No. _____

In The

Supreme Court of the United States

FREDRICK BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Third Circuit**

# PETITION FOR WRIT OF CERTIORARI

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August 17, 2020

## I. Question Presented

Were the Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution infringed, where pursuant to F.R.E. 412, the Trial Court restricted Petitioner's ability to cross examine and/or introduce evidence of either prior or subsequent prostitution-related acts by the victim witnesses and where said evidence would serve to negate the mens rea elements of the crimes charged?

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## III. LIST OF PRIOR FEDERAL COURT PROCEEDINGS

1. U.S. District Court for the Middle District of Pennsylvania: U.S. v. Frederick Brown, 3:17-CR-00396. Judgment entered on July 23, 2019

2. United States Court of Appeals for the Third Circuit: U.S. v. Frederick Brown, No. 19-2743. Judgment entered on May 19, 2020.

## IV. PETITION FOR WRIT OF CERTIORARI

The Petitioner, Fredrick Brown, an inmate currently incarcerated at the Pennsylvania State Correctional Institute at Rockview, by and through Paul P. Ackourey, Esquire, C.J.A. Panel Attorney in the Middle District of Pennsylvania, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit filed to No. 19-2743.

## V. OPINION BELOW

Following argument on March 11, 2019, before U.S. District Judge Malachy E. Mannion, the United States District Court for the Middle District of Pennsylvania granted the Government's/Respondent's Motion in Limine pursuant to F.R.E. 412, thereby precluding the Petitioner from introducing at the time of trial, evidence and testimony as to prostitution-related activity of the complaining witnesses occurring prior to 2011 and subsequent to 2014, the alleged dates of criminal conduct as set forth in the Indictment. A formal order was filed of record on March 15, 2019, together with a Memorandum in Support of the same. (See Appendix, p. p)

On May 19, 2020, the United States Court of Appeals for the Third Circuit entered its judgment in the instant matter pursuant to Fed. R. App. P. 36, affirming the District Court's Judgment. The judgment and accompanying opinion issued by the United States Court of Appeals for the Third Circuit is attached as Appendix at p. 1.

## VI. JURISDICTION

Fredrick Brown's Appeal to the United States Court of Appeals for the Third Circuit was denied on May 19, 2020. Petitioner invokes this Court's jurisdiction pursuant to 20 U.S.C.

§1254, having timely filed this Petition for Writ of Certiorari within ninety (90) days of the judgment of the Third Circuit Court of Appeals.

## VII. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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 offense to be put twice 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. Appendix, p. 17.

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 crimes shall have been committed, which district shall have been previously ascertained by law, and be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. Appendix, p 18

18 U.S.C. §1591(a)(b)(1). Appendix, p 19

## VIII. STATEMENT OF THE CASE

On December 19, 2017, a Federal Grand Jury sitting in Scranton, Pennsylvania, returned a four (4) count indictment against the Petitioner, Fredrick Brown, charging him as follows:

1. Sex Trafficking by Force or Coercion (2011-2014) in violation of 18 U.S.C. §1591(a)(b)(1);
2. Sex Trafficking of a Minor by Force and Coercion (2011-2014) in violation of 18 U.S.C. §1591(a)(b)(1);
3. Conspiracy to Distribute and Posses with the Intent to Distribute two hundred eighty (280) grams or more of cocaine base (crack) (2011-2014) in violation of 21 U.S.C. §846;

4. Possession with the Intent to Distribute Cocaine Base (crack) (2011-2014) in violation of 21 U.S.C. §841(a)(1).

Shortly prior to trial, the Respondent filed a Motion in Limine seeking to preclude reference to the complaining witness' other sexual behavior pursuant to Federal Rule of Evidence 412. Petitioner filed a responsive answer with an argument on said motion conducted before the Federal District Court for the Middle District of Pennsylvania on March 11, 2019. Following argument, the lower Court entered an order on the record, granting Respondent's motion and thereby precluding Petitioner from questioning the alleged victims as to their prostitution activities both prior and subsequent to the dates of the alleged criminal conduct set forth in the Indictment. Trial commenced on March 12, 2019 with the lower Court thereafter filing both a Memorandum and Order addressing the Respondent's Motion in Limine. Appendix, p 9. Petitioner was ultimately convicted on all counts.

On direct appeal, Petitioner argued that both Counts One (1) and Two (2) of the Indictment required a showing by the Government that Defendant knowingly recruited, enticed, harbored, transported and obtained multiple women to engage in commercial sex acts.....**knowing and in reckless disregard** of the fact that force, threats of force, fraud and coercion would be used causing multiple victims to engage in commercial sex acts. In addition, Count Two (2) required a showing that Defendant either knew or recklessly disregarded the fact that one (1) of the victims was under the age of eighteen (18) years of age, after having reasonable opportunity to view her. Petitioner contended that his ability to negate the mens rea element of these crimes was substantially hindered by the preclusion of evidence that the women in question engaged in commercial sex acts both prior to 2011 and subsequent to 2014 independent of the Petitioner's participation. By so limiting the Petitioner's ability to present a defense to the mens rea element, he argued that his due process rights, as well as his rights to

confront witnesses as guaranteed by both the Fifth and Sixth Amendments to the United States Constitution were infringed. The evidence in question Petitioner argued was admissible under the exception found in Fed. R. Evid. 412(b)(1)(C), where the exclusion of such evidence would violate Petitioner's Constitution Rights.

