

No. _____

IN THE
Supreme Court of the United States

JEREMY J. BOHLMAN,

Petitioner,
vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Fed.R.Evid 412 bars a defendant from introducing evidence showing that the alleged victim engaged in subsequent sexual acts inconsistent with her rape allegations even after the government introduced subsequent behavior evidence which was purportedly consistent with her rape allegations.

TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	1
OPINIONS AND ORDERS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
Fed.R.Evid. 412. Sex-Offense Cases: The Victim	2
United States Constitution, Amendment V	3
United States Constitution, Amendment VI	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. The Ninth Circuit's interpretation of Fed.R.Evid. 412 places the rule in conflict with the Confrontation Clause, the Compulsory Process Clause and the Due Process Clause	6
CONCLUSION	12

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Burr v. Sullivan</i> , 618 F.2d 583 (9th Cir.1980)	8
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973)	7
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986)	7
<i>Fowler v. Sacramento County Sheriffs Dept.</i> , 421 F.3d 1027 (9th Cir. 2005)	9
<i>Olden v. Kentucky</i> , 488 U.S. 227 - 232 (1988)	8
<i>Pennsylvania v. Ritchie</i> , 480 U.S. 39 (1987)	7
<i>S.M. v. J.K.</i> , 262 F.3d 914 (9th Cir. 2001)	9
<i>United States v. Carboni</i> , 204 F.3d 39 (2d Cir. 2000)	9
<i>Washington v. Texas</i> , 388 U.S. 14 (1967)	10
<i>Wood v. Alaska</i> , 957 F.2d 1544 (9th Cir. 1992)	11
Federal Statutes	
18 U.S.C. § 1153	3
18 U.S.C. § 2241	1, 4
18 U.S.C. § 2242	1, 4
28 U.S.C. § 1254	2
28 U.S.C. § 1291	2
Other	
Fed.R.Evid. 412	<i>passim</i>

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

Petitioner, Jeremy J. Bohlman, respectfully prays that a writ of certiorari issue to review the published decision of the United States Court of Appeals for the Ninth Circuit, entered on March 2, 2018. (App. 1-5).

OPINIONS AND ORDERS BELOW

On December 15, 2015, Appellant, Jeremy Bohlman, was indicted by a grand jury on one count of aggravated sexual abuse in Indian Country under 18 U.S.C. §§ 2241(a)(1) and 1153, and one count of sexual abuse in Indian Country under 18 U.S.C. §§ 2242(1) and 1153.

A jury trial commenced on September 26, 2016. The jury returned a verdict of guilty on both counts on September 28, 2016. On January 31, 2017, Mr. Bohlman was sentenced to 262 months imprisonment on both counts, to be served concurrently, and to be followed by ten years of supervised release.

Mr. Bohlman's timely notice of appeal was filed on February 1, 2017. On May 4, 2018, the United States Court of Appeals issued a memorandum disposition affirming the District Court's decision (1) to admit evidence of Mr. Bohlman's prior sex conviction, and (2) denying Mr. Bohlman's motion in limine to admit evidence of sexual behavior inconsistent with rape allegations. (App. 1-5).

STATEMENT OF JURISDICTION

The Court of Appeals affirmed the District Court's judgment and sentence in this matter. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed.R.Evid. 412. Sex-Offense Cases: The Victim

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

- (1) evidence offered to prove that a victim engaged in other sexual behavior; or
- (2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) Criminal Cases. The court may admit the following evidence in a criminal case:

- (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
- (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
- (C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:

- (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

- (B) do so at least 14 days before trial unless the court, for good cause, sets a different time;
- (C) serve the motion on all parties; and
- (D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On December 15, 2015, Appellant, Jeremy Bohlman, was indicted by a grand jury on one count of aggravated sexual abuse in Indian Country under 18 U.S.C. §§

2241(a)(1) and 1153, and one count of sexual abuse in Indian Country under 18 U.S.C. §§ 2242(1) and 1153.

Pretrial, the government filed a motion in limine pursuant to Fed.R.Evid. 412 seeking the preclusion of evidence of the complainant's sexual behavior without a prior ruling from the District Court as to admissibility. Mr. Bohlman responded by stating he would not seek to introduce such evidence without seeking a prior ruling.

Mr. Bohlman subsequently filed a motion seeking to admit evidence that the complainant had consensual sex with approximately 24 hours after the rape. Mr. Bohlman argued that this evidence would not be admitted to demean the complainant's character, but rather it cast doubt upon the credibility of the complainant, whom the government intended to show was traumatized by the purported rape and acted in conformity with traumatization. The District Court ultimately denied Mr. Bohlman's motion to admit the evidence, and excluded it.

