IN THE

SUPREME COURT OF THE UNITED STATES

_____No. 19-A982_____

MELVIN RUSSELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant proffering evidence of a complainant's other sexual behavior under one of the three exceptions to the federal rape-shield rule, Federal Rule of Evidence 412, must proffer substantive evidence regarding the complainant's other sexual behavior, in addition to meeting the requirements of the Rule itself.

PARTIES TO THE PROCEEDINGS

The parties appear in the caption of the case on the cover page.

RELATED CASES

(1.) *United States v. Russell,* No. 18-2174, U.S. Court of Appeals for the Tenth Circuit. Opinion and Judgment affirming conviction entered December 20, 2019.

(2.) *United States v. Russell*, No. 1:14-CR-02563-PJK-1, U.S. District Court for the District of New Mexico. Judgment entered November 8, 2018.

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PETITION FOR A WRIT OF CERTIORARI

Melvin Russell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's unpublished opinion appears in the appendix to this petition at App. A-1. The judgment of the district court appears at App. A-12 of the appendix, followed by the district court's order denying Mr. Russell's motion under Federal Rule of Evidence 412 (App. A-19), and the portion of the trial transcript containing evidence, argument, and the oral ruling of the district court on Mr. Russell's renewed Rule 412 motion. (App. A-24).

BASIS OF SUPREME COURT JURISDICTION

The Tenth Circuit Court of Appeals issued its judgment on December 20, 2019. (App. A-1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED IN THIS CASE

18 U.S.C. § 113(a)(4) provides:

Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

(4) Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than 1 year, or both.

18 U.S.C. § 2241(a)(1) provides:

(a) Whoever, in the special maritime and territorial jurisdiction of the United States … knowingly causes another person to engage in a sexual act—

(1)by using force against that other person; or

(2)by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;
or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

18 U.S.C. § 2246 provides:

(2)the term "sexual act" means—

(A)contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B)contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C)the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D)the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3)the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

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.

STATEMENT OF THE CASE

Overview

In order to prove that Melvin Russell committed aggravated sexual abuse under 18 U.S.C. § 2241(a)(1), the Government was required to demonstrate that Mr. Russell forcibly vaginally penetrated the complainant, C.E. Mr. Russell's defense centered on the Government's inability to prove this ultimate element in the case. To that end, he sought to admit evidence of C.E.'s sexual encounter with another man shortly before her alleged assault, citing two exceptions to Federal Rule of Evidence 412, which otherwise precludes the admission of evidence involving a complainant's other sexual behavior. First, Mr. Russell sought to admit the evidence under Rule 412(b)(1)(A) – which permits admission of evidence of a complainant's other sexual behavior in a sexual assault case "if offered to prove that someone other than the defendant" was the source of the complainant's injuries – on the basis that it provided an alternate source for vaginal injuries that C.E.'s examining physician explained were "minor and mild" and only "potentially" the result of a forcible sexual assault. Second, Mr. Russell sought to admit the evidence under Rule 412(b)(1)(C) – which allows for admission of such evidence where its "exclusion would violate the defendant's constitutional rights" – on the basis that its exclusion would violate his rights to confront the witnesses against him and to defend himself from the instant charge.

To show that the proffered evidence of C.E.'s other sexual behavior bore more than a speculative relationship to his defense, Mr. Russell pointed to not only the examining physician's conclusion that C.E.'s vaginal injuries might not be the result of a sexual assault, but also to the complete absence of Mr. Russell's DNA on swabs taken from inside C.E.'s body; the testimony of C.E.'s examining surgeon that her vaginal injuries were only "potentially" the result of forcible intercourse; the testimony of her examining nurse that consensual sex can cause vaginal injuries; evidence that C.E. suffered from serious medical conditions that could cause her to bruise where healthy individuals might not; C.E.'s lack of credibility and independent memory of the night in question, as pointed up by her binge drinking on the night in issue, her presentation at the hospital a day later with a blood alcohol level *four times the legal limit*, and the fact that she told at least four different versions of the alleged assault to medical professionals, law enforcement, and the jury; and the testimony of C.E.'s friend that the friend and her child slept in the same small room as C.E. and Mr. Russell on the night in question – even waking in the middle of the night – yet witnessed nothing unusual between them.

