IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	NO. 1:10-CR-098
	:	
	:	
[redacted]	:	UNDER SEAL

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION *IN LIMINE* FOR AN EVIDENTIARY HEARING TO ADMIT STATEMENTS OF VICTIM CONCERNING HER HISTORY OF CHILD SEXUAL ABUSE

Comes Now the United States of America, by Sally Quillian Yates, United States Attorney, and Katherine M. Hoffer and Richard S. Moultrie, Jr., Assistant United States Attorneys for the Northern District of Georgia, and files this Government's Response to Defendant [redacted] (hereinafter "Defendant") Motion *in Limine* for an Evidentiary Hearing to Admit Statements of Victim Concerning Her History of Child Sexual Abuse. For the reasons set forth below, the United States urges the Court to deny Defendant's motion.

Defendant claims that the Court should allow the defense to "explore" the victim's "claimed" history of sexual abuse as a child for the purpose of: (1) explaining why she delayed reporting Defendant's assault; (2) proving her bias, and motivation to fabricate claims of assault, against Defendant; (3) showing that her "prior sexual experiences influenced her perception" of the event that is the subject of the criminal

charges in this case; and (4) in the alternative, establishing that the victim is lying about the sexual abuse she suffered as a child.

However, Defendant fails to (a) show how the victim's admitted history of being sexually abused as a child, and any expert testimony on the matter, would be relevant to any issue in the case, or (b) demonstrate that the evidence is admissible pursuant to any of the exceptions enumerated under Rule 412. Defendant is charged with sexually assaulting the victim by unlawfully groping her during a physical examination, and then lying to federal investigators about the circumstances of the incident. When she appeared before a federal grand jury the victim explained that her emotional and psychological response to Defendant's conduct had been impacted by sexual abuse she suffered as a child. However, Defendant fails to articulate how the victim's explanation of how she was impacted by her childhood trauma is relevant to any defense to the charges in this case, or to any other constitutional right. Further, evidence about the victim's childhood sexual abuse is not admissible pursuant to other exceptions allowed under Rule 412. The case does not involve evidence related to the source of semen, injury or other physical evidence, nor is the victim's consent an issue, given that Defendant does not claim any prior sexual relationship with the victim, and has denied touching the victim's breasts or genital area at all during his examination of her.

Therefore, pursuant to Federal Rules of Evidence, Rules 401 and 412, the Court should exclude the evidence. Moreover, even if the Court determines that the evidence does bear some relevance to an issue in the case, the evidence should still be excluded pursuant to Rule 403, because any probative value is slight, while the risk of prejudice to the victim, and confusion of the relevant issues in the case, is extreme. Finally, the government requests that, should the Court decide to conduct an in camera hearing, the victim be given the right to be heard at the hearing prior to the Court's determination of whether to admit such evidence, and that the proceeding, and records related to it, be sealed.

I.
BACKGROUND

On March 9, 2010, a federal grand jury sitting in the Northern District of Georgia returned a five-count indictment against Defendant, then a medical doctor employed at the Atlanta Veterans Administration Medical Center (hereinafter "VAMC"). (Doc. 1.) Count One charged Defendant with conspiracy to make materially false statements to federal law enforcement agents, in violation of Title 18, United States Code, Sections 371 and 1001. (Doc. 1.) Counts Two and Three charged Defendant with substantive counts of making materially false statements to federal law enforcement agents, in violation of Title 18, United States Code, Section 1001. (Doc. 1.) Count Four charged Defendant with abusive sexual contact with a patient,

in violation of Title 18, United States Code, Section 2244(b). (Doc. 1.) Count Five charged Defendant with simple assault of a female patient, in violation of Title 18, United States Code, Section 113(a)(5).

On April 7, 2010, Defendant made an initial appearance before United States Magistrate Judge Russell G. Vineyard and was arraigned. (Doc. 8.) On May 27, 2010, Judge Vineyard certified the case ready for trial. (Doc. 22.) On June 23, 2010, this Court issued an order setting trial of the case to commence on August 23, 2010. (Doc. 26.) On July 13, 2010, Defendant filed the instant motion under seal. (Doc. 28.)

II.
BRIEF STATEMENT OF CASE

A. Facts Related to Assault of Victim and Defendant's False Statements

On November 17, 2008, the victim, L.F., a veteran of the Armed Forces and hemophilia patient, went to the VA hospital located in Decatur, Georgia, for treatment of a sore hip that she believed to be related to her medical condition. (Doc. 1 at 2.) Contrary to the VA hospital's policy that female patients be given the option of requesting the presence of a female staff member during physical examinations by male doctors, Defendant ordered the victim to remove her blouse and bra so that he could examine her breasts. (Doc. 1 at 3, 8-9.) While the victim was alone with Defendant in the examination room, Defendant complimented L.F. about her breasts,

groped the victim's breasts with his bare hands, and tried, on several occasions, to convince the victim to allow him to remove her pants to conduct a pap smear. (Doc. 1 at 3-4.) The victim refused. (Doc. 1 at 4.)