The case proceeded to trial. At trial, the alleged victim testified to her version of relevant events. She and Mr. Bohlman were half-siblings who had not grown up together, but had gotten closer as adults. She testified that they spent an evening together at the house he was staying at. Methamphetamine was used. She testified that early in the morning, he became flirtatious, and kissed her. She testified that she was uncomfortable and went to the bathroom. She testified that he became aggressive, pounded on the bathroom door, and she came out because she felt she had nowhere

else to go. He picked her up, carried her to the bedroom, and according to her, raped her.

Mr. Bohlman testified on his own behalf. He testified that he and the alleged victim spent the evening together, and that they both consumed methamphetamine. He stated that he flirted, and she flirted back. They mutually kissed, and ultimately had consensual intercourse. He testified that she consumed more methamphetamine afterward. He testified that she never said “no” or provided any resistance, either verbally or physically.

The case thus constituted a classic, “he said, she said” scenario. The government, however, was allowed to unfairly tip the scales in its favor. The government presented the testimony of several family-members of the victim to testify that during the morning and afternoon following the alleged rape, the victim was distraught and behaved consistently with having been raped. They took her to the hospital. An emergency room nurse, doctor and responding FBI agent were all called to testify at trial. They too testified that she behaved consistently with someone who had been raped.

Mr. Bohlman had sought to counter that evidence through both cross-examination and through a defense witness. Aaron Holt was prepared to testify that he had met the alleged victim several days prior at a casino. They spent time together at the casino, consumed methamphetamine together, and engaged in sexual contact.

Most importantly, he was prepared to testify that the day after the alleged rape, he had gotten together with the alleged victim. He was prepared to testify that they spent the evening together, and had sex in a car outside of her father's house.

The District Court ultimately excluded any testimony by Mr. Holt regarding having casual sex with the alleged victim the day after she claimed that she was violently raped by Mr. Bohlman. The District Court allowed Mr. Holt to testify that they spent time together the day/evening after the rape. The District Court also prohibited Mr. Bohlman's counsel from cross-examining the alleged victim about having sex with Mr. Holt the day after she claimed she was raped.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's interpretation of Fed.R.Evid. 412 places the rule in conflict with the Confrontation Clause, the Compulsory Process Clause and the Due Process Clause

The District Court erroneously excluded evidence that the alleged victim engaged in consensual sex with Aaron Holt within approximately 24 hours of the purported rape. Mr. Holt and the complainant had first met on October 8, 2015, while the purported rape occurred on October 10, 2015.

This evidence would not have been admitted for the purpose of demeaning the complainant's character. Rather, the evidence reflected upon the victim's credibility. The government elicited evidence from an FBI agent, a doctor and nurse from an

Emergency Room, and three family members indicating that the alleged victim was traumatized by the purported rape, and acted in conformity with that traumatization. Evidence of consensual sexual contact with someone she had just met, and which occurred a very short time after the purported rape would cast doubt on the credibility of claims of trauma, and cast doubt upon her credibility in claiming that such trauma ever existed.

Fed.R.Evid 412(b)(1)(C) establishes that the rule does not exclude evidence whose exclusion would violate constitutional rights. “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal citations and quotation marks omitted). “[A]n essential component of procedural fairness is an opportunity to be heard.” *Id.* The right to present a defense includes, at a minimum, “the right to put before a jury evidence that might influence the determination of guilt[,]” *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987), the right to present exculpatory evidence, *Crane*, 476 U.S. at 690, and the right to “confront and cross-examine witnesses[,]” see *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

This case squarely presents the issue of what constitutional limits should be placed on Fed.R.Evid. 412. The Ninth Circuit held that the exception set forth in

Fed.R.Evid. 412 (b)(1)(C) for “evidence whose exclusion would violate the defendant’s constitutional rights” did not apply. (App. 5). The Ninth Circuit reasoned that Mr. Bohlman was able to cross-examine sufficiently regarding the alleged victim’s credibility, including evidence that she slept in Mr. Holt’s car. (App. 5).

The Ninth Circuit decision allows the government to have it both ways – it was allowed to corroborate Ms. Cummings’ story that she was raped by introducing evidence that she subsequently behaved in a manner consistent with her story, while preventing Mr. Bohlman from introducing evidence of inconsistent behavior. Mr. Bohlman was entitled to confront that story, and demonstrate through cross-examination and affirmative witness testimony, that she actually behaved inconsistently with her story. The Confrontation Clause requires that a defendant be given an opportunity for effective cross-examination. *Olden v. Kentucky*, 488 U.S. 227, 231 - 232 (1988). Thus, if the exclusion of “other sexual behavior” evidence would violate a criminal defendant’s constitutional right to present a complete defense, it should be admissible under Rule 412.