The Third Circuit Court of Appeals found that F.R.E. 412(a)(1)-(2) seeks to encourage victims to bring and take part in prosecutions by shielding them from harassing, invasive, and minimally probative inquiries into their past sexual histories. The Court found that a Defendant's right to cross examine witnesses and his right to present a defense of his choice against an essential element of a crime charged are subject to reasonable restrictions including those found in the Federal Rules of Evidence. The Appellant Court determined that evidentiary restrictions were only unconstitutional where their application was arbitrary or disproportionate to the purpose that they are designed to serve. United States v. Scheffer, 523 U.S. 303, 308 (1998) (quoting: Rock v. Arkansas, 483 U.S. 44, 56 (1987). The Third Circuit held the District Court's decision as to the admissibility of evidence of prostitution-related activities by the complaining witnesses either prior to 2011 or subsequent to 2014, was neither arbitrary nor disproportionate. The Third Circuit further found that such evidence would have little probative value and its exclusion was more than justified pursuant to F.R.E. 403.

## IX. REASONS FOR GRANTING THE WRIT

In Count One (1) of the Indictment, the Defendant was charged under 18 USC §1591(a)(b)(1), wherein it was alleged that from on or about 2011, to on or about 2014, in the Middle District of Pennsylvania and elsewhere, Fredrick Brown did knowingly recruit, entice, harbor, transport, provide, advertise, patronize, solicit and obtain multiple victims....knowing and in reckless disregard that force, threats of force, fraud and coercion would be used....

In Count Two (2) of the Indictment, the Defendant was charged under 18 USC §1591(a)(b)(1) with knowingly recruiting and enticing....a victim by any means in and affecting interstate commerce, knowing and in reckless disregard of the fact that force, threat of force, fraud, and coercion would be used to cause victim one (1) to engage in commercial sex acts....

Each of these counts required the Government to establish beyond a reasonable doubt that at the time he either recruited, enticed, harbored, transported, provided, advertised, patronized, or solicited the complaining witnesses, he either possessed the knowledge that force or threats of force would be used or that he proceeded in reckless disregard of that fact. In the instant case, a number of the alleged victims in question engaged in prostitution-related activities prior to meeting and becoming involved with Mr. Brown. Nearly all of the alleged victims engaged in prostitution-related activities after dealing with Mr. Brown. In deciding the Motion in Limine filed by the Respondent, the Trial Court restricted both the cross examination of the complaining witnesses and the introduction of evidence by the Petitioner as to commercial sex acts performed by the alleged victims outside the dates of Brown's alleged criminal conduct as set forth in the Indictment. The issue is not whether the complaining witnesses consented to engage in commercial sex acts for Brown. Rather the focus is whether at the time Brown committed the actus reus, did he possess the necessary mens rea, to wit: did he know that force, fraud or

coercion would be used to compel the victims to perform commercial sex acts. Petitioner contends that if he was aware that the women in question had previously engaged in sex-related commercial activity prior to his involvement with them, the mens rea element would be negated. While various Circuits have had an opportunity to review the application of F.R.E. 412 in the context of a prosecution under 18 U.S.C. §1591, they almost uniformly dealt with arguments that other prostitution-related activities by the alleged victims evidenced consent. See United States v. Williams, 666 Fed. Appx. 186 (3rd Cir. 2016); United States V. Gemma, 818 F. 3d 23 (1st Cir. 2016), (cert. denied, 137 S. Ct. 410, 196 L. Ed. 2d 319 (2016); United States v. Rivera, 799 F.3d 180 (2d Cir. 2015); United States v. Roy, 781 F. 3d 416 (8th Cir. 2015); United States v. Cephus, 684 F. 3d 703 (7th Cir. 2012). While F.R.E. 412 generally prohibits the admissibility of evidence offered to prove that a victim engaged in other sexual behavior and evidence offered to prove a victim's sexual predisposition, the Rule sets forth three (3) exceptions. F.R.E. 412(b)(1)(c) permits admission of such evidence where its exclusion would violate an accused's constitutional rights. Petitioner contends that by barring him from cross examining complaining witnesses as to both prior and subsequent commercial sex acts, his ability to challenge the mens rea requirement set forth above was severely hampered. The denial of cross examination upon a proper subject is grounds for a reversal of a conviction if the denial appears to have been harmful. United States v. Riggi, 951 F. 2d 1368, 1376 (3rd Cir. 1991), citing United States v. Honneus, 508 F. 2d 566, 572 (1st Cir. 1974), cert. denied, 421 U.S. 948, 95 S. Ct. 1677, 44 L Ed. 2d (1975). While this Court has found that a Trial Court may impose reasonable limits on defense counsel's inquiry into potential bias of a prosecution witness to take into account such factors as harassment, prejudice, confusion of the issues, and witnesses safety or interrogation that would be repetitive or only marginally relevant, such limitations cannot serve to deny an

accused's opportunity to impeach a witness as to an essential element of the crime charged. See Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988). Any restriction placed upon the accused as to the scope of cross examination must be balanced against his Sixth Amendment Rights to confront those witnesses against him. Id. As Justice Potter Stewart wrote "Any rule that impedes the discovery of truth in the Court of Law impedes the doing of justice". Hawkins v. U.S., 358 US 74, 81, 79 S. Ct. 136, 140, 3 L Ed. 2d125 (1958).

## X. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

BY: _____

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## CERTIFICATE OF BAR MEMBERSHIP

Paul P. Ackourey, Esquire, Counsel for the Petitioner, hereby certifies that he is admitted to practice before the Supreme Court of the United States of America as of the 12th day of May, 1997.

/s/ Paul P. Ackourey, Esquire
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## CERTIFICATION OF WORD COUNT

Paul P. Ackourey, Esquire, Counsel for Petitioner, hereby certifies that the Petition for Writ of Certiorari contains one thousand nine hundred seventy-eight (1,978) words excluding tables, certifications, and addenda.

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## CERTIFICATE OF IDENTICAL COMPLIANCE OF PETITION

Paul P. Ackourey, Esquire, Counsel for Petitioner is hereby certifying that the Petition for Writ of Certiorari filed electronically with the Office of the Clerk of the United States Supreme Court is identical to the hard copies of said Petition filed with said office.

