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IN THE SUPREME COURT OF THE UNITED STATES

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SHA-RON HAINES,

*Petitioner*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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PETITION FOR A WRIT OF CERTIORARI

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Dated this 11 day of June, 2019



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Per Supreme Court Rule 9, Counsel was appointed under the Criminal Justice Act of 1964 pursuant to 18 U.S.C. §3005A(d)(6) and does not need separate admission to the Supreme Court Bar.

### **QUESTIONS PRESENTED FOR REVIEW**

Can the Government invoke Federal Rule of Evidence 412, the rape shield, over the objection of the victim, when doing so infringes upon a defendant's constitutional rights to present a defense and to cross examination.

Can the Government infringe upon the alleged victim's right to privacy by overriding her decision to waive the protections afforded by Federal Rule of Evidence 412, without any reasonable governmental/public interest to justify said intrusion?

Both are issues of first impression.

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## **PETITION FOR CERTIORARI**

Petitioner SHA-RON HAINES respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

## **OPINION AND ORDER BELOW**

The Ninth Circuit Court of Appeals' published opinion on March 14, 2019 denying HAINES relief in his direct appeal is not yet assigned an index number and is attached as Appendix Vol 1, A.

## **JURISDICTIONAL STATEMENT**

The Ninth Circuit Court of Appeals entered its final order in this case on March 14, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This Petition is timely under Supreme Court Rule 13.3.

## **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

The Fifth Amendment to the United States Constitution provides:

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.

The Sixth Amendment to the United States Constitution provides:

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.

Federal Rule of Evidence 412 provides:

(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.

## STATEMENT OF THE CASE

### **HAINES' CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN FEDERAL RULE OF EVIDENCE 412 WAS INVOKED TO EXCLUDE RELEVANT EVIDENCE OVER THE OBJECTION OF THE ALLEGED VICTIM**

Between April 2014 and May 24, 2014, Sha-ron Haines, just barely 18 years old, met "JC" who was then fifteen (15) years old and a prostitute. JC had previously been traveling to and from California and Nevada with Haines' co-defendant, Tyrall King, for the purpose of engaging in prostitution.

On July 24, 2014, a Criminal Complaint was filed against King alleging Coercion and Enticement and Transportation of Minors alleging a 15 year-old and a 17 year-old minor traveled to California with King for the purposes of engaging in prostitution. That complaint provided that on May 22, 2014, King persuaded the two minors to travel interstate for the purpose of engaging in prostitution. Criminal Complaint, filed July 24, 2014, Supplemental Appendix Under Seal, K.

On April 1, 2015, the Grand Jury returned a four-count Superseding Criminal Indictment charging Tyrall King and Sha-ron Haines with Count One, Conspiracy to Commit Sex Trafficking in violation of Title 18 U.S. C. Section 1594(3)(c); Count Two, Sex Trafficking, in violation of Title 18 U.S.C. Section 159(a)(1), (a)(2), (b)(2) and (c) and Title 18 U.S. C. Section 2; Count Three, Conspiracy to Transport for Prostitution or Other Illegal Sexual Activity, in violation of Title 18, U.S.C. Section 1594(c); and Count Four, Transportation for Prostitution or Other Illegal Sexual Activity, in

violation of Title 18 U.S.C. Section 2423(a) and Section 2. Superseding Criminal Indictment, filed April 1, 2015, Appendix Vol 7, J. Haines trial commenced on August 17, 2015. Jury Trial Day One Transcript, dated August 17, 2015, Appendix Vol 1 and 2, E. On August 24, 2015, the jury found Haines guilty on all counts. Jury Trial Day Four Transcript, dated August 24, 2015, Appendix Vol. 7, H.

Prior to trial, Haines sought to question JC about the fact that she had never used a pimp when she engaged prior acts of prostitution, asserting the information was material to the issue of whether he recruited, encouraged, enticed, harbored, transported, provided or obtained JC, knowing she would be caused the engage in commercial sex acts as charged, or, whether he was merely present as he claimed. Jury Trial Day One Transcript, dated August 17, 2015, pg 187-189, Appendix Vol 2, E pages 000228a-000230a. The Government invoked Fed. Rule Evid. 412<sup>1</sup>, to preclude

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<sup>1</sup>Federal Rule of Evidence 412 provides:

(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

the evidence. The District Court granted the request.