Despite fitting within the two proffered exceptions to Rule 412, the evidence of C.E.'s sexual encounter was excluded by the district court. The Tenth Circuit affirmed the judgment, concluding that due to a "lack of substantive evidence"

regarding C.E.'s consensual sex with another individual, "the district court had nothing on which to consider the application of the exception urged by Mr. Russell." (App. A-6). As an example of the sort of "substantive evidence" concerning the complainant's other sexual behavior that a defendant must proffer in order to invoke a Rule 412 exception, the Tenth Circuit looked to its prior holding in *United States v. Begay*, 937 F.2d 515 (10th Cir. 1991), in which it held that evidence of a complainant's prior sexual assault was admissible under the same two exceptions, where the defendant could show that the complainant's prior assault was witnessed by a third party who could testify to as its nature and by testimony from the complainant's physician that "it was impossible to determine from the physical examination alone" whether the defendant or the other individual caused the complainant's injuries. (App. A-8) (internal quotation omitted).

The Tenth Circuit is not alone in requiring that a defendant seeking admission of Rule 412 evidence effectively prove that the complainant's other sexual behavior exonerates him. The legislative history of Rule 412(b)(1)(A) makes it plain that, with regard to that exception at least, the proffered evidence "may still be excluded if it does not satisfy Rules 401 or 403."[1] *See* Rule 412, Advisory Committee Notes

[1] Pursuant to these Rules, evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

to 1994 Amendments (1994). However, the circuits differ greatly as to how far a defendant must go to demonstrate the probative value of evidence offered under a Rule 412 exception. Indeed, in the absence of any Supreme Court case analyzing Rule 412, those circuits that routinely hear cases involving the Rule – the vast majority of which involve Native American defendants accused of crimes in Indian Country – are devising their own standards for when an exception applies. Consequently, the Eighth and Tenth Circuits mandate that a Rule 412 proponent offer substantial evidence concerning the circumstances of the alleged victim's past sexual activity, while the Fourth and Sixth Circuits adhere to the straightforward language of the Rule itself. The result is that sexual assault defendants in the federal system are not on equal footing before the nation's courts – an untenable state of affairs, and one made worse by the fact that these defendants, nearly all of them Native American, are among the most disenfranchised individuals in this country.

Factual Background

After a day of binge drinking with friends, C.E. – a forty-two year old woman suffering from serious chronic medical conditions including advanced liver disease, a right nephrectomy, chronic inflammation, colonitis, and anemia – went to the home of her friend, Mr. Russell, on the Navajo Nation. C.E.'s friend Rochelle and Rochelle's three-year-old daughter were in tow. Mr. Russell hosted the group in a small room (described in a police officer's testimony as the length of

a jury box) of his home that contained a bed and a couch. At some point, Rochelle and her daughter went to sleep on the couch, while C.E. sat on the bed a few feet away. Rochelle later woke up during the night to find the room quiet and nothing unusual occurring. After the group awoke the next morning and the women departed, C.E. told Rochelle that Mr. Russell had raped her throughout the night. More than twenty-four hours later, a dangerously inebriated C.E. reported her alleged assault at the San Juan Regional Medical Center in New Mexico. Though she reported tapering off her drinking after leaving Mr. Russell's home, C.E.'s blood alcohol level was still .298 – about four times the legal limit – at the time of her report.

C.E. reported at a sexual assault nurse examination (SANE) that her assault lasted a full nineteen hours – from 6:00 p.m. in the evening until 1:00 p.m. the following day. She described a sustained, violent assault, including being vaginally penetrated by Mr. Russell's penis, his finger, and an unidentified foreign object; forcible oral copulation, "offender to patient"; and being hit, kicked, stomped, and threatened at the point of a samurai sword, interrupted only with occasional trips to the bathroom. She denied having eaten, bathed, douched, or washed her genitals since the alleged assault. C.E.'s blood alcohol level was .298 – four times the legal limit – at the time of her report.

On physical examination, C.E. presented with bruises in different shades of red and purple to extragenital regions of her body – namely, her neck, shoulder, arms, chest, legs, flanks, and buttocks. A separate genital assessment showed minor tears above her clitoris, and bruising to her anterior vestibule, urethral meatus, and hymen. In contrast to the bruises to other areas of her body, C.E.'s mild vaginal injuries were not visible without magnification.

C.E. reported that she'd had consensual vaginal intercourse with an unidentified individual at some point within the five days leading up to the assault, in response to a specific query on the SANE.

Mr. Russell was charged with one count for aggravated sexual abuse of C.E. in violation of 18 U.S.C. §§ 1153, 2241(a)(1), and 2246(2)(A) – a charge that required the Government to prove not only that he "use[d] force" against C.E., but that he subjected her to forcible vaginal penetration. *See* 18 U.S.C. § 2246(2).