ACKOUREY & TUREL, P.C.

BY:/s/ Paul P. Ackourey, Esquire
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## CERTIFICATE OF VIRUS SCAN

Paul P. Ackourey, Esquire, counsel for Petitioner, does hereby certify that a virus check of the Petition for Writ of Certiorari and Appendix was performed using Microsoft Security Essentials and the same is virus free.

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# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 19-2743

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UNITED STATES OF AMERICA

v.

FREDRICK BROWN,
Appellant

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On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3:17-cr-00396-001)
District Judge: Honorable Malachy E. Mannion

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Submitted Under Third Circuit L.A.R. 34.1
on April 24, 2020

Before: AMBRO, SHWARTZ, and BIBAS, *Circuit Judges*

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JUDGMENT

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This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted under L.A.R. 34.1(a) on April 24, 2020.

On consideration whereof, it is now **ORDERED** and **ADJUDGED** that the District Court's judgment entered on July 24, 2019, is hereby **AFFIRMED**. Costs will not be taxed. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodsuweit
Clerk

Dated: May 19, 2020

Certified as a true copy and issued in lieu
of a formal mandate on 06/10/20

Teste: Patricia S. Dodsuweit
Clerk, U.S. Court of Appeals for the Third Circuit

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**NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 19-2743

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UNITED STATES OF AMERICA

v.

FREDRICK BROWN,
Appellant

---

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3:17-cr-00396-001)
District Judge: Honorable Malachy E. Mannion

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Submitted Under Third Circuit L.A.R. 34.1(a)
on April 24, 2020

Before: AMBRO, SHWARTZ, and BIBAS, *Circuit Judges*

(Filed: May 19, 2020)

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OPINION*

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BIBAS, *Circuit Judge*.

Fredrick Brown was a pimp who used lies to push women and an underage girl into prostitution and violence to keep them in it. A federal jury convicted him of several crimes, including sex trafficking a minor and sex trafficking through force, fraud, or coercion. His

* This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

defense at trial was that his victims were prostitutes by choice, not victims of abuse. The District Court let Brown cross-examine his victims about their other prostitution during the three years charged in the indictment. But it barred him from questioning them about their earlier and later histories of prostitution, relying on Federal Rule of Evidence 412 (often called the rape-shield law). Because the court did not abuse its discretion by excluding this evidence, we will affirm.

## I. BACKGROUND

### A. Facts

From 2011 to 2014, Brown ran a prostitution ring out of a few hotels in northeastern Pennsylvania. During that time, he met A.B., a 17-year-old homeless runaway from Russia. He took her in and gave her drugs. Soon, he pushed her into prostitution to earn money, but told her that she would be safe only if he was her pimp. She agreed. For more than a year, he set her up with johns whom he knew from his drug dealing. Usually, this happened in local hotels. But sometimes, he drove her to other hotels as far away as New York and Virginia.

Brown enticed A.B. into prostitution by falsely promising her lots of money. Though at first he proposed to split her earnings equally, he took most of her share to cover the costs of hotel rooms, food, condoms, and a fee for his protection. To control her, he punched, slapped, pistol-whipped, raped, and pointed his gun at her. One beating was so severe that she had to go to the hospital. A.B. feared that if she disobeyed him, he would kill her. Brown also controlled all her immigration paperwork, so as a noncitizen A.B. worried that she could not leave him. Brown was violent toward his other prostitutes too.

Eventually, state and federal investigators learned of Brown's prostitution ring. By then, he had been sentenced to state prison on DUI and drug charges. A federal grand jury charged him with several crimes, including sex trafficking "by means of ... force, fraud, or coercion" and trafficking a minor. 18 U.S.C. § 1591(a), (b)(1).

**B. Procedural history**

Before trial, the Government expected Brown to argue that his victims had prostituted for him voluntarily as they had been prostitutes before. So the Government moved to exclude the victims' histories of prostitution under Rule 412. Brown argued that the evidence was admissible under an exception to the rule, because excluding it would "violate [his] constitutional rights" to confront witnesses and to present his defense. Fed. R. Evid. 412(b)(1)(C).

The District Court granted the motion in part. It let Brown ask the victims about their prostitution histories, but only during the years when he allegedly ran the ring. Everything else, the court ruled, would be "unduly prejudicial under [Rule] 403" and would undermine one of Rule 412's purposes: to "protect individuals who are victims of sex trafficking." App. 16.

At trial, several of Brown's victims, including A.B., testified in detail about Brown's sex trafficking. The court let him cross-examine them on any prostitution between 2011 and 2014, even if Brown was not involved, because it went to whether their prostitution for Brown was consensual or coerced. Brown used this latitude on cross-examination. And in his closing, defense counsel argued: "These folks are in [the] business. So it isn't like no one can get away from this man. It's just that some chose to stay longer than others

because the money was better." Day 4 Trial Tr. 107:9–:12, *United States v. Brown*, No. 3:17-cr-00396-001 (M.D. Pa. Mar. 15, 2019), ECF No. 119. That defense failed. The jury convicted Brown on all counts.

Brown now appeals his conviction, challenging the District Court's partial exclusion of the witnesses' histories of prostitution under Rule 412. The District Court had jurisdiction under 18 U.S.C. § 3231 and we have jurisdiction under § 1291. We review the court's reading of the rules of evidence de novo and its application of them for abuse of discretion. *United States v. Tyson*, 947 F.3d 139, 142 (3d Cir. 2020). A court does not abuse its discretion unless its evidentiary rulings are "arbitrary" or "irrational." *United States v. Bailey*, 840 F.3d 99, 117 (3d Cir. 2016) (quoting *United States v. Schneider*, 801 F.3d 186, 198 (3d Cir. 2015)).