**1. The alleged victim's credibility was attacked by the Government when she provided testimony favorable to Haines**

At trial, the Government claimed Haines and co-defendant King wanted to make money so conspired and brought JC and her friend AS to California to engage in prostitution. King was AS's pimp and Haines was JC's pimp. Jury Trial Day One Transcript, dated August 17, 2015, pg 198, Appendix Vol 2, E, p. 239. However, JC testified that was not true. JC testified that she and her friend AS decided to go to

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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.

California together with AS's pimp, Tyrall King, to engage in prostitution, to go to beach and have fun. She had no discussions with Haines about going to California. Jury Trial Day Two Transcript, dated August 18, 2015, pg 197, Appendix Vol 4, F, p. 523. When King picked her up for the trip, Haines and her friend, AS, were in his car. Jury Trial Day Two Transcript, dated August 19, 2015, Pg 112-115, Appendix Vol. 4, F, pp. 000438-000441. JC did not know beforehand that Haines was going. Jury Trial Day Two Transcript, dated August 18, 2015, pg 196, Appendix Vol. 4, F, p. 000522. In California, JC and AS told King where they wanted to go to engage in prostitution. Jury Trial Day Two Transcript, dated August 18, 2015, pg 199, Appendix Vol. 4, p. 000525. JC's intent was to keep the money she earned. Jury Trial Day Two Transcript, dated August 18, 2015, pg 114, Appendix Vol. 4, F, p. 000440. Haines did not encourage JC to engage in prostitution and did not ask for any of her money earned. She alone decided to engage in prostitution. JC did not use a pimp as she was independent. She gave Haines none of her money and he never requested any. Jury Trial Day Two Transcript, dated August 18, 2015, pg 196-200, Appendix Vol. 4, F, p. 000522-000526.

When she provided testimony favorable to Haines, the Government attacked JC's credibility accusing her of lying. Jury Trial Day Four Transcript, dated August 24, 2015, pg 64-65, 81, 83, 87, 127, Appendix Vol. 7, H, pp. 001060-001061, 001077, 001079, 001083, 001123.

The Government impeached JC with prior grand jury testimony. When she testified in front of the grand jury, JC testified, in part, that she gave the money earned from prostitution to Haines. She later admitted this was a lie she had repeated in order to get out of custody.<sup>2</sup>

After JC testified, the Government presented cooperating co-defendant Tyrall King, as a witness to contradict JC. King was admittedly AS's pimp. He testified that Haines was JC's pimp, that Haines planned the trip and drove part of the way to California. Jury Trial Day Two Transcript, dated August 18, 2015, pg 308-318, Appendix Vol. 4, F, pp. 000634 - 000644.

**2. The Government precluded Haines from rehabilitating JC by invoking Fed. Rule Evid. 412**

Haines' defense was mere presence. The issue in dispute was whether or not Haines was JC's pimp as alleged by the Government, or, whether he went along for the

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<sup>2</sup>Prior to trial, Haines filed a Motion to Dismiss Indictment Due to Outrageous Conduct, Brady Violations, Withholding Exculpatory evidence, Subornation of Perjury. Motion to Dismiss, Appendix Vol. 7, J. He alleged that JC's grand jury testimony had been coerced by Detective Rich Leung. When JC indicated that she would not testify and lie to implicate Haines to the grand jury, in retaliation Leung called her probation officer to report that JC was not cooperating and had her arrested ostensibly for being on Facebook. Then he visited her in custody, told her that if she cooperated and testified before the grand jury, she would get out. Motion to Dismiss, Appendix Vol. 7, J. After she testified, she was released. In denying the request the District Court stated that assuming everything JC said was true, it did not rise to the level of outrageous govt conduct to justify dismissal. Evidentiary Hearing Transcript, dated August 11, 2015, pg 1, 299, Appendix Vol. 1, D, pp. 000030-000031.

