No. 21-_____

IN THE
SUPREME COURT OF THE UNITED STATES

CORNELL DEVORE RHYMES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

JUVAL O. SCOTT
Federal Public Defender
For the Western District of Virginia

BENJAMIN SCHIFFELBEIN
Assistant Federal Public Defender
For the Western District of Virginia
Federal Public Defender's Office
210 First Street, S.W.
Roanoke, Virginia 24011
(540) 777-0880

QUESTION PRESENTED

The following question is presented:

1. Does a court violate a defendant's constitutional right to confront witnesses against him when, in a non-consensual sex trafficking case, the court relies on Federal Rule of Evidence 412 to prevent the defendant from questioning the alleged victim about her prior instances of engaging in consensual prostitution, even after the alleged victim denies never having engaged in prostitution before?

PARTIES TO THE PROCEEDING

Petitioner is Cornell Devore Rhymes, who was the petitioner / appellant below.

Respondent is the United States of America, which was the respondent / appellee below.

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Petitioner, Mr. Cornell Devore Rhymes, respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

DECISIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit ("Fourth Circuit Opinion," Pet. App. at 1a) is published at *U.S. v. Cornell Devore Rhymes*, 827 F. Appx 266 (4th Cir. 2020). The judgment of the United States District Court for the Eastern District of Virginia ("District Court Judgment," Pet. App. at 231a) can be found at *U.S. v. Cornell Devore Rhymes*, No. 1:17-mj-00587-TCB, Dkt. No 91 (E.D. Va., Feb 21, 2019). The District Court for the Eastern District of Virginia did not file a corresponding written opinion.

JURISDICTION

The judgment of the Court of Appeals confirming conviction and sentencing was entered on September 15, 2020. Mr. Rhymes timely filed a petition for rehearing and rehearing en banc, which was denied on April 13, 2021. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction over the judgment of this matter under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The issue before the Court involves:

United States Constitution Sixth Amendment

> 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.

Federal Rule of Evidence 412. Sex-Offense Cases: the Victim (the "Rape Shield Rule")

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

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

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

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

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

(c) Procedure to Determine Admissibility.

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

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

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

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

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

STATEMENT OF THE CASE

I. Introduction

This case presents the court with a classic, constitutional question often raised in criminal prosecutions: how far can a court restrict a defendant right to question a witness about prior sexual activity when that prior activity is central to the defendants claim of innocence. Mr. Rhymes faced this issue at trial. He attempted to question his alleged victim about her prior engagements in prostitution to help demonstrate that her current claims of force or coercion were fabricated. Rather than being coerced by the defendant, who offered her drugs in trade for her sex work, her prior experience with prostitution would have shown that she consented to this exchange. Her prior work in prostitution also directly refuted her trial testimony when she claimed that she had not previously engaged in prostitution. And yet, given the broad scope of Rule 412, the court precluded the appellant from inquiring into this topic. This case presents an opportunity for the court to provide clear guidance on the tension between a defendants' constitutional right to confront witnesses against him and Rule 412's limitations on that right.

II. Facts Relative to the June 2017 Incident Involving McKenzie

On the evening of June 3, 2017, McKenzie, who was at the time 18 years old, called third party Jada Morales seeking help. (Pet. App. at 19a). Ms. Morales was engaged in prostitution at a Motel 6 located in Springfield, Virginia. (*Id.* at 19a). When she reached out to Ms. Morales, McKenzie was fully aware that Ms. Morales used prostitution as a means of supporting herself. (*Id.* at 24a). Prior to the June 2017

incident, McKenzie had also engaged in prostitution twice before, each time voluntarily and with the intent to earn money. (*Id.* at 50a).

McKenzie gave multiple differing accounts as to why she called Ms. Morales. (*Id.* at 115). On the stand, McKenzie testified that she had been physically abused by her boyfriend and needed options to flee the situation. (*Id.* at 32a). On multiple occasions during the investigation, however, McKenzie failed to tell investigators that she was trying to leave her boyfriend. (*Id.* at 60a). Rather, she stated that she had lost her job and had no means to support herself. (*Id.* at 59a). She was also admittedly addicted to cocaine at the time, and regularly used heroin and crystal methamphetamine. (*Id.* at 46a, 75a).