## II. THE DISTRICT COURT PROPERLY EXCLUDED SOME EVIDENCE OF THE WITNESSES' OTHER PROSTITUTION UNDER RULE 412

The District Court read Rule 412 correctly. And it applied that rule properly to exclude evidence that had little (if any) probative value and was highly prejudicial, while still giving Brown leeway to present his defense. So the court neither abused its discretion nor violated his constitutional rights.

Rule 412's reach is broad. In "criminal proceeding[s] involving alleged sexual misconduct," it bars evidence of "a victim's sexual predisposition," including evidence "that a victim engaged in other sexual behavior." Fed. R. Evid. 412(a)(1)–(2). The Rule seeks to encourage victims to bring and take part in prosecutions by shielding them from harassing, invasive, and minimally probative inquiries into their sexual histories. *See id.* r. 412

advisory committee's note to 1994 amendment. But it does not pursue that goal at all costs. It has several exceptions, including one when otherwise forbidden evidence is needed to protect a defendant's constitutional rights. *Id.* r. 412(b)(1)(C).

The testimony that Brown tried to elicit was inadmissible under Rule 412. He sought to argue that his victims' prostitution histories predisposed them to consensual prostitution with him as their pimp. So the only question is whether the Constitution required admitting the evidence. Brown argues that by preventing cross-examination on earlier and later prostitution, the court "effectively barred" him from contesting the mens rea required for the crimes charged. Appellant's Br. 13–14. Barring that evidence, he argues, violated the Due Process and Confrontation Clauses. *See* U.S. Const. amends. V, VI.

We disagree. A defendant's right to cross-examine witnesses is "not unlimited." *United States v. Fattah*, 914 F.3d 112, 180 (3d Cir. 2019). Nor is his right to present the defense of his choice against an essential element of a crime. *Clark v. Arizona*, 548 U.S. 735, 769–70 (2006). Both are subject to reasonable restrictions, including the Federal Rules of Evidence. *Id.* at 770; *Fattah*, 914 F.3d at 180. Evidentiary restrictions are unconstitutional only if their application is "arbitrary" or "disproportionate to the purposes that they are designed to serve." *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)).

The limitations that the District Court imposed here were neither arbitrary nor disproportionate. On the contrary, they focused the trial on the relevant time while still giving Brown substantial freedom to put on his defense. The court let him cross-examine the victims about any prostitution during the three-year period charged in the indictment, even if

Brown was not involved. That was more than enough to preserve his constitutional rights. *See United States v. Lockhart*, 844 F.3d 501, 509–10 (5th Cir. 2016).

In any event, whether Brown's victims engaged in prostitution before 2011 or after 2014 would have had little if any probative value. That is precisely why our sister circuits have repeatedly upheld excluding similar predisposition evidence. *See, e.g., United States v. Roy*, 781 F.3d 416, 420 (8th Cir. 2015) ("The victim's participation in prostitution either before or after the time period in the indictment has no relevance to whether [the defendant] beat her, threatened her, and took the money she made from prostitution in order to cause her to engage in commercial sex."); *United States v. Cephus*, 684 F.3d 703, 708 (7th Cir. 2012) (holding that a victim's prior prostitution "does not suggest" that she voluntarily prostituted for the defendant or consented to beatings and threats). And even if this evidence were probative, it would have been substantially outweighed by the danger of unfair prejudice. *See Bailey*, 840 F.3d at 122 (citing *Old Chief v. United States*, 519 U.S. 172, 184 (1997)). Thus, Rule 403 more than justified the court's temporal limitation. Fed. R. Evid. 403.

* * * * *

District courts have wide discretion to apply the Federal Rules of Evidence, even when they restrict a defendant's cross-examination of witnesses and his ability to put on the defense of his choice. Here, the District Court properly applied Rule 412, limiting evidence of the victims' prostitution histories to the timeframe charged in the indictment. Because the court did not abuse its discretion, we will affirm.

# UNITED STATES DISTRICT COURT
# MIDDLE DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA** | : | |
| | : | |
| **v** | : | **3:CR-17-396** |
| **FREDRICK BROWN,** | : | **(Judge Mannion)** |
| **Defendant** | : | |

## ORDER

Based on the foregoing memorandum, the government's motion *in limine* pursuant to FRE 412 to preclude defendant Brown from introducing evidence and testimony of prior or subsequent prostitution related activities by the government's victim witnesses, **(Doc. 81)**, is **GRANTED.** However, defendant Brown will be allowed to cross examine the government's victim witnesses about their prostitution activities during the time period of the sex trafficking offenses charged in Counts One and Two of the Indictment, **(Doc. 1).**

s/ *Malachy E. Mannion*
**MALACHY E. MANNION**
**United States District Judge**

**Dated: March 15, 2019**

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A-8

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | 3-CR-17-396 |
| v. | : | (JUDGE MANNION) |
| FREDRICK BROWN, | : | |
| Defendant | : | |

**MEMORANDUM**

Before the court in this case with charges of sex trafficking and drug trafficking against defendant Fredrick Brown is the pre-trial motion *in limine* filed by the government on March 6, 2019.[1] (Doc. 81). The government seeks to preclude the defendant from introducing evidence of prior and subsequent prostitution-related acts by the government's victim witnesses as an exception under FRE 412. The government argues that the defendant should be barred from offering any evidence at trial regarding alleged sexual activities of its sex trafficking victim witnesses except with respect to the defendant's cross examination of these witnesses about their prostitution activities for the defendant. The government contends that the other acts of prostitution by its witnesses not related to the charges in this case are precluded under FRE 412 as "prior or subsequent" or "other" sexual behavior. For the reasons set forth below, the court will **GRANT** the government's motion *in limine* as noted

[1]This Memorandum and the accompanying Order memorializes the ruling orally given to counsel prior to trial.



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below.