At an evidentiary hearing on August 11, 2015 JC said she lied to the grand jury because she wanted to get out of custody. She had lied saying she gave Haines money. Haines had not threatened, coerced or encouraged her to engage in prostitution. Jury Trial Day Two Transcript, dated August 18, 2015, pg 211, Appendix Vol. 4, F, p. 000537. At trial she said she was telling the truth because she has no reason to lie; she was in custody and was not getting out no matter what she said so there's no benefit in lying. Jury Trial Day Two Transcript, dated August 18, 2015, pg 212, Appendix Vol. 4, F, p. 000538

ride. After JC's credibility was attacked by the Government and her testimony was undermined by that of King, Haines sought to recall JC to rehabilitate her with evidence that on multiple prior occasions when JC had engaged in prostitution, she never used a pimp to support her trial testimony that Haines was not her pimp. Jury Trial Day Three Transcript, dated August 19, 2015, pg 8, Appendix Vol. 5, G, p. 000679. Haines argued the evidence bolstered JC's credibility which had been attacked by the Government and undermined by co-operating co-defendant King. Over JC's ostensible objection, the Government invoked Fed. Rule Evid. 412 and again successfully precluded admission of the evidence.

**3. The Ninth Circuit relied primarily upon an inapplicable case in denying Haines relief**

In upholding the district court's exclusion of the prior acts evidence, the Ninth Circuit relied primarily upon the holding in *United States v. Elbert*, 561 F.3d 771, 776 (8<sup>th</sup> Cir. 2009). However, that case is inapplicable and distinguishable on its facts.

In *Elbert*, the minor children were exploited by Elbert, they worked as prostitutes for him. The children were transported by him to the area where they engaged in prostitution, he instructed them, monitored them and took their earnings. At trial, Elbert sought to introduce evidence that the victims had engaged in prostitution before they met him to further his consent defense. Whether the children engaged in acts of prostitution before their encounters with Elbert was rightly ruled to be irrelevant. The court found none of the exceptions for Fed. Rule Evid. 412 applied

because consent is not a defense to the charges. Conversely, Haines's defense was mere presence; it is a defense to the charges. The evidence he sought to introduce was material and relevant after JC's testimony was undermined by the Government.

### **REASONS FOR GRANTING THE WRIT**

This case presents questions of critical importance because Fed. Rule Evid. 412 as applied in this case is unconstitutional; it precluded Haines from introducing evidence material to his defense and from effectively cross examining JC.

Additionally, the specific purpose of the rape shield statute, Fed. Rule Evid. 412, is to protect a victim's right to privacy. Denying the victim the ability to waive those protections is tantamount to victimizing or infantilizing the victim by overriding her wishes in favor of those of the Government. This is tantamount to an impermissible Governmental intrusion in the absence of reasonable governmental/public interest. Accordingly, the Ninth Circuit's ruling that a victim cannot waive Fed. Rule Evid. 412 protections and that the Government can invoke in over a victim's objection was erroneous.

Both of the aforementioned issues are ones of first impression.

A defendant's constitutional rights contemplated by the exception set forth in Fed. Rule Evid. 412(b)(1)(c) include the accused's right under the Sixth Amendment and the Fifth Amendment. The constitutional rights contemplated by the exception set forth in Fed. Rule Evid. 412(b)(1)(c) include the accused's right under the Sixth



Amendment to confront a witness. See, e.g., *Olden v. Kentucky*, 488 U.S. 227, 231 (1988). This includes "a meaningful opportunity to present a complete defense" at trial, *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) and to confront witnesses, including by "impeach[ing] the credibility of a prosecution witness by cross-examination," *Davis v. Alaska*, 415 U.S. 308, 309 (1974).

The Due Process Clause and Sixth Amendment, guarantee "criminal defendants 'a meaningful opportunity to present a complete defense.' *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). That guarantee requires consideration of two factors: first, the extent to which the evidence was "central to the defendant's claim of innocence;" and second, the extent to which its exclusion was supported by a "valid state justification. *Id.* The Fifth Amendment's guarantees a defendant's right "to present evidence favorable to an element that must be proven to convict him." *Clark v. Arizona*, 548 U.S. 735, (2006).