Upon receiving McKenzie's request for help, Ms. Morales told McKenzie that McKenzie could stay with her and that Ms. Morales would send a man to pick McKenzie up. (*Id.* at 33a). The Appellant, along with two other men - third parties known as "Byrd" (Justin Robinson) and "Tweez" (Jaitone Summers) - picked McKenzie up in a grey rental van. (*Id.* at 33a). The Appellant drove the van, while Byrd and Tweez sat in the rear with McKenzie. (*Id.* at 33a). During the ride, the parties discussed prostitution and McKenzie's prior sexual history. Thereafter, McKenzie alleged that third party Byrd forced McKenzie to give him oral sex. (*Id.* at 35). No weapons, physical force, or threats were used. (*Id.* at 79a). Before arriving at the Motel 6, the parties also stopped and purchased a prepaid flip phone for McKenzie to use for commercial sex purposes. (*Id.* at 36a).

When the parties arrived at the Motel 6, McKenzie met up with Ms. Morales, who gave McKenzie lingerie and assisted her in posing for photos that were used on an internet website advertising commercial sex. (*Id.* at 36a-38a). For 36 hours thereafter, McKenzie engaged in prostitution at the Motel 6. (*Id.* at 42a). During this time, Appellant managed McKenzie's clients and provided her with cocaine. (*Id.* at 46a). Appellant and McKenzie also engaged in oral and vaginal sex. (*Id.* at 40a). At no time did Appellant physically assault McKenzie, nor did he ever brandish a weapon or verbally threaten or coerce her. (*Id.* at 82a-83a).

On the morning of June 5, 2017, McKenzie woke up alone in the Motel 6 hotel room in which she had been working for the last 36 hours. (*Id.* at 47a). Her personal cell phone was left in the room with her, along with a baggie of cocaine. (*Id.* at 47a). McKenzie took her phone, left the motel room, and used the prepaid cell phone that had been provided to her to contact her allegedly abusive boyfriend to come pick her up. (*Id.* at 47a).

McKenzie was thereafter picked up by the boyfriend she was allegedly trying to flee. (*Id.* at 47a). McKenzie's boyfriend asked her to report the events to police, and, approximately eight hours after leaving the Motel 6, she agreed. (*Id.* at 63a). Before arriving at the police department, McKenzie threw the flip phone that Appellant had provided to her, and which contained valuable evidence as to the case, out of the car window. (*Id.* at 48a). At the police station, McKenzie refused to assist the police investigation by placing a monitored call to Appellant. (*Id.* at 134a). She ultimately signed a statement of release, declined to press charges against Appellant, and was subsequently subpoenaed to appear in court and testify against him. (*Id.* at 49a).

III. The District Court Proceedings

Appellant was charged by Indictment with, *inter alia*, Conspiracy to Engage in Sex Trafficking and Sex Trafficking by Force, Fraud, or Coercion.

On July 26, 2018, the prosecution filed a motion *in limine* seeking to render inadmissible any evidence regarding McKenzie's sexual history. The prosecution did not disclose in the motion that McKenzie had previously engaged in prostitution.

The case proceeded to trial on November 14, 2018. During pretrial proceedings on that date, the district court judge heard oral argument with regard to the motion *in limine* and granted the same, preventing Petitioner from questioning McKenzie with regard to her prior history of prostitution. (*Id.* at 12a).