Throughout the case below, Mr. Russell's defense was based on the lack of evidence showing that he vaginally penetrated C.E., a necessary element of aggravated sexual abuse. At a pre-trial hearing, the nurse who performed C.E.'s SANE, Susan Eldred, testified that individuals with liver disease like C.E. "can [be] affect[ed] [in] how they present in terms of how easily they bruise." She conceded that she had "no way of knowing" whether the bruises elsewhere on C.E.'s person came from the same source as her minor vaginal tears, or even

whether the bruises came from the same or "multiple sources," or were left at different times. Eldred confirmed that C.E. told her that she had vaginal intercourse within the five days leading up to the SANE, which could have meant anytime within that time frame, including the day before. Queried whether "consensual sex can lead to injuries in the vaginal area," Eldred specifically confirmed that "[i]t can."

Asked on direct examination whether C.E.'s vaginal injuries were consistent with her account of her alleged forcible rape, Eldred answered in the affirmative without providing any additional explanation. On cross-examination, she insisted that she "[did]n't believe that [she] was offering any opinion at all" on the issue. Asked to give one, Eldred confirmed that her backing of C.E.'s account was not the result of a deductive or logical process. Rather, Eldred stated that she simply "d[oesn't] question that [a] series of events happened" when her patients tell her it did.

Mr. Russell's Rejected Argument Under Rule 412

Following this testimony, both sides filed motions under Rule 412. Mr. Russell's motion argued that Rule 412 (b)(1)(A) should apply to the evidence of C.E.'s vaginal intercourse with another man in the five days prior to the SANE exam. Mr. Russell noted that C.E. had a long history of medical issues known to create a tendency to bruising and to adversely impact healing time, which, in

combination with her responses to the SANE report and evidence of C.E.'s lack of credibility (as evidenced by her prior inconsistent statements and extreme inebriation on the night in issue), could demonstrate that her vaginal injuries "could have been caused by earlier sexual intercourse. The medical realities of her condition indicate that such injuries may result from consensual intercourse and may take longer to heal."

Further, Mr. Russell noted that Rule 412(b)(1)(C) also applied to his case, because exclusion of the evidence would violate his rights to a meaningful opportunity to defend against the allegations against him, to confront the witnesses against him, to adequate assistance of counsel, and to due process.

The district court denied Mr. Russell's motion. The district court held, in relevant part, that "Mr. Russell has brought no specific evidence to the court's attention … that the prior sexual encounter was in any way violent or rough. The SANE nurse indicated that the injuries suggest violent or rough sex, and no evidence suggests otherwise."

Conflicting Trial Testimony Casts Doubt on All Aspects of C.E.'s Account

At trial, C.E.'s friend Rochelle testified that, on the evening she drove C.E. to Mr. Russell's house, she first encountered C.E. at the home of another friend, Virgil Brewster. C.E. and Brewster had already finished one 30-pack of beer and were working on a 12-pack when Rochelle arrived at around 3:00 or 4:00 p.m.;

they were also drinking vodka. Three to five hours later, Rochelle, her daughter, and C.E. went to Mr. Russell's home, after C.E. declared that they could get "more drinks" there.

After their arrival, Mr. Russell entertained the group in a small room containing his bed, couch, and a television. He showed them pictures of his late wife and his samurai sword. The group was "pretty intoxicated," and C.E. passed out throughout the evening. Rochelle observed how C.E. got up to use Mr. Russell's toilet. Eventually, Rochelle and her daughter went to sleep on the couch. Rochelle testified that she woke up at about 3:00 or 4:00 a.m. and noticed no unusual activity in the little room, before falling back asleep. She "didn't hear anything" through the night, nor did her daughter report hearing anything. The couch on which Rochelle and her daughter slept was only a few feet from the bed on which C.E. spent the night.

The next morning, the women chatted and had shots of vodka with Mr. Russell. Back in the vehicle, Rochelle testified that C.E. told her that Mr. Russell raped her overnight. Rochelle noticed a bruise forming on C.E.'s neck.

C.E. testified that she and Rochelle went directly to Mr. Russell's home from the home C.E. shared with her roommate, Tyrone — not from Brewster's home, as testified to by Rochelle and Brewster. She claimed to have been

"drinking just a bit." On cross-examination, however, C.E. acknowledged that she had "a 40-ounce" before Rochelle arrived, and between 10 and 15 beers after that.

According to C.E., it was 2:00 or 3:00 p.m. when she and Rochelle arrived at Mr. Russell's home – not 7:00 or 8:00 p.m., as Rochelle testified. On direct examination, C.E. estimated that her drinking at Mr. Russell's consisted of "a couple of shots of hard liquor," though she conceded on cross-examination that she also shared another 30-pack of beer with Rochelle and Mr. Russell.