**A. THE "RAPE SHIELD", FEDERAL RULE OF EVIDENCE 412, IS NOT INTENDED TO PRECLUDE ADMISSION OF EVIDENCE OF A NON-SEXUAL NATURE**

The federal rape shield law, Fed. Rule Evid. 412(a)(1) provides that in a case involving allegations of sexual misconduct, "evidence offered to prove that a victim engaged in other sexual behavior" is inadmissible. The rule "aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details."

Advisory Committee Note to the 1994 Amendment of Fed. Rule Evid. 412. The exclusion, however, is not absolute. The rule wisely makes explicit that evidence whose exclusion would violate the defendant's constitutional rights should be admitted. Fed. Rule Evid. 412(b)(1)(c).

Rape shield laws are "designed to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior." *Michigan v. Lucas*, 500 U.S. 145 146 (1991). It is not the intention of Fed. Rule Evid. 412 to bar evidence that is not directly related to past sexual behavior or sexual predisposition. Haines was not seeking to introduce evidence of JC "sexual conduct" per se. When JC conducted "business" she did so without a pimp; that was the only relevant factor. Therefore, the rule is not applicable.

**B. EVIDENCE BOLSTERING JC'S CREDIBILITY WAS RELEVANT AND NECESSARY TO REHABILITATE HER AFTER THE GOVERNMENT CHOSE TO ATTACK HER INTEGRITY**

When the veracity of a victim is vital to the outcome of the trial, preventing the accused from presenting evidence of the victim's credibility violates a defendant's confrontation rights. See, for example, *United States v. Duran*, 886 F.2d 167 (9<sup>th</sup> Cir. 1989). Evidence that JC never used a pimp when she engaged in prostitution was directly relevant to her credibility, after her veracity was attacked by the Government. Haines was denied the right to present evidence that would have rehabilitated JC in violation of his confrontation rights.

The circuit's reliance on the case of *United States v. Shamsud-Din*, wherein the court found the fact that the victim prostituted at other times without a pimp to be irrelevant, is misplaced. In that case, the court, in part, found the evidence to be marginally relevant as it pertained to the victim's credibility because prior prostitution activities do not bear on victim's truthfulness. *United States v. Shamsud-Din*, No.10 CR 927, 2011, U.S. Dist. LEXIS 124449, 9 N.D. Ill. (Oct 27, 2011). That may have been true in that case. However, under the facts and circumstances of the case at bar, the fact that JC had never used a pimp reinforced her trial testimony that Haines was not her pimp when the veracity of that assertion had been challenged. Therefore, the evidence did bear upon her truthfulness. The evidence was highly relevant to the essential issue in dispute; whether or not Haines was her pimp.

For reasons discussed in footnote 2, JC had testified before the grand jury that Haines was her pimp contrary to her trial testimony. The jury was therefore presented with two conflicting stories from JC and was charged with determining which one was the truth. The Government impeached JC with her grand jury testimony which was also bolstered by King. However, Haines was precluded from presenting evidence that reflected that JC's trial testimony was truthful and that she was not lying as charged by the Government. This evidence was relevant to assist the jury in determining which version to believe. Under the facts and circumstances of this case, evidence that JC never used a pimp was not "marginally relevant" like the evidence sought to be

introduced in *Shamsud-Din*.

Of note, *Shamsud- Din* referenced the ninth circuit case of *Wood v. State of Alaska*, 957 F.2d 1544 (9<sup>th</sup> Cir. 1992). In that case, the circuit pointed out that the rape shield statute "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Id.* The rule was not used in its intended manner in the case at bar.

In *Swofford v. Dobucki*, 137 F.3d 441 (7<sup>th</sup> Cir. 1996) the trial court excluded all references to a child's prior sexual abuse by his parents ruling it constituted inadmissible evidence of the victim's "prior sexual activity." In that case, the prosecution inappropriately exploited the adversarial advantage provided by the law. The circuit court found that, though the rape shield law operated to limit the accused's defense, it did not sufficiently impact the basic credibility determination that comprised the jury's verdict. *Id.* In the case at bar, the prosecution exploited the adversarial advantage provided by the rape shield law by attacking JC's credibility and then using the rape shield to preclude her from being rehabilitated. In that regard, the rule operated to limit Haines' defense by precluding him from introducing evidence that was relevant not only to his defense but also to the credibility determination.

