**STATE’S MOTION IN LIMINE TO PRECLUDE** **EVIDENCE OF PAST SEXUAL BEHAVIOR OF VICTIM AND** **CHILD WITNESS**

##### United States of America

Plaintiff, United States of America, by and through its attorneys, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, United States Attorney for the District of \_\_\_\_\_\_\_\_\_\_\_\_, and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Assistant U.S. Attorney, moves pursuant to Fed. R. Crim. P. 12 (e) and Fed. R. Evid. 412 for entry of an order precluding the defense from arguing or introducing any evidence of sexual predisposition or sexual behavior of the victim and of his younger minor brother in the above-referenced case.

**BACKROUND**

Defense counsel provided the government with its first disclosure of the summary of defense witnesses’ testimony on December 10, 1996, which was the date that the letter was received in the office of the United States Attorney. A copy of the summary regarding one of the proposed defense witnesses, Ms. R.W., is attached to this motion and incorporated herein by reference.

Defense counsel indicates that Ms. R.W. is the defendant’s adult sister, and that she was acquainted with the victim and his younger brother, and saw them during the summer of 1993, prior to the dates of the crimes alleged in the indictment. The disclosure states that Ms. R.W. will testify that “G.S. and J.S. were also knowledgeable about sexual matters and they would make her feel uneasy with their comments.”

The government contends that this testimony would constitute evidence that the victim and/or his brother engaged in other sexual behavior, or evidence that the victim and/or his brother had some sexual predisposition, which evidence is precluded under Fed. R. Evid. 412 (a). The government asks this court for a pretrial ruling barring argument and evidence concerning this or any related matters.

The defendant has not complied with the requirements of Fed. R. Evid. 412 (c), which mandates a written motion be filed at least 14 days prior to trial, specifically describing the evidence and stating the purpose for which it is being offered.

**LAW**

Rule 412, the federal rape shield law,

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 fact-finding

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. Fed. R. Evid. 412, advisory

committee’s note (1994 Amendments), (hereinafter “Adv. Note”).

There is no evidence in this case involving semen, injury or other physical evidence of sexual assault, so this evidence could not possibly fall within the rape shield exception contained in Rule 412 (b) (1) (A). This case involves a child under 12, and thus consent is not an issue, making the exception in Rule 412 (b) (1) (B) inapplicable to this case.

The only possible theory under which this evidence could be admissible is if the court were to determine, after the appropriate notice and *in camera* hearing, that its exclusion would violate the defendant’s constitutional rights. The government submits that the proffered evidence is speculative, irrelevant and not constitutionally required to be admitted in this case, and that its probative value, if any, is substantially outweighed by the possible harm to the victim and the brother in this case.

By it’s strict terms Rule 412 does not apply to third-party witnesses such as the victim’s minor brother. However, the Advisory Committee Notes to the 1994 amendments to Rule 412 state that such witnesses are to be protected under Rules 404, 608 and 403. *See also* Government’s Motion to Preclude Evidence of Prior Sexual History of Victim’s Mother filed in this case, for an expanded discussion of this point.

The defendant may argue that this evidence is not within the definition of Rule 412. In *United States v. Torres*, 937 F.2d 1469, 1472 (9th Cir. 1991), *cert.denied*, 502 U.S. 1037 (1992), the Ninth Circuit defined “past sexual behavior” broadly to include “all sexual behavior of the victim of an alleged sexual assault which precedes the date of the trial.” The court was interpreting an earlier version of Rule 412, which did not proscribe inquiry into sexual predisposition of a victim until it was amended in 1994. “Rule 412 has been revised…to expand the protection afforded alleged victims of sexual misconduct.”

Adv. Note

In *Torres*, the defendant attempted to introduce testimony concerning the 17-year-old victim engaging in sexual behavior with someone other than the defendant six months after the acts charged in the indictment. He argued that such evidenced “would have established a plausible alternative source for the victim’s familiarity with sex and sexual terminology at such a young age.” The Ninth Circuit affirmed the court’s decision to exclude this evidence, and reasoned as follows:

Here, the victim’s testimony did not demonstrate any unusual

knowledge of sexual techniques or nomenclature. Rather, her

testimony was replete with simple references to ‘private spot,’

‘private parts,’ and ‘private places.’ *Id*. at 1474.

In the instant case, the victim is ten years old, and his brother is nine. All the reports provided to defense counsel clearly show that these boys, as well as the other act victim who will be testifying, use childlike and simple terms for genitalia, such as “private part” or “private,” and “butt” or “behind” or “where you go number 2” to refer to the anus. There is simply no credible basis for suggesting that defendants’ confrontation or other rights requires admission of this type of evidence in a case such as this. *See also, United States v. St. Pierre*, 812 F.2d 417, 418 (8th Cir. 1987) (precluding evidence of pornographic magazine possession by twelve-year-old victim to support defense argument of alternative source for victim’s sexual sophistication).

The fact that defendant denies the allegations made in the indictment does not assist in this analysis. In *United States v. Johns*, 15 F.3d 740, 744 (8th Cir. 1994), the defendant denied having sex with the victim when she was fourteen through twenty-one years of age. He claimed that the only way she could have made such explicit allegations was if she had experienced sex with another person, and offered evidence of sexual acts with others to establish this theory. The court upheld exclusion of the evidence, finding neither a constitutional basis nor specific exception to warrant its admission. *Id.*

Furthermore, there is no evidence that this proffered testimony refers to identity of the perpetrator. It occurred well before the charged acts, and is unlike the situation in *United States v. Yazzie*, 59 F.3d 807, 814 (9th Cir. 1995), in which the testimony related directly to the defense that it was someone other than the defendant who assaulted the nine-year-old victim at or about the date in question. *See also, United States v. Bear Stops*, 997 F.2d 451, 454-56 (8th Cir. 1993) (uncontroverted evidence of sexual assaults by other boys during same time period as charged assault by defendant constitutionally required to establish alternative explanation for victim’s behavioral manifestations).

Unlike *Yazzie* and *Bear Stops*, in this case there is absolutely no evidence that the victim or the other act witness (his cousin) were molested or sexually abused by any person other than the defendant. There is also no evidence that the victim’s brother was ever molested or sexually abused by anyone. Allowing the defendant’s sister to use sexual innuendo to show these little boys’ sexual predisposition or to attack their character is precisely what Rule 412 is intended to prevent, particularly when defendant has failed to follow the procedural requirements for a prior motion, notice to the victim and a statement of the purpose for such ambiguous, speculative and controverted evidence.

In addition, the probative value of such evidence is minimal, if any. Assuming that the defense were permitted to ask the boys about this talk in front of Ms. R.W. on cross-examination, and they were to deny it, this back door attack on general credibility does not make otherwise unrelated evidence admissible. In *United States v. Payne*, 944 F.2d 1458 (9th Cir. 1991), the defendant sought to introduce evidence that the teenage victim was found in a trailer on another occasion in a state of partial undress with a boy other than the defendant. It was offered to show the victim’s bias against the defendant for disciplining her seven months later over the trailer incident, her lack of credibility because of her inconsistent recounting of the trailer incident, to explain medical evidence concerning her hymen and to rebut evidence that she was a virgin at the time of the charged assault. *Id.* at 1468.

In affirming the exclusion of the evidence, and rejecting the claim that the Constitution required its admission, the Ninth Circuit determined that the evidence was of little probative value, going only to the victim’s general credibility. “We find that the probative value of minor inconsistencies regarding an obviously embarrassing situation is virtually nil and does not outweigh the prejudicial effect of introducing [the victim’s] collateral sexual conduct.” *Id*. at 1468.