During the trial, McKenzie testified that she was "speechless" when the men who picked her up started discussing prostitution, and that it was a "complete surprise" to her that she would be asked to engage in prostitution. (*Id.* at 35a). She testified that while in the van on the way to the motel, she told Byrd that she was "unfamiliar" with oral sex, "hadn't done it a lot before," and "didn't really know what she was doing." (*Id.* at 78a). McKenzie further testified that her friend, Ms. Morales, had to teach her how to engage in prostitution. (*Id.* at 40a). Counsel for Petitioner was unable to contradict that testimony by cross-examining McKenzie with regard to her prior prostitution experience, thereby hindering his ability to establish as a defense that McKenzie had consented to engaging in prostitution as a way to earn money to support her drug addiction. (*Id.* at 54a).

On November 15, 2018, after the trial concluded, the jury returned guilty verdicts as to Count I (Conspiracy) and Count III (Sex Trafficking). (*Id.* at 228a-230a). The jury did not render an opinion as to Count II, and subsequently the District Court granted Appellant's Motion for a Mistrial as to Count II. (*Id.* at 229a).

Appellant received a sentence of 180 months in prison for each of the two Counts, the terms of which were set to run concurrently. (*Id.* at 231a-232a).

IV. The Appeal to the Court of Appeals for the Fourth Circuit

Appellant timely noted his appeal of the District Court's judgment and sentencing to the Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the District Court's ruling in its entirety. (*Id.* at 9a). In so doing the Fourth Circuit determined that, because Appellant had an opportunity to impeach Mackenzie's testimony as to other issues, he had no constitutional right to impeach her on the issue of her prior prostitution experience despite her testimony indicating the contrary. (*Id.* at 6a). The Fourth Circuit upheld the application of the Rape Shield Rule. (*Id.6a*).

REASONS FOR GRANTING THE PETITION

I. The Overbroad Application of Federal Rule of Evidence 412 (the "Rape Shield Rule") Resulted in a Sixth Amendment Violation.

This case presents an opportunity to clarify the right to present a defense in circumstances where rape shield rules and laws have been used to restrict the presentation of a defense. This petition is cognizable under Rule 10(c) of the Rules of the Supreme Court of the United States:

> a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

There is an inherent tension between the 6th Amendment Confrontation Clause, which guaranties criminal defendants the right to an opportunity to effectively cross-examine adverse witnesses, and Federal Rule of Evidence 412, the "Rape Shield Rule," which prohibits defendants from being able to cross-examine a witness with regard to their past sexual behavior. To rectify this tension, the Rape Shield Rule, by its own terms, does not apply to "evidence whose exclusion would violate the defendant's constitutional rights," or "if offered by the defendant to prove consent." Fed. R. Evid. 412.

This Court has made clear that the right to present a defense is a "clearly established" and core right. In *Davis v. Alaska*, 415 U.S. 308, 316-317, 94 S.Ct. 1105 (1974), this Court said:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A. J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).

In *Crane v. Kentucky*, 476 U.S. 683, 690-691, 106 S.Ct. 2142 (1986), this Court said:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, supra, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete

> defense." *California v. Trombetta*, 467 U.S., at 485, 104 S.Ct., at 2532; cf. *Strickland v. Washington*, 466 U.S. 668, 684-685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507-508, 92 L.Ed. 682 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984). See also *Washington v. Texas*, supra, 388 U.S., at 22-23, 87 S.Ct., at 1924-1925.

And in the *per curiam* decision of *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480 (1988), this Court was faced with the refusal to permit a rape accuser (a white woman) to be questioned about the consensual extramarital relationship between herself and the defendant (a black man). The *Olden* defendant was prevented from using such testimony to establish as a defense the accuser's motive to protect her marriage and reputation by falsely recasting the affair as a rape on the basis that the evidence was relevant but more prejudicial than probative. The *Olden* Court noted, at 232:

> While a trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant," *Delaware v. Van Arsdall*, supra, at 679, 106 S.Ct., at 1435, the limitation here was

> beyond reason. Speculation as to the effect of jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the accuser's] testimony.