### **C. THE NINTH CIRCUIT'S RELIANCE ON ELBERT IS MISPLACED**

In upholding the district court's exclusion of Haines' evidence, The Ninth Circuit Court relied primarily on the holding in *United States v. Elbert* 561 F.3d 771, 776 (8<sup>th</sup>

Cir. 2009). However, that case is inapplicable to the facts of the instant matter. Haines' defense was that he did not recruit, entice, harbor, transport, provide or obtain JC, knowing she would be caused the engage in commercial sex acts. The defense in *Elbert* was consent. Haines' defense was mere presence.

In *Elbert*, the minor children were exploited by Elbert. They worked as prostitutes for him. Whether the children engaged in acts of prostitution before their encounters with Elbert was ruled to be irrelevant. The court precluded the evidence finding that none of the exceptions for Fed. Rule Evid. 412 applied because consent is not a defense to the charges. *Id.* The fact that JC had never used a pimp when she engaged in prostitution was relevant to whether or not Haines was her pimp as alleged by the Government, or merely present as he claimed. Unlike consent, mere presence is a defense to the charges. Therefore, JC's prior conduct was relevant to Haines' defense.

A mere presence defense forces the government to prove a defendant's criminal intent so as to negate any innocent explanation for his presence. *United States v. Delgado*, 56 F.3d 1357, 1365 (11th Cir. 1997). See, *United States v. Thomas*, 58 F.3d 1318, 1321-22 (8th Cir.1995). The Due Process Clause and Sixth Amendment, guaranteed Haines the right to present evidence in support of that defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). That guarantee requires consideration of two factors: first, the extent to which the evidence was "central to the defendant's claim of

innocence”; and second, the extent to which its exclusion was supported by a “valid state justification.” *Id.* Evidence of Jc’s prior conduct was central to the Haines’ mere presence defense after that defense was undermined. Exclusion of said evidence was not supported by a valid federal justification, JC was willing to waive the protections of Fed. Rule Evid. 412. The Fifth Amendment’s Due Process Clause guarantees a defendant’s right to present evidence favorable to an element that must be proven to convict. *Clark v. Arizona*, 548 U.S. 735,(2006). Under the circumstances, that JC never used a pimp when she conducted “business” was evidence favorable to Haines’ mere presence defense. It might have influenced the jury’s determination of guilt. Consequently, it was error to exclude the evidence.

Of note, the court in *Elbert* emphasized that the exclusive purpose of Fed. Rule Evid. 412 is "to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details." *Elbert*, 561 F.3d 771. Unequivocally, the rule is victim centric. JC was precluded from regaining her integrity when the Government used the rule to further victimize JC by precluding her from presenting evidence supportive of what she represented to be truthful trial testimony.

Moreover, the prosecution opened the door by impeaching JC with her grand jury testimony wherein she stated words to the effect that Haines was her pimp. Haines was then denied the opportunity to cross examine JC with evidence that she

never used a pimp. This amounted to a Sixth Amendment violation. See, e.g., *Olden v. Kentucky*, 488 U.S. 227, 231 (1988). Exclusion of this relevant evidence was prejudicial as the jury was left with the JC's conflicting testimony without allowing Haines to properly cross-examine the witness. The rule is intended to prevent past sexual conduct from being used to attack a victim's credibility. It was not used in its intended manner. The Government attacked JC's credibility, not Haines. He was seeking to bolster not undermine the victim's testimony.

**D. SINCE THE RAPE SHIELD LAW IS MADE AND BASED UPON THE VICTIM'S RIGHT TO PRIVACY, THE GOVERNMENT SHOULD NOT BE PERMITTED TO INVOKE IT OVER A VICTIM'S OBJECTION**

The Ninth Circuit determined that the applicability of Fed. Rule Evid. 412 should not depend upon the alleged victim's desire to testify stating that though the exclusion contains three specific exceptions in criminal cases; the victim's desire to testify and waive its protections is not one of them. Opinion, Appendix A.