C.E. testified that after Rochelle and her daughter fell asleep, Mr. Russell threw her on the bed and penetrated her. She acknowledged that Mr. Russell's bed was "[a]bout four steps away" from the couch occupied by Rochelle and her daughter. C.E. called out for help, and kept doing so until Mr. Russell produced "his knife or whatever it was kept under the bed," and threatened her with it. In contradiction to multiple previous statements, C.E. testified that Mr. Russell raped her "about three" times, interrupted by her trip to use his bathroom. She did not testify to being kicked or stomped, as she told Eldred. Rochelle and her daughter slept through the entire assault, despite C.E.'s calling out to them in the tiny room. According to C.E., the brutal assault ended when Rochelle's daughter woke up as "the sun was about to go down" — in contradiction to both Rochelle's testimony that all was quiet when she woke in the morning and C.E.'s own previous statement that she was assaulted for multiple days or for nineteen hours.

On direct examination, C.E. testified that at the time of the events in issue she was living with "[a] friend of mine," Tyrone Tallman. On cross-examination, C.E. was not questioned about the nature of her and Tallman's relationship. Nevertheless, on re-direct, the Government elicited testimony from C.E. that Tallman was homosexual.

FBI Special Agent Brad Michael testified that he informed C.E. that his job was "to find the evidence that [ ] supports you in this thing, and that's what we'll do." Michael testified that he never queried C.E. about the inconsistencies between each of her prior statements. Michael further testified as to how Mr. Russell gave a video-recorded statement to law enforcement, of which the jury saw a heavily-edited, five-snippet excerpt. Mr. Russell, however, was in the interview "for a considerable amount of time," at the end of which he answered in the affirmative when another agent, Jennifer Sullivan, told him that he assaulted C.E. Mr. Russell never made a written confession to the crime.

On cross-examination, Michael acknowledged that Sullivan stated in the unedited video that she was frequently "accused of being intimidating and threatening and coercive," and that Sullivan was left alone in a room with Mr. Russell for approximately ninety minutes before his alleged admission. Michael also testified to his awareness that Sullivan's notorious interrogation "tactics have previously been criticized by federal judges in this district." *See United States v.*

Bundy, 966 F.Supp.2d 1180, 1186-87 (D.N.M. 2013) (noting that the court "has serious concerns that during gaps in the record of the interrogation [by Sullivan], [d]efendant was induced by psychologically coercive techniques to confess to matters as to which she had no actual recollection"); *United States v. Tennison,* 2016 WL 9777155, at *4 (D.N.M., June 9, 2016) (unpublished) (Sullivan failed to "conduct[] her interrogation within Fifth Amendment bounds").

Evidence of the SANE Nurse and Renewal of Mr. Russell's Rule 412 Motion

On direct examination, Eldred, the SANE nurse, testified to the importance of seeing patients reporting sexual assault "within 96 hours after the assault," because "injuries mostly have healed within that time frame," and evidence collection is "not typically available" after five days. Following this testimony, defense counsel argued that, by eliciting this testimony, the prosecution "opened the door to [Rule] 412 evidence" of C.E.'s other sexual encounter, which could have provided an alternate source for her injuries.

On cross-examination, Eldred conceded that every question on the SANE related to the patient's recent sexual history was relevant to her examination. However, the district court's Rule 412 ruling excluding evidence of C.E.'s consensual sexual encounter during the relevant timeframe made it impossible for defense counsel to ask Eldred whether that encounter could have caused her minor

vaginal tears. Eldred testified that C.E. complained of "pain to her abdomen and pelvis" at her SANE, but conceded on cross-examination that C.E.'s preexisting conditions of hepatic cirrhosis, colonitis, and swelling of the colon "are all things that can cause abdominal pain."

Following Eldred's testimony, Mr. Russell renewed his proffer under Rule 412, pointing to Eldred's acknowledgment that SANEs are conducted within five days of assaults because "injuries left over from sex that occurred within that five-day period can still be present," and her admission that she considered the question of whether or not [C.E.] had consensual vaginal intercourse within the previous five days to be relevant to her examination.

On the final day of trial, Mr. Russell again asked the court to reconsider its ruling on his Rule 412 Motion. Defense counsel pointed to the Government's eliciting testimony from C.E. that her male roommate Tallman "preferred men. The obvious implication of the Government's question is to imply that she did not have a significant other" who could provide an alternate source for her mild vaginal tears or give her a motive "to come up with a story as to why" she had spent the night at Mr. Russell's home. The district court declined to reconsider its Rule 412 ruling in light of the above-cited testimony.

DNA Analysis Shows No Evidence of Mr. Russell's DNA Inside C.E.'s Body

FBI forensic examiner Tiffany Smith testified that vaginal, cervical, oral,

and gluteal swabs taken from C.E. at SANE in 2014 "all tested negative for the presence of semen." Smith testified that the Government asked her to perform additional testing on the swabs in 2016, this time proceeding to DNA testing despite the absence of semen found in the initial tests. Significantly, "no male DNA was found from the vaginal, cervical, or oral swabs" taken from inside C.E.'s body. DNA tests of the swabs taken from C.E.'s gluteal folds showed "DNA from two individuals," one of them probably C.E., and the other of whom was at least ten times more likely" to be from Mr. Russell than "an unrelated unknown individual." On cross-examination, however, Smith acknowledged that it is possible that an individual's "DNA finds its way onto things that we have never been in contact with" and that one person's DNA can be transferred on to another individual's person through use of the same toilet seat.