It follows, therefore, that the denial or abridgement of the right to effectively cross-examine a witness deserves something more than the abbreviated and erroneous analysis offered by the Fourth Circuit in this matter. The entirety of the Fourth Circuit's analysis of this issue is as follows:

> Rhymes contends that the district court's exclusion of the evidence deprived him of a meaningful opportunity to challenge M.M.'s credibility. However, Rhymes cross-examined M.M. on what he believed to be inconsistencies in her statements and on her prior drug use, and M.M. further admitted on cross-examination that she was aware that Jada worked as a prostitute when M.M. asked Jada for a place to stay. Evidence of M.M.'s sexual history therefore was not constitutionally mandated in order for Rhymes to challenge her credibility on cross-examination. *See Maynes*, 880 F.3d at 115 ("In considering Sixth Amendment challenges, specifically, the guarantees an opportunity for effective cross- examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (internal quotation marks omitted)). We therefore conclude that the district court did not abuse its discretion in granting the Government's motion in limine to exclude the challenged evidence.

(Pet. App. at 1a).

The lower court in no way acknowledged the impeachment value of refuting Mackenzie's testimony with regard to her experience as a prostitute, nor did it recognize that the methods in which petitioner was permitted to impeach Mackenzie were unrelated to her testimony regarding the same. Such cross-examination testimony would have struck right at the heart of the petitioner's defense – it helped to indicate or establish that Mackenzie engaged in prostitution as a pattern or practice to earn money, consented to the incident at issue, and misled the jury as to her prior consensual experience as a prostitute.

By preventing the defendant from introducing evidence of Mackenzie's prior consensual prostitution, the court unfairly prevented the appellant from establishing his theory of innocence. Without this key piece of information, the appellant could not counter Mackenzie's testimony that the government used to prove coercion.

For example, as evidence that Mackenzie was forced or coerced into sexual activity, the government was able to introduce that the appellant managed her prostitution, provided her with cocaine, and had sex with her, and received all of the profits from her sexual encounters. However, had the defense been able to inquire into her prior instances of consensual prostitution, the defense could have established that this conduct was consistent with her prior instances of prostitution and that she engaged in these activities to further her drug addiction. Mackenzie's actions after the alleged criminal episode help to demonstrate that this instance of prostitution was consensual and consistent with her experience.

When Mackenzie threw her phone away before reporting to the police station, she prevented the defense and the government from uncovering the full details of her conversations that led to her decision to go to the motel. When provided with evidence that she previously engaged in prostitution, this action seems less a decision to get rid of embarrassing evidence and more a decision to avoid the police from uncovering inculpatory evidence. She refused to place a call to the appellant potentially because she knew that the call would implicate, not exculpate, her. And she declined to press charges because she knew that she was consensually engaged in prostitution, not engaged by force or threats or coercion. Without allowing the defendant to present evidence of her prior consensual prostitution, the defendant was unable to tie this evidence to his claim of innocence.

Further, the Fourth Circuit claims that the application of the Rape Shield Rule in such instances is justified merely because the Sixth Amendment has certain limits and defendants are not permitted to cross-examine "in whatever way, and to whatever extent, the defense might wish.". That is simply not the standard for determining whether the application of the Rape Shield Rule "would violate the defendant's constitutional rights." Fed. R. Ev. 412(b)(3). Rather, it is necessary for courts facing this question to consider the evidence at hand and determine whether "such evidence is central to the defendant's claim of innocence." *Crane*, *supra.* The need for this Court's guidance in defining the necessary process for analysis of such a question is apparent. This case thus provides this Court with an appropriate vehicle to discuss the relationship of rape shield statutes to the constitutional right to present a defense. Certiorari is appropriate and respectfully requested.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the Fourth Circuit's judgment affirming the conviction of Cornell Devore Rhymes, summarily reverse the decision below and vacate the conviction, and grant such other relief as justice requires.

Respectfully submitted,

JUVAL O SCOTT
Federal Public Defender
For the Western District of Virginia

BENJAMIN SCHIFFELBEIN
Assistant Federal Public Defender
For the Western District of Virginia
Counsel of Record
Federal Public Defender's Office
210 First Street, S.W.
Roanoke, Virginia 24011
(540) 777-0880

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