Following the incident, and while still at the VA hospital, L.F. telephoned a friend and described Defendant's conduct in the examination room. (Doc. 1 at 5.) On the following day, L.F. reported the assault to a social worker assigned to L.F. by Hemophilia of Georgia, an agency that assists hemophilia patients. (Doc. 1 at 7.)

Agents employed by the VA Office of the Inspector General of the Department of Veteran Affairs (hereinafter "VA OIG") then interviewed Defendant about the victim's allegations. (Doc. 1 at 11.) Defendant insisted to the agents that he had only examined the victim's abdominal area. (Doc. 1 at 11.) Further, Defendant telephoned a nurse at the VA hospital who is identified in the criminal indictment as R.S., an unindicted co-conspirator. (Doc. 1 at 3, 7-10, 12-13.) Defendant asked R.S. to falsely claim to federal investigators that she was present in the examination room on November 17, 2008, with Defendant and the victim. (Doc. 1 at 9-11.)

Subsequently, when VA OIG agents interviewed R.S. on December 2, 2008, the nurse claimed that she had been present in the examination room with Defendant and the victim, just as Defendant had requested that she so state. (Doc. 1 at 9-11.) However, following the interview, the nurse telephoned the agents to admit that

Defendant had asked her to falsely claim that she was present in the examination room with Defendant and the victim, and to falsely claim that he had only examined the victim's abdominal area. (Doc. 1 at 9-11.)

Next, on December 11, 2008, VA OIG agents interviewed Defendant at his home. (Doc. 1 at 11.) Defendant insisted to the VA OIG agents that he had only performed an abdominal examination that required L.F. to lie on the examination table. (Doc. 1 at 11.) Defendant denied touching L.F.'s breasts or pelvic area. (Doc. 1 at 11.) Defendant also stated that, in spite of his reassurances to R.S. that she had not been present in the examination room with L.F. and him on November 17, 2008, R.S. herself insisted on lying to VA OIG agents by stating that she had been present in the examination room. (Doc. 1 at 11.)

B. Victim's Testimony before the Grand Jury

On March 9, 2010, L.F. appeared before a federal grand jury. *See* Transcript of Testimony of L.F., attached hereto, as Government's Exhibit ("Govt. Ex.") A. During her testimony, L.F. divulged to the grand jury that her mother's boyfriend had molested her from the time she could "remember" until age 17. Govt. Ex. A at 6, lines 4-8. L.F. said that she wanted the grand jury to be aware of the issue so that they would "understand a little bit of why I reacted [to Defendant's assault] the way that I did." Govt. Ex. A at 6, lines 9-10. In explaining why she didn't confront Defendant

while in the examination about his fondling of her breasts, L.F. explained that she "froze" and "felt like I was a kid again in there where I knew it was wrong but I couldn't say anything." Govt. Ex. A at 17, lines 5-9. Further, in concluding her testimony to the grand jury, L.F. described how Defendant's assault brought back the memories of her child sexual abuse. Govt. Ex. A at 32-34. At no time did L.F. tell the grand jury that her childhood sex abuse had caused her to be confused about whether Defendant had inappropriately touched her breasts, and made attempts to touch her genital area.

C. Elements of the Criminal Offenses Alleged in the Indictment

Count One charges Defendant with conspiring with Nurse R.S., an unindicted co-conspirator, to make materially false statements to federal law enforcement agents about the circumstances of L.F.'s physical examination, in violation of Title 18, United States Code, Sections 371 and 1001. (Doc. 1.)

1. Title 18, United States Code, Section 371 – General Conspiracy.[1]

Title 18, United States Code, Section 371, provides that if two or more persons conspire to commit an offense against the United States, and one or more of these persons does any act to effect the object of the conspiracy, each shall be guilty of an

[1] Judicial Council of the Eleventh Circuit, *Pattern Jury Instructions (Criminal Cases)*, Special Instruction 13.1, p. 147 (2010).

offense against the United States. The Government must establish the following facts to prove a defendant guilty of conspiracy:

> First: Two or more persons in some way agreed to try to accomplish a shared and unlawful plan;
>
> Second: That the Defendant, knowing the unlawful purpose of the plan, willfully agreed to participate in the plan;
>
> Third: That during the conspiracy, one of the conspirators knowingly engaged in at least one overt act as described in the indictment; and
>
> Fourth: The overt act was committed at or about the time alleged and with the purpose of carrying out or accomplishing some object of the conspiracy.

2. Title 18, United States Code, Section 1001 