C.E.'s Treating Surgeon Testifies That the Medical Evidence Shows Only "Potential" Sexual Assault

Dr. Dwayne Gibbs, the surgeon who saw C.E. in the hospital, testified that C.E.'s blood alcohol level was .298 – about four times the legal limit – when she presented for treatment. A CT scan of C.E.'s pelvis showed "hepatic cirrhosis," "fluid in the abdomen," "colonic wall thickening consistent with inflammation or infection," "edema," and a "right nephrectomy." While there were contusions about her face and chest and bruises to her abdomen, injuries to C.E.'s external genitalia were only "minor and mild." Crucially, Gibbs concluded that while C.E.

had only "potentially" been sexually assaulted, she had "clearly been injured, kicked, beaten, whatnot."

After being denied a jury instruction on the lesser-included offense of "assault by striking, beating or wounding," Mr. Russell was convicted by a jury of aggravated sexual abuse.

The Tenth Circuit's Ruling

Mr. Russell appealed his conviction to the Tenth Circuit Court of Appeals, arguing, *inter alia,* that the district court reversibly erred in excluding evidence of C.E.'s consensual sexual encounter with another man, proffered under Rule 412(b)(1)(A) & (b)(1)(C). With regard to Rule 412(b)(1)(A), Mr. Russell argued that the evidence should have been admitted during trial to provide an alternate source for C.E.'s vaginal tears, given the complete absence of Mr. Russell's DNA on C.E.'s oral, vaginal, and cervical swabs; the testimony of C.E.'s own doctor that her vaginal injuries were "minor and mild" and only potentially the result of non-consensual sex; the SANE nurse's testimony that non-consensual sex can leave injuries; the wild inconsistencies between C.E.'s various accounts of her alleged rape, and between each of these accounts and the testimony of her friends; and the testimony of Rochelle that she woke in the night just a few steps away from where the alleged rape was allegedly unfolding, and saw nothing of the kind.

With regard to Rule 412(b)(1)(C), Mr. Russell argued that exclusion of the pertinent evidence denied him his Fifth Amendment right to due process and his Sixth Amendment rights to confront adverse witnesses and to adequate assistance of counsel. Mr. Russell sought to rely on the Tenth Circuit's ruling in *Begay,* in which the Tenth Circuit held that a defendant's confrontation rights were violated by a district court's denying him the right to cross-examine his alleged child victim and her examining physician about a prior sexual act between the child and another individual who might have caused her genital injuries.

The Tenth Circuit denied Mr. Russell's appeal, holding that the evidence was properly excluded. The court held that neither proffered Rule 412 exception applied because other evidence Mr. Russell adduced – including testimony that C.E.'s vaginal injuries were minor and mild, and that consensual sex can cause mild vaginal injuries – was insufficient to constitute a specific offer of proof "concerning the nature of C.E.'s alleged prior sexual behavior." (App. A-6). "Without more," the Tenth Circuit held, Mr. Russell's "interests in admitting C.E.'s answers to the SANE questions do not outweigh the state's interest in protecting the victim's private, sensitive information." (App. A-8). The court rejected Mr. Russell's reliance on *Begay*, holding that that case turned on the fact that "someone witnessed" the complainant's earlier sexual assault, which gave the court "evidence concerning the nature of the prior sexual assault to consider

when applying Rule 412(b)(1)(C)." Moreover, the court held that, even if the district court erred in excluding the evidence in issue, the error was harmless, based on the sheer number of bruises to the extra-genital areas of C.E.'s body; the SANE nurse's testimony that C.E.'s injuries were consistent with her account of being raped (which the nurse admitted she offered only because of her personal policy of taking her patients at their word); and Mr. Russell's supposed confession to the crime. (App. A-11).

REASONS FOR GRANTING THE PETITION

I. The Circuits are Split as to Whether Defendants Proffering Evidence Under Federal Rule of Evidence 412 Must Proffer Substantive Evidence Regarding the Complainant's "Other Sexual Behavior"

Though signed into law a full generation ago, as the centerpiece of the Privacy Protection for Rape Victims Act of 1978,[2] Federal Rule of Evidence 412 has been the subject of far less litigation than the State statutes that arose in its wake. Indeed, the scope of Rule 412 and the proper application of its three exceptions have never been addressed by the Supreme Court.[3] Although these

[2] Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046.