The intent of the rule is to shield victims, primarily from having their privacy invaded. Thus, it is colloquially known as the "rape shield law." The goal of the rule is to protect victims from "potential embarrassment." JC was embarrassed when the Government presented to the twelve people judging her, evidence that she was lying to them and then invoked the rape shield to preclude her from presenting evidence which reflected that she was in fact telling them the truth. The rape shield was not calculated to preclude a victim from exercising free will to waive its protections and/or

to be wielded as a sword by the Government to preclude relevant evidence over the objection of the very person it was specifically enacted to protect, as was done in the case at bar.

In every reported other case where the Government invoked the rape shield, it was doing so to protect the victim. Since it is the victim's right to privacy the rule seeks to protect, it should be hers to waive. The Government should not be permitted to invoke it over the victim's objection as it did in the case at bar.

Freedoms such as the right to privacy are protected against unwarranted governmental interference. See, *Bates v. City of Little Rock*, 361 U.S. 516, (1960); *Whalen v. Roe*, 429 U.S. 589 (1977); *Katz v. United States*, 389 U.S. 347 (1967). An individual can waive the right to privacy as it is the victim's right to waive. See, for example, *Lewis v. United States*, 385 U.S. 206, 424 (1966) (the privacy protections of Fourth Amendment can be waived); See also, *Cramer v. Concolidated Freightways*, 209 F.3d 1122 (9th Cir., 2000) (civil right to privacy can be waived).

In ruling that a victim cannot waive Fed. Rule Evid. 412 if the Government invokes it, the Ninth Circuit Court usurped the rights of a victim in place and stead of those of the Government without considering whether or not such Governmental interference was legitimately warranted. The substitution of the wants of a victim, with those of the Government, is tantamount to victimizing or infantilizing the victim by overriding her wishes in favor of the Government. This is an impermissible,



arbitrary governmental interference. Accordingly, the Ninth Circuit was wrong when it ruled that a victim cannot waive Fed. Rule Evid. 412 protections.

**E. THE FACT THAT JC NEVER USED A PIMP WAS NOT SALACIOUS AND WOULD NOT HAVE INFUSED THE PROCEEDINGS WITH ANY ADDITIONAL SEXUAL INNUENDO CONTRARY TO THE CIRCUIT'S DETERMINATION**

In ruling that it does not matter whether or not a witness wants the rape shield protections, the circuit court failed to pay due deference to the privacy interests at play. The circuit court stated that in addition to protecting the victim, the rule also serves the purpose of keeping out irrelevant, prejudicial, and/or inflammatory evidence from the jury. Opinion page 10-11, Appendix Vol. 1, A. At best this is a secondary purpose. The court cited a portion of the Advisory Committee Note to the 1994 Amendment of Fed. Rule Evid. 412, that the rule prevents, "the infusion of sexual innuendo into the fact finding process." The full text of the cited advisory note is as follows:

The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Notes of Advisory Committee on Rules -1994 Amendment.

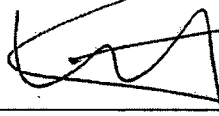
The stated purpose of the rule is to protect witnesses so that they can be encouraged to participate in legal proceedings against alleged offenders. Permitting a victim to waive the protection would not undermine that purpose.

Also, permitting JC to testify that on other occasions when she had engaged in prostitution she had never used a pimp, would not infect the process with sexual innuendo. Haines was not seeking to admit the substance or nature of the sex acts themselves; that was not the purpose. Had the Government not attacked the integrity of its victim witness when she did not testify in the desired manner, how she had conducted "business" in the past would not have been of such significance.

### CONCLUSION

The Ninth Circuit's ruling in regard to Federal Rule of Evidence 412 denied Haines his constitutional right to present a defense and to effective cross examination. It also unnecessarily infringes upon a victim's right to privacy. A new trial is warranted. For the above reasons, Haines requests the Court grant the Petition for a Writ of Certiorari.

Respectfully Submitted



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