The Courts have “repeatedly held that when the Government’s case turns on the credibility of a witness, then defense counsel must be given a maximum opportunity to test the credibility of the witness.” *Burr v. Sullivan*, 618 F.2d 583, 587 (9th Cir.1980). “[T]he right to cross-examine includes the opportunity to show not only that a witness is biased, but also that the testimony is exaggerated or otherwise

unbelievable.” *Fowler v. Sacramento County Sheriff's Dept.*, 421 F.3d 1027, 1035 (9th Cir. 2005) (internal quotation marks and brackets omitted). In addition, “cross-examination may implicate the Sixth Amendment even if it is not certain to affect the jury’s assessment of the witness’s reliability or credibility.” *Id.* “Rather, it is sufficient that a jury might reasonably have questioned the witness’s reliability or credibility in light of the cross-examination.” *Id.* (internal quotation marks omitted).

Moreover, by introducing testimony of subsequent behavior as corroboration, the government effectively “opened the door” to this issue. Courts have recognized that Rule 412 does not apply if a party “opens the door” to the admission of evidence that may otherwise be prohibited by the Rule. *See, e.g., S.M. v. J.K.*, 262 F.3d 914, 919-20 (9th Cir. 2001) (“Had Defendant attempted to introduce evidence that Plaintiff had previously been assaulted, it would have been subject to Rule 412. By introducing the evidence herself, Plaintiff opened the door to the admission of further related evidence.”)

Moreover, it is not clear that evidence occurring so close in time would be considered “other sexual behavior” under Fed.R.Evid. 412(a)(1) at all. The advisory committee notes state that “[t]he word ‘other’ is used to suggest some flexibility in admitting evidence ‘intrinsic’ to the alleged sexual misconduct.” Fed. R. Evid. 412 Advisory Committee Notes to 1994 Amendment. Accordingly, the excluded conduct was not “other” sexual behavior. *See, e.g., United States v. Carboni*, 204 F.3d 39, 44 (2d

Cir. 2000) (evidence is not considered extrinsic “if it arose out of the same transaction or series of transactions as the charged offenses, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial”).

The exclusion of this evidence violated not just the evidence code and the Confrontation Clause. “No person shall be ... deprived of life, liberty, or property, without due process of law.” U.S. Const. Amend. V. Furthermore, “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor.” U.S. Const. Amend. VI.

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967).

Aaron Holt was prepared to testify as a defense witness that he had sex with Amber Cummings within approximately 24 hours of the purported rape. The exclusion of this evidence violated Mr. Bohlman's constitutional right to present a defense, in addition to violating his constitutional right to confront his accuser.

The case cited by the Ninth Circuit is factually and legally distinguishable. (App. 5). In *Wood v. Alaska*, 957 F.2d 1544 (9th Cir. 1992), the trial court issued a protective order excluding any evidence the victim had posed for an adult magazine, acted in X-rated movies, and she had communicated these experiences to the defendant. *Id.* at 1546. The facts of *Wood*, however, demonstrate that the defendant simply sought to portray the complainant as a promiscuous person, in order to sully her character. That is not what Mr. Bohlman sought to do, however. Instead, the evidence spoke to the likelihood that the complainant was actually raped and suffering from the trauma that a rape would necessarily cause. Mr. Bohlman was not attempting to show anything about the complainant's generalized attitude toward sex. To the contrary – evidence that the complainant engaged in consensual sex with a recent acquaintance approximately 24 hours after she claims to have been violently raped casts considerable doubt upon her claim that she was raped.

Here, the government argued (1) that the complainant was raped, (2) that the victim was traumatized, and (3) she behaved consistently with that trauma, which corroborates that she was in fact raped. Evidence that she was sexually active in the immediate aftermath unquestionably impeached this line of argument, and indicated the unlikelihood that she was actually suffering from such trauma. While excluded by a strict reading of the text of Fed.R.Evid. 412, the Constitutional provisions cited herein required the admission of the evidence.

CONCLUSION

Based on the arguments discussed herein, it is requested that this Court grant this Petition for Writ of Certiorari, reverse the Ninth Circuit's decision affirming the District Court's denial of Mr. Bohlman's motion in limine, reverse the conviction and remand for new trial consistent with this court's decision.

Dated: July 31, 2018

Respectfully Submitted,



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