[3] The Court has twice addressed State laws enacted in the wake of Rule 412, though those narrow holdings did not provide a vehicle for the Court to offer guidance in analyzing multiple sections of the Rule, as this case does. *See Michigan v. Lucas,* 500 U.S. 145 (1991) (reversing adoption of a Michigan rule that excluding evidence of a complainant's prior sexual behavior is per se unconstitutional where the complainant and defendant had a prior sexual

exceptions appear at first blush to be straightforward and easy to apply, the reality in multiple circuits is not so simple. In the absence of a clear directive from this Court, the circuit courts of appeals are split as to what, if anything, more a defendant must show for a defendant's proffered evidence to be introduced under Rule 412(b)(1), besides what is mentioned in the text of the exceptions themselves. The result is that defendants in some circuits are burdened with making substantial – and sometimes onerous and seemingly arbitrary – offers of proof in order to make out their defenses, while defendants in other circuits are held only to the letter of the Rule itself.

The Tenth Circuit's apparent "Rule 412-plus" requirement, articulated by the panel below, appears to be the standard in the Eighth Circuit as well. *See United States v. Pumpkin Seed,* 572 F.3d 552 (8th Cir. 2009) (excluding evidence that the complainant had sex with other men, offered to show the defendant was not the source of complainant's vaginal injuries, where the defendant did not offer specific proof concerning the circumstances of the alleged victim's past sexual activity with the other men); *see also United States v. Seibel*, 712 F.3d 1229 (8th Cir. 2013) (holding that the district court did not abuse its discretion in excluding

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relationship); *Olden v. Kentucky,* 488 U.S. 227, 230-31 (1988) (per curiam) (denial of defendant's right to cross-examine complainant regarding her relationship with a boyfriend violated his Sixth Amendment rights, as defendant was foreclosed "from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness).

evidence of semen discovered on a child complainant's bedding, notwithstanding the defendant's ability to demonstrate that he was not source of the semen discovered, where the defendant "pointed to no evidence that indicates that [the child complainant] directed law enforcement to seize or test any items at the house").

In the Eighth and Tenth circuits it is simply not enough that a defendant's proffered evidence of the complainant's other sexual behavior comes within a particular exception to the Rule carved out by Congress. Rather, the defendant must also assume a law enforcement role by taking additional steps to prove how the complainant's other sexual behavior led to the evidence or injury at issue; indeed, the defendant might even have to account for vagaries in the complainant's own behavior, as in *Seibel*. This is a forbidding prospect where defense counsel may not be able to locate or interview any witness involved in the complainant's other sexual behavior, let alone obtain their testimony under oath.

Other circuits, however, hew to the language of the Rule and its exceptions in determining whether an exception applies. The Fourth Circuit, for one, looked only to the language of the Rule and the legislative history in finding that a defendant's knowledge of the complainant's prior sexual behavior was inadmissible where "offered solely to show the accused's state of mind." *See Doe v. United States*, 666 F.2d 43, 49 (4th Cir. 1981); *see also id.* (noting that the

legislative history bears out only that such evidence "was excluded because Congress considered that this evidence was not relevant to the issues of the victim's consent or her veracity") (citing *Privacy of Rape Victims: Hearings on H.R. 14666 and Other Bills Before the Subcomm. on Criminal Justice of the Committee on the Judiciary*, 94th Cong., 2d Sess. 14-15, 45 (1976)).

The Sixth Circuit also applies a not-heightened standard based on a straightforward construction of the Rule's exceptions. *See United States v. Anderson,* 467 Fed.Appx. 474, 479 (6th Cir. 2012) (unpublished) (holding that a district court abused its discretion in excluding evidence of past sexual encounters between the defendant and the alleged victim proffered under Rule 412(b)(1)(B), where the defendant's "sole defense was consent"); *see also id.* ("acknowledg[ing] that there is no bright-line rule governing the admissibility of evidence under Rule 412(b)(1)(B)," but concluding that "the district court's rationale for excluding [the defendant's] proffered evidence" – that the defendant's past encounters with the complainant "occurred at a different place than the indicted offenses" – was "problematic" for reading additional requirements into the Rule 412 analysis).

