimony of . . . similar act witnesses, and fail[ing] to adequately prepare for trial."[46] The district court applied a *Strickland v. Washington*[47] analysis, which requires the defendant to show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense."[48] The Fourth Circuit agreed that the defendant did not satisfy either prong of the *Strickland* test and accordingly affirmed the district court's dismissal of the issue.[49]

With respect to the second issue, however, the Fourth Circuit more thoroughly analyzed whether the trial court's rulings violated the defendant's right to confront the witnesses against him.[50] Because the appeal involved denial of habeas relief by the federal district court, the Fourth Circuit reviewed the state

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37. *Id.* at 448.
38. *Id.*
39. *Id.*
40. *Id.* at 448–49.
41. *Id.* at 449–51.
42. *Id.*
43. *Id.* at 451.
44. *Id.* at 445.
45. *See id.* at 452.
46. *Id.* at 452 n.16.
47. 466 U.S. 668 (1984).
48. *Barbe*, 521 F.3d at 452 n.16 (quoting *Strickland*, 466 U.S. at 687) (internal quotation marks omitted).
49. *Id.*
50. *See id.* at 452.

court record de novo.[51] Under the Antiterrorism and Effective Death Penalty Act of 1996[52] (AEDPA), a federal court must apply a two-step analysis to determine whether the defendant is entitled to habeas relief after a state court has decided an issue on its merits.[53] The first step requires the court to determine whether one of the two following situations exists:

> (a) the state court adjudication of the issue on its merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (b) the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[54]

Second, if the court finds that one of those two situations exists, it still may only provide habeas relief "if the error had a 'substantial and injurious effect or influence in determining the jury's verdict.'"[55] If these two requirements are satisfied, then the federal court may grant habeas relief.[56]

Addressing the first step, the Fourth Circuit determined that the trial court's exclusion of the defense counsel's line of questioning violated the defendant's Sixth Amendment rights as interpreted by the United States Supreme Court. Specifically, the trial court's exclusion "amount[ed] to an objectively unreasonable application of federal law" under the *Rock-Lucas* Principle.[57] Based on the Confrontation Clause of the Sixth Amendment, the *Rock-Lucas* Principle requires state courts to determine on a case-by-case basis whether excluding the evidence "'is "arbitrary and disproportionate" to the State's legitimate interests.'"[58] To aid state courts in making these case-by-case determinations, the Fourth Circuit in *Barbe* set forth three factors to consider: "(1) the strength *vel non* of the state's interests that weigh against admission of the excluded evidence; (2) the importance of the excluded evidence to the presentation of an effective defense; and (3) the scope of the evidence ban being applied against the accused."[59]

The Fourth Circuit held that the West Virginia state trial court's exclusion of the defense counsel's questioning amounted to an "objectively unreasonable application of federal law," thereby satisfying the first step of the AEDPA

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51. *Id.*

52. Pub. L. No. 104-132, § 104(3), 110 Stat. 1214, 1219 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

53. *Barbe*, 521 F.3d at 453 (citing 28 U.S.C. § 2254(d) (2006)).

54. *Id.* (quoting § 2254(d)).

55. *Id.* (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)).

56. *See id.*

57. *Id.* at 454.

58. *Id.* at 458 (quoting Michigan v. Lucas, 500 U.S. 145, 151 (1991)).

59. *Id.* (internal citations omitted) (citing White v. Coplan, 399 F.3d 18, 24 (1st Cir. 2005)).

analysis.[60] Based on the state trial court's record, it was unclear if the trial court had even considered the *Rock-Lucas* Principle.[61] Failing to consider the *Rock-Lucas* Principle would have been an "objectively unreasonable application of federal law" because it is the controlling federal law on the issue.[62] Even if the trial court had considered the *Rock-Lucas* Principle, the Fourth Circuit determined the trial court "applie[d] it unreasonably to the facts."[63] Examining the state court record de novo,[64] the Fourth Circuit noted that the trial court had excluded per se all questioning of the expert about sexual abuse committed by other men.[65] The trial court's ruling—if the defendant could not meet the falsity exception, "the rape shield applies, period"—illustrated the per se nature of the exclusion.[66] This ruling violated the *Rock-Lucas* Principle's premise that per se exclusion of such evidence is impermissible.[67]