## I. BACKGROUND[2]

On December 19, 2017, Brown was charged in a four-count Indictment with sex trafficking by force, fraud, and coercion in violation of 18 U.S.C. §§1591(a) and (b)(1); sex trafficking of a minor by force, fraud, and coercion in violation of 18 U.S.C. §§1591(a) and (b)(1); conspiracy to distribute and possess with intent to distribute 280 grams or more of crack cocaine in violation of 21 U.S.C. §846; and possession with intent to distribute 280 grams or more of crack cocaine in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(A). (Doc. 1).

The trial in this case is scheduled to commence on March 12, 2019. The government filed its pre-trial motion *in limine* on March 6, 2019. Brown filed his brief in opposition on March 10, 2019. (Doc. 90).

## II. LEGAL STANDARD

The government's motion *in limine* is filed pursuant to Fed.R.Evid. 412. "Rule 412 prohibits the admissibility of 'evidence offered to prove that a victim engaged in other sexual behavior' and 'evidence offered to prove a victim's sexual predisposition." United States v. Williams, 666 Fed.Appx. 186, 200 (3d

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[2]Since the court stated the background of this case in its prior Memorandum denying Brown's suppression motion, it will not be fully repeated herein.



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Cir. 2016), *cert. denied*, 138 S.Ct. 121 (2017). "Rule 412 applies in cases involving 'alleged sexual misconduct,' conduct within the terms of the sex trafficking statute [18 U.S.C. §1591]." Id. at 201. "The evidence ordinarily barred by Rule 412 is only admissible 'in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.'" Id. There are three exceptions under Rule 412(b)(1) where evidence of alleged sexual misconduct may be admitted. Id. The applicable exception in this case falls under Rule 412(b)(1)(c), evidence whose exclusion would violate the defendant's constitutional rights. There are two constitutional rights at issue herein, namely, defendants' right to present a full defense under the Fifth Amendment's Due Process Clause and defendants' right to confront witnesses under the Sixth Amendment.

## III. DISCUSSION

Brown contends that he should be permitted to offer evidence of prior and subsequent prostitution-related acts by the government's victim-witnesses as part of his rights under the Fifth and Sixth Amendments to offer a complete defense in his trial and to cross-exam and impeach witnesses. He argues that such evidence is admissible as an exception under FRE 412(b)(1)(c). Brown indicates that the information he received from the government during discovery reveals that the witnesses engaged in commercial sex acts before, during and after their alleged involvement with him. He contends that the stated evidence should be admissible since it is

relevant regarding one of the elements of the sex trafficking charge the government must prove, i.e., he knew force, fraud, or coercion would be used to cause the victim-witnesses to engage in a commercial sex act. Additionally, he contends that the alleged prior and subsequent commercial acts performed by the witnesses are relevant to show that their prostitution related acts were consensual and not forced by him and that they were not compelled to engage in prostitution to avoid serious harm. Brown argues that "evidence of prior and subsequent prostitution related activities by the complaining witnesses if known to [him] would tend to negate this *mens rea* requirement."

Thus, Brown contends that he should be allowed to introduce this evidence at trial.

Even though the Third Circuit has not yet decided the instant issue, recently in United States v. Taylor, 352 F.Supp.3d 409 (M.D.Pa. Nov. 7, 2018), we precluded the defendants in a sex trafficking case from presenting evidence of and from cross examining the government's victim witnesses about their sexual activity that was not directly related to the defendants and to the charges against them. Thus, in the instant case, the government relies, in part, upon the *Taylor* case and seeks to preclude Brown from cross-examining its victim witnesses regarding any of their sexual activities outside the scope of their testimony on direct examination. It does not challenge Brown's ability to cross-examine its victim witnesses about their acts of prostitution for him regarding the sex trafficking offenses charged in the indictment.

Based on the rationale discussed in the *Taylor* case, the court will preclude Brown from introducing any evidence and from cross-examining the government's victim witnesses regarding prostitution acts that they may have engaged in before or after the time period charged in the indictment. (Doc. 1). The court finds that no violation of the defendant's constitutional rights to a complete defense and to cross-examine witnesses will occur if the defendant is not allowed to introduce such testimony and evidence against the government's victim witnesses.

As noted in *Taylor, id.* at 412:

> Defendant['s] rights under the Fifth and Sixth Amendments are not unlimited. Nor is the right to cross-examine witnesses unlimited. *See* United States v. Senat, 698 Fed.Appx. 701, 704 (3d Cir. 2017) ("The Confrontation Clause does not limit a district court's 'wide latitude ... to impose reasonable limits on such cross-examination,' including limits based on 'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'") (citations omitted). *See also* United States v. Lockhart, 844 F.3d 501 (5th Cir. 2016) (Fifth Circuit held that the district court's exclusion of evidence that victim was a prostitute before defendant's involvement with her did not violate defendant's right to a defense and to cross-exam the witness).

*See also* United States v. Thompson, 178 F.Supp. 3d 86, 90 (W.D.Pa. 2016); United States v. Williams, *supra*; United States v. Overton, 2017 WL 6347084105, *6-*7 (W.D.N.Y. Dec. 13, 2017).