The need for some guiding standards in analyzing the Rule 412 exceptions is particularly glaring where, as here, the exception at issue is contained at Rule

412(b)(1)(C).[4] Commentators have rightly noted that "the constitutional catch-all exception seems amorphous, malleable, and subjective,"[5] and the case law bears this out. In this case, Mr. Russell sought to rely on the Tenth Circuit's ruling in *Begay,* in which, a generation ago, that court held that denying a defendant the right to cross-examine a child complainant and her physician about a prior sexual act between the child and another individual violated the defendant's rights under the Confrontation Clause. Rather than emphasize in any way certain highly unusual features of the case (not least of which was a third-party eyewitness to the child's prior sexual abuse), the *Begay* court looked to precedent including *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), and *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987), that broadly emphasized how "cross-examination 'is critical for ensuring the integrity of the factfinding process' and 'is the principal means by which the believability of a witness and the truth of his testimony are tested.'" *Begay,* 937 F.3d at 520 (quoting *Stincer,* 482 U.S. at 736).

In the instant case, however, the Tenth Circuit rejected the notion that *Begay* was a full-throated affirmation of the Sixth Amendment right of the accused to

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[4] To date, the Supreme Court has only recognized that a defendant's constitutional rights were violated where exclusion resulted in a "denial of a defendant's opportunity to impeach a witness for bias." *See Olden,* 488 U.S. at 231-32.

[5] Bennett Capers, Rape, Truth, and Hearsay, 40 Harv. J. L. & Gender 183, 206 (2017).

confront witnesses and to present evidence in his own defense. Rather, the court concluded that *Begay* was distinguishable because in that case the defendant could show that "someone witnessed" the complainant's earlier sexual assault and could testify as to its nature – a circumstance that will simply not be present in the vast majority of cases. (App. A-9). In this way, the court doubled down on its additional requirement that a criminal defendant must effectively prove, prior to trial, how the complainant's other sexual behavior exonerates him, in addition to showing how the proffered evidence fits within one of the Rule 412 exceptions.

Based on the foregoing, it is plain that the lower courts are wanting for direction as to how to analyze the exceptions under Rule 412. In the absence of a clear directive from this Court, a criminal defendant in one circuit may well be spared a criminal conviction after being allowed to present exculpatory evidence under a listed exception, while that same defendant, tried in another jurisdiction, could be precluded from even presenting a defense contemplated by the plain language of the Rule. Clear guidance from this Court is necessary so that those accused of sexual misconduct are on equal footing before this nation's courts.

The need for direction is especially important in light of the fact that the individuals directly impacted by the lower courts' inconsistent applications of Rule 412 are among the most marginalized people in the United States. Given Indian tribes' status as "domestic dependent nations" within the federal system, Native

Americans charged with sexual offenses in Indian Country "are subject to federal jurisdiction for … offenses that are almost exclusively within states' criminal jurisdiction." Timothy J. Droske, Correcting Native American Sentencing Disparity Post-Booker, 91 Marq. L. Rev. 723, 724 (2008); *see also id.* (noting how "in Minnesota, South Dakota, and New Mexico – three states with large Native American populations – Native Americans accounted for only six percent of sexual abuse offenders in state courts but over ninety percent of sexual abuse offenders in federal court"). With federal jurisdiction comes the prospect of considerably harsher federal penalties than most non-Native offenders will face, a particularly grim reality when "Native Americans as a whole, and particularly those living within Indian country, endure higher rates of poverty, unemployment, low education, crime rates, and alcoholism than the rest of the country." *Id.* at 739-740. Thus, while Rule 412 may be the subject of far less litigation than its State-law progeny, resolution of the question presented will bring much needed uniformity to the situation of individuals who are already greatly disadvantaged by the federal system, simply by virtue of their race.

II. This Case is the Right Vehicle by Which the Court Can Resolve This Extremely Important Question

This case offers an excellent vehicle by which this Court can resolve the inconsistent application of Rule 412's exceptions across the nation's lower courts. It will permit the Court to offer specific guidance with respect to two of the three

exceptions – those contained at Rule 412(b)(1)(A) and Rule 412(b)(1)(C) – which happen to be the two that are by far the most litigated and the most susceptible to creative application. *Cf.* Rule 412(b)(1)(B) (applying only in the narrow class of cases in which "specific instances" of past sexual behavior between the complainant and the accused are offered by the latter "to prove consent" or are "offered by the prosecutor").

Equally important, the facts of this case are stark. Mr. Russell met the threshold requirement of Rule 403 by proffering considerable evidence that C.E.'s sexual encounter with another individual in the short-time frame before her alleged rape was more probative than prejudicial[6] to C.E. – including evidence that C.E.'s ever-changing account of her sexual assault was not supported by the results of her oral, vaginal, and cervical DNA swabs; the findings of C.E.'s physician that her vaginal injuries were only "potentially" the product of assault and the admission of her examining nurse that consensual sex can cause such injuries; and the testimony of an eyewitness, Rochelle, that she saw nothing unusual occurring in the room during the time that Mr. Russell was allegedly assaulting C.E. Nor can there be

[6] Indeed, the Tenth Circuit failed to explain how admission of Mr. Russell's proffered evidence that a single adult woman had a consensual encounter with an adult man would subject the woman in question to public embarrassment and sexual stereotyping in the twenty-first century, particularly when put against Mr. Russell's interest in defending himself against felony charges of aggravated sexual abuse.

any dispute that Mr. Russell proffered the evidence for the specific purposes set forth at Rule 412(b)(1)(A) and (b)(1)(C).