Next, the Fourth Circuit determined that excluding the evidence in the defendant's particular case was "disproportionate to the State's [legitimate] interests."[68] The court reached its determination in light of the three factors it had set forth to consider.[69] First, the court noted the State's interest in enforcing its rape shield statute: to "protect[] victims of sexual abuse from needless harassment, humiliation, and unnecessary invasions of privacy."[70] It also recognized that such statutes encourage victims of sexual abuse to seek legal recourse against offenders.[71] Moving to the second factor, the court analyzed the importance to the defendant's case of allowing cross-examination of the expert on the possibility that sexual abuse committed by other men caused the victim's psychological profile.[72] The court determined that allowing such cross-examination was "crucial to [the defendant's] presentation of an effective defense."[73] The defendant sought to defend himself by showing that the victim was not credible due to her previous assertions that the defendant had not sexually abused her.[74] The prosecution offered the expert to boost the victim's credibility by showing that she had indeed been sexually abused.[75] Preventing

60. *Id.* at 454.
61. *Id.*
62. *See id.*
63. *Id.* (alteration in original) (quoting Conaway v. Polk, 453 F.3d 567, 581 (4th Cir. 2006)) (internal quotation marks omitted).
64. *See id.* at 452.
65. *Id.* at 458.
66. *Id.*
67. *Id.*
68. *Id.* at 460.
69. *See id.* at 458–60.
70. *Id.* at 459 (quoting Quinn v. Haynes, 234 F.3d 837, 850 (4th Cir. 2000)) (internal quotation marks omitted).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 459.
75. *Id.*

the defendant from cross-examining the expert on other possible causes of the victim's psychological profile might lead the jury to infer that only the defendant could have been the cause.[76] This inference would boost the victim's credibility, thus "undercut[ting] and effectively scuttl[ing]" the defendant's case.[77] Finally, the court examined the scope of evidence that the trial court banned.[78] The Fourth Circuit observed that the trial court barred the defendant from inquiring about sexual abuse by any other men.[79] This effectively prevented the defendant from introducing any evidence that would "rebut the inference created by the expert's testimony" that only the defendant could have caused the victim's psychological profile.[80] Thus, the court determined that the exclusion of the line of questioning and the effect that it had on Barbe's defense "was disproportionate to the State's interests in having the [rape shield statute] applied."[81] Therefore, the first requirement of the AEDPA analysis was satisfied because the trial court was "objectively unreasonable" in its application of the *Rock-Lucas* Principle either by failing to consider it or by applying it unreasonably to the facts.[82]

Turning to the second step of the AEDPA analysis, the court determined that the state trial court's ruling "had a substantial and injurious effect on the jury's verdict."[83] By preventing the defense counsel from questioning the expert on the effects of other sexual abuse, the jury could infer only that the defendant had caused the victim's psychological profile and, therefore, the victim was credible in her allegations against the defendant.[84] The Fourth Circuit decided that the exclusion and the resulting inference caused "grave doubt" about the injurious effect that the ruling might have had on the verdict, and because such grave doubt existed, the court was required to grant habeas relief to the defendant.[85]

Therefore, the Fourth Circuit granted the defendant habeas relief because it found that the trial court's rulings violated his Sixth Amendment right to confront the witnesses against him.[86] Under the *Rock-Lucas* Principle, the Confrontation Clause prevents trial courts from establishing a per se rule that

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76. *Id.* at 459–60.
77. *Id.* at 460.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 454 (quoting Conaway v. Polk, 453 F.3d 567, 581 (4th Cir. 2006)).
83. *Id.* at 461.
84. *Id.*
85. *Id.* The Fourth Circuit noted that if a court is "in 'grave doubt' concerning the effect of [a constitutional error on a jury's verdict], the habeas petitioner is entitled to prevail. *Id.* (quoting Fullwood v. Lee, 290 F.3d 663, 679 (4th Cir. 2002)). Furthermore, "[s]uch a 'grave doubt' exists when, in the relevant circumstances, the question is so evenly balanced that the reviewing court finds itself in 'virtual equipose' on the harmlessness issue." *Id.* (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)).
86. *Id.* at 445.

excludes all questioning of a witness.[87] Instead, trial courts must weigh the three factors set forth in *Barbe* to determine whether excluding such questioning would be "arbitrary or disproportionate to the State's legitimate interests."[88] In *Barbe*, the state trial court excluded per se all questioning of sexual abuse by other men.[89] It apparently neither engaged in a *Rock-Lucas* balancing test nor considered any of the relevant factors, and even if it did, its ruling was still flawed.[90] As a result, the Fourth Circuit held that the Sixth Amendment violation entitled Barbe to habeas relief.[91]

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87. *Id.* at 458. (citing Michigan v. Lucas, 500 U.S. 145, 151 (1991)).
88. *Id.* (quoting *Lucas*, 500 U.S. at 151) (internal quotation marks omitted).
89. *Id.*
90. *Id.* at 454.
91. *Id.* at 445.