Therefore, the court will grant the government's motion *in limine* under FRE 412 and not allow Brown to introduce any evidence or testimony of alleged prior and subsequent prostitution and commercial sex acts by the government's victim witnesses, since the exclusion of this evidence in this



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case will not violate Brown's constitutional rights under the Fifth and Sixth Amendments to present a complete defense and to cross-exam the government's witnesses. However, the court will allow Brown to ask the government's victim witnesses about other prostitution acts that occurred during the time period charged in the indictment, as they are relevant to the issue of force or coercion. The probative value, however, of evidence outside of the dates within the Indictment is outweighed by the prejudicial effect of it and the harm to the victim-witnesses. Even though this evidence may relate to Brown's defense to the sex trafficking charges under §1591(a), the court finds that he can still cross-exam the women as well as all of the government's witnesses and present other evidence, including the witnesses's acts of prostitution during the time period of the charges in Counts One and Two of the indictment. Brown will also be able to cross-examine the women regarding whether they were forced or coerced to engage in commercial sex acts during the stated time period. But Brown will not be allowed to present any evidence and testimony regarding prostitution acts that the women allegedly engaged in prior to or subsequent to the time period charged in the indictment. Any alleged commercial sex acts by the witnesses outside of the scope of the indictment are not directly related to Brown and the sex trafficking charges against him. As noted in Taylor, 352 F.Supp. 3d at 416 "[t]o allow such evidence and testimony, including the witnesses' prior and subsequent arrests and convictions related to prostitution [activities outside the scope of the indictment], would result in a mini-trial

placing the four victim witnesses on trial for their alleged stated acts related to prostitution shifting the focus of the case from the defendant[] to the witnesses themselves."

## IV. CONCLUSION

Based on the foregoing, the court will **GRANT** the government's motion *in limine* to preclude Brown from introducing or referencing prior or subsequent prostitution activities by the government's victim witnesses under FRE 412. (Doc. 81). An appropriate order will issue.

s/ *Malachy E. Mannion*
**MALACHY E. MANNION**
**United States District Judge**

**Date: March 15, 2019**

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# CONSTITUTION ANNOTATED

Analysis and Interpretation of the U.S. Constitution

## Constitution of the United States

## Fifth Amendment

Fifth Amendment Annotated

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.

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# CONSTITUTION ANNOTATED
Analysis and Interpretation of the U.S. Constitution

## Constitution of the United States

## Sixth Amendment

Sixth Amendment Annotated

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 defence.

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set out as a note under section 1101 of Title 8, Aliens and

### Forced labor

whoever knowingly provides or obtains the labor or of a person by any one of, or by any combination of, wing means—

by means of force, threats of force, physical restraint, threats of physical restraint to that person or another

by means of serious harm or threats of serious harm to person or another person;

by means of the abuse or threatened abuse of law or process; or

by means of any scheme, plan, or pattern intended to the person to believe that, if that person did not such labor or services, that person or another would suffer serious harm or physical restraint,

punished as provided under subsection (d).

Whoever knowingly benefits, financially or by receiving of value, from participation in a venture which has in the providing or obtaining of labor or services by the means described in subsection (a), knowing or in disregard of the fact that the venture has engaged in viding or obtaining of labor or services by any of such shall be punished as provided in subsection (d).

In this section:

(1) The term "abuse or threatened abuse of law or legal cess" means the use or threatened use of a law or legal cess, whether administrative, civil, or criminal, in any ner or for any purpose for which the law was not igned, in order to exert pressure on another person to se that person to take some action or refrain from taking action.

(2) The term "serious harm" means any harm, whether sical or nonphysical, including psychological, financial, or utational harm, that is sufficiently serious, under all the rrounding circumstances, to compel a reasonable person of same background and in the same circumstances to form or to continue performing labor or services in order avoid incurring that harm.

Whoever violates this section shall be fined under this imprisoned not more than 20 years, or both. If death lts from a violation of this section, or if the violation ludes kidnaping, an attempt to kidnap, aggravated sexual se, or an attempt to kill, the defendant shall be fined under title, imprisoned for any term of years or life, or both. ded Pub.L. 106–386, Div. A, § 112(a)(2), Oct. 28, 2000, 114 Stat. amended Pub.L. 110–457, Title II, § 222(b)(3), Dec. 23, 2008, 122 5068.)

## § 1590. Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor

(a) Whoever knowingly recruits, harbors, transports, pro- es, or obtains by any means, any person for labor or services violation of this chapter shall be fined under this title or prisoned not more than 20 years, or both. If death results m the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse, or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

(b) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties under subsection (a).

(Added Pub.L. 106–386, Div. A, § 112(a)(2), Oct. 28, 2000, 114 Stat. 1487; amended Pub.L. 110–457, Title II, § 222(b)(4), Dec. 23, 2008, 122 Stat. 5069.)

## § 1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

(e) In this section:

(1) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term "coercion" means—

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

(4) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(5) The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

(Added Pub.L. 106–386, Div. A, § 112(a)(2), Oct. 28, 2000, 114 Stat. 1487; amended Pub.L. 108–21, Title I, § 103(a)(3), Apr. 30, 2003, 117 Stat. 653; Pub.L. 108–193, § 5(a), Dec. 19, 2003, 117 Stat. 2879; Pub.L. 109–248, Title II, § 208, July 27, 2006, 120 Stat. 615; Pub.L. 110–457, Title II, § 222(b)(5), Dec. 23, 2008, 122 Stat. 5069; Pub.L. 114–22, Title I, §§ 108(a), 118(b), May 29, 2015, 129 Stat. 238, 247.)

### HISTORICAL AND STATUTORY NOTES

**Codifications**

Amendment by Pub.L. 109–248, Title II, § 208(2)(B), July 27, 2006, 120 Stat. 615, directing striking of ", or both" in subsec. (b)(2), was incapable of execution since ", or both" had already been stricken by prior amendment by Pub.L. 109–248, § 208(2)(A).