However, it is equally true that Mr. Russell did not offer the kind of "substantive evidence" or "specific offer of proof" regarding C.E.'s other sexual behavior that the Tenth and Eighth Circuit require of criminal defendants – no convenient eyewitness nor video recording – for the simple reason that, for many defendants, such evidence is unavailable. As such, this case presents a fine example of how a defendant would likely have obtained a different evidentiary outcome if he had come within the jurisdiction of another circuit (here, the Fourth or Sixth), and thus might have obtained an entirely different result at trial.

Mr. Russell anticipates that, should briefing be ordered on the instant petition, the Government would protest that the Tenth Circuit's finding of harmless error should preclude it from disposition by this Court. Mr. Russell strongly disagrees. The Tenth Circuit's ruling was based on two findings – first, that there was ample other evidence of Mr. Russell's guilt in the form of the extensive bruising "all over her body" and second, that Mr. Russell purportedly "confessed to raping C.E." (App. A-11). Both of these findings are deeply flawed. With regard to C.E.'s more severe non-sexual injuries, which the Tenth Circuit conflated with her mild injuries, Mr. Russell notes, as he did below, that his defense was based on the possibility that injuries of a non-sexual nature noted on C.E.'s face,

neck, and trunk — from which her treating physician concluded that she had "clearly" been forcibly struck — could have been left by a different individual than the "mild and minor" tears noted in C.E.'s vaginal area — which her physician concluded were only "potentially" indicative of sexual assault. Moreover, the examining nurse conceded there was no indication that the two types of injuries were left at the same time, and that individuals with advanced liver disease like C.E. bruise far more easily than the typical individual. To that end, Mr. Russell's also contended below that the district court committed reversible error in depriving him of a jury instruction on the lesser-included offense of "assault by striking, beating, or wounding" under 18 U.S.C. § 113(a)(4).

With regard to Mr. Russell's so-called confession, the record shows only that, after ninety minutes, an FBI agent – albeit one repeatedly criticized by federal courts for being coercive – obtained his agreement with her characterizations of him as a "violent person" who used his sword to make things "go his way" with C.E. Mr. Russell submits that, if anything, this is an admission, not a confession, and a shaky one at that. It is hardly a signed confession, made in writing and describing a series of events constituting a criminal offense. Indeed, in *Begay*, the case unsuccessfully distinguished by the Tenth Circuit, the Tenth Circuit held that the trial court's constitutional error in excluding proffered evidence of the child complainant's other sexual encounter was *not* harmless, notwithstanding the

defendant's *three* separate confessions to the complainant's sexual abuse. *See Begay*, 937 F.2d at 525 (finding that, while "[t]he overall strength of the prosecution's case was substantial, … when the effect of the shutting off of all inquiry into the prior [ ] incidents is considered, we cannot declare a belief that the constitutional infringement … was harmless beyond a reasonable doubt").

Crucially, Mr. Russell has been unable to locate a case in which a defendant's confession, absent other compelling evidence of guilt, was sufficient to find a trial court's constitutional error harmless beyond a reasonable doubt. *Cf. Brown v. U.S.*, 411 U.S. 223, 224-226 (1973) (error was harmless beyond a reasonable doubt where defendants' separate confessions to law enforcement described in detail their conspiracy to transport stolen goods, police officers observed stolen goods in one defendant's possession, photographs were taken of the crime in progress, and five witnesses saw the defendants unloading boxes at obscure hours and carrying them into the store); *Enoch v. Gramley*, 70 F.3d 1490, 1500-01 (7th Cir. 1995) (error was harmless where evidence of defendant's guilt was "overwhelming," limited not only to defendant's confession but also to the facts that defendant was linked to victim's murder by multiple witnesses, his bloody shirt was discovered near the crime scene, and the murder weapon closely resembled a knife he was seen carrying); *Tucker v. Johnson*, 242 F.3d 617, 628

(5th Cir. 2001) (error was harmless where confession was explicit and in writing, and was supported by other overwhelming evidence of guilt).

Accordingly, because the Tenth Circuit's finding of harmless error was supported by neither the trial record nor the case law, it should not prevent this Court from granting the instant petition, which involves an excellent vehicle for resolution of an important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

MELVIN RUSSELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of May, 2020 I served a copy of the Petition for a Writ of Certiorari and this Certificate of Service was sent via email and regular U.S. Mail to the following:

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