**Sense of Congress**

Pub.L. 114–22, Title I, § 109, May 29, 2015, 129 Stat. 239, provided that: "It is the sense of Congress that—

"(1) section 1591 of title 18, United States Code, defines a sex trafficker as a person who 'knowingly...recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person...knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion...or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act';

"(2) while use of the word 'obtains' in section 1591, United States Code [sic; probably should read 'section 1591 of title 18, United States Code'], has been interpreted, prior to the date of enactment of this Act [May 29, 2015], to encompass those who purchase illicit sexual acts from trafficking victims, some confusion persists;

"(3) in United States vs. Jungers, 702 F.3d 1066 (8th Cir. 2013), the United States Court of Appeals for the Eighth Circuit ruled that section 1591 of title 18, United States Code, applied to persons who purchase illicit sexual acts with trafficking victims after the United States District Court for the District of South Dakota [illegible] granted motions to acquit these buyers in two separate [illegible]

"(4) section 108 of this title [Pub.L. 114–22, Title I, § 108, May 29, 2015, 129 Stat. 238, amending this section and 22 U.S.C.A. § [illegible]] amends section 1591 of title 18, United States Code, to add the [illegible] 'solicits or patronizes' to the sex trafficking statute making [illegible] clear for judges, juries, prosecutors, and law enforcement officials [illegible] criminals who purchase sexual acts from human trafficking victims [illegible] be arrested, prosecuted, and convicted as sex trafficking [illegible] when this is merited by the facts of a particular case."

**Purpose**

Pub.L. 114–22, Title I, § 108(c), May 29, 2015, 129 Stat. 239, provided that: "The purpose of the amendments made by this section [amending this section and 22 U.S.C.A. § 7102] is to clarify the range of [illegible] punished as sex trafficking."

## § 1592. Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor

(a) Whoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person—

(1) in the course of a violation of section 1581, 1583, 1584, 1589, 1590, 1591, or 1594(a);

(2) with intent to violate section 1581, 1583, 1584, 1590, or 1591; or

(3) to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel, in order to maintain the labor or services of that person, when the person is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000,

shall be fined under this title or imprisoned for not more than [illegible] years, or both.

(b) Subsection (a) does not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000, if that conduct is caused by, or incident to, that trafficking.

(c) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties described in subsection [illegible]

(Added Pub.L. 106–386, Div. A, § 112(a)(2), Oct. 28, 2000, 114 Stat. 1488; amended Pub.L. 110–457, Title II, § 222(b)(6), Dec. 23, 2008, 122 Stat. 5070.)

### HISTORICAL AND STATUTORY NOTES

**References in Text**

Section 103 of the Trafficking Victims Protection Act of 2000, [illegible] referred to in text, means Pub.L. 106–386, Div. A, § 103, Oct. 28, 2000, 114 Stat. 1469, which enacted 22 U.S.C.A. § 7102.

## § 1593. Mandatory restitution

(a) Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this chapter.

(b)(1) The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court

# Rule 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

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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.

**NOTES**

(Added Pub. L. 95–540, §2(a), Oct. 28, 1978, 92 Stat. 2046; amended Pub. L. 100–690, title VII, §7046(a), Nov. 18, 1988, 102 Stat. 4400; Apr. 29, 1994, eff. Dec. 1, 1994; Pub. L. 103–322, title IV, §40141(b), Sept. 13, 1994, 108 Stat. 1919Apr. 26, 2011, eff. Dec. 1, 2011.)

**NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT**

Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. 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.

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.

The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation. Rule 412 extends to "pattern" witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible. When the case does not involve alleged sexual misconduct, evidence relating to a third-party witness' alleged sexual activities is not within the ambit of Rule 412. The witness will, however, be protected by other rules such as Rules 404 and 608, as well as Rule 403.

The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occurred. It does not connote any

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requirement that the misconduct be alleged in the pleadings. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct." When this is not the case, as for instance in a defamation action involving statements concerning sexual misconduct in which the evidence is offered to show that the alleged defamatory statements were true or did not damage the plaintiff's reputation, neither Rule 404 nor this rule will operate to bar the evidence; Rule 401 and 403 will continue to control. Rule 412 will, however, apply in a Title VII action in which the plaintiff has alleged sexual harassment.

The reference to a person "accused" is also used in a non-technical sense. There is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense. Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, this evidence is subject to the requirements of Rule 404.

*Subdivision (a).* As amended, Rule 412 bars evidence offered to prove the victim's sexual behavior and alleged sexual predisposition. Evidence, which might otherwise be admissible under Rules 402, 404(b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires. The word "other" is used to suggest some flexibility in admitting evidence "intrinsic" to the alleged sexual misconduct. *Cf.* Committee Note to 1991 amendment to Rule 404(b).

Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact. *See, e.g., United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991), *cert. denied*, 113 S.Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (birth of an illegitimate child inadmissible); *State v. Carmichael*, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible). In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies or dreams. *See* 23 C. Wright & K. Graham, Jr., *Federal Practice and Procedure*, §5384 at p. 548 (1980) ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.").

The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b)(2) exception is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible.

The introductory phrase in subdivision (a) was deleted because it lacked clarity and contained no explicit reference to the other provisions of law that were intended to be overridden. The conditional clause, "except as provided in subdivisions (b) and (c)" is intended to make clear that evidence of the types described in subdivision (a) is admissible only under the strictures of those sections.

The reason for extending the rule to all criminal cases is obvious. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is not confined to cases that involve a charge of sexual assault. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.

The reason for extending Rule 412 to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.

*Subdivision (b)*. Subdivision (b) spells out the specific circumstances in which some evidence may be admissible that would otherwise be barred by the general rule expressed in subdivision (a). As amended, Rule 412 will be virtually unchanged in criminal cases, but will provide protection to any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused. A new exception has been added for civil cases.

In a criminal case, evidence may be admitted under subdivision (b)(1) pursuant to three possible exceptions, provided the evidence also satisfies other requirements for admissibility specified in the Federal Rules of Evidence, including Rule 403. Subdivisions (b)(1)(A) and (b)(1)(B) require proof in the form of specific instances of sexual behavior in recognition of the limited probative value and dubious reliability of evidence of reputation or evidence in the form of an opinion.

Under subdivision (b)(1)(A), evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged may be admissible if it is offered to prove that another person was the source of semen, injury or other physical evidence. Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible. *See United States v. Begay*, 937 F.2d 515, 523 n. 10 (10th Cir. 1991). Evidence offered for the specific purpose identified in this subdivision may still be excluded if it does not satisfy Rules 401 or 403. *See, e.g., United States v. Azure*, 845 F.2d 1503, 1505–06 (8th Cir. 1988)

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(10 year old victim's injuries indicated recent use of force; court excluded evidence of consensual sexual activities with witness who testified at in camera hearing that he had never hurt victim and failed to establish recent activities).

Under the exception in subdivision (b)(1)(B), evidence of specific instances of sexual behavior with respect to the person whose sexual misconduct is alleged is admissible if offered to prove consent, or offered by the prosecution. Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused. In a prosection [sic] for child sexual abuse, for example, evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution may be admissible pursuant to Rule 404(b) to show a pattern of behavior. Evidence relating to the victim's alleged sexual predisposition is not admissible pursuant to this exception.

Under subdivision (b)(1)(C), evidence of specific instances of conduct may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. For example, statements in which the victim has expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape defendant seeking to prove consent. Recognition of this basic principle was expressed in subdivision (b)(1) of the original rule. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause. *See, e.g., Olden v. Kentucky*, 488 U.S. 227 (1988) (defendant in rape cases had right to inquire into alleged victim's cohabitation with another man to show bias).

Subdivision (b)(2) governs the admissibility of otherwise proscribed evidence in civil cases. It employs a balancing test rather than the specific exceptions stated in subdivision (b)(1) in recognition of the difficulty of foreseeing future developments in the law. Greater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment.

The balancing test requires the proponent of the evidence, whether plaintiff or defendant, to convince the court that the probative value of the proffered evidence "substantially outweighs the danger of harm to any victim and of unfair prejudice of any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403. First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence *substantially* outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties.

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Evidence of reputation may be received in a civil case only if the alleged victim has put his or her reputation into controversy. The victim may do so without making a specific allegation in a pleading. *Cf.* Fed.R.Civ.P. 35 (a).

*Subdivision (c)*. Amended subdivision (c) is more concise and understandable than the subdivision it replaces. The requirement of a motion before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. In deciding whether to permit late filing, the court may take into account the conditions previously included in the rule: namely whether the evidence is newly discovered and could not have been obtained earlier through the existence of due diligence, and whether the issue to which such evidence relates has newly arisen in the case. The rule recognizes that in some instances the circumstances that justify an application to introduce evidence otherwise barred by Rule 412 will not become apparent until trial.

The amended rule provides that before admitting evidence that falls within the prohibition of Rule 412(a), the court must hold a hearing in camera at which the alleged victim and any party must be afforded the right to be present and an opportunity to be heard. All papers connected with the motion and any record of a hearing on the motion must be kept and remain under seal during the course of trial and appellate proceedings unless otherwise ordered. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible, and in which the hearing refers to matters that are not received, or are received in another form.

The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by Fed.R.Civ.P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to Fed.R.Civ.P. 26 (c) to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. *Cf. Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 962–63 (8th Cir. 1993) (posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances at work). Confidentiality orders should be presumptively granted as well.

One substantive change made in subdivision (c) is the elimination of the following sentence: "Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether

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such condition of fact is fulfilled and shall determine such issue." On its face, this language would appear to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused or a defendant in a civil case based upon the judge's belief that such past acts did not occur. Such an authorization raises questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments. *See* 1 S. Saltzburg & M. Martin, *Federal Rules Of Evidence Manual*, 396–97 (5th ed. 1990).

The Advisory Committee concluded that the amended rule provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues.

[The Supreme Court withheld that portion of the proposed amendment to Rule 412 transmitted to the Court by the Judicial Conference of the United States which would apply that Rule to civil cases. This Note was not revised to account for the Court's action, because the Note is the commentary of the advisory committee. The proposed amendment to Rule 412 was subsequently amended by section 40141(b) of Pub. L. 103–322. See below.]

### Congressional Modification of Proposed 1994 Amendment

Section 40141(a) of Pub. L. 103–322 [set out as a note under section 2074 of this title] provided that the amendment proposed by the Supreme Court in its order of Apr. 29, 1994, affecting Rule 412 of the Federal Rules of Evidence would take effect on Dec. 1, 1994, as otherwise provided by law, and as amended by section 40141(b) of Pub. L. 103–322. See 1994 Amendment note below.

### Committee Notes on Rules—2011 Amendment

The language of Rule 412 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

### Amendment by Public Law

**1994** —Pub. L. 103–322 amended rule generally. Prior to amendment, rule contained provisions relating to the relevance and admissibility of a victim's past sexual behavior in criminal sex offense cases under chapter 109A of Title 18, Crimes and Criminal Procedure.

**1988** —Pub. L. 100–690, §7046(a)(1), substituted "Sex Offense" for "Rape" in catchline.

Subd. (a). Pub. L. 100–690, §7046(a)(2), (3), substituted "an offense under chapter 109A of title 18, United States Code" for "rape or of assault with intent to commit rate" and "such offense" for "such rape or assault".

Subd. (b). Pub. L. 100–690, §7046(a)(2), (5), substituted "an offense under chapter

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109A of title 18, United States Code" for "rape or of assault with intent to commit rape" in introductory provisions and "such offense" for "rape or assault" in subd. (b)(2)(B).

Subds. (c)(1), (d). Pub. L. 100–690, §7046(a)(4), substituted "an offense under chapter 109A of title 18, United States Code" for "rape or assault with intent to commit rape".

**Effective Date**

Section 3 of Pub. L. 95–540 provided that: "The amendments made by this Act [enacting this rule] shall apply to trials which begin more than thirty days after the date of the enactment of this Act [Oct. 28, 1978]."

‹ Rule 411. Liability Insurance up Rule 413. Similar Crimes in Sexual-Assault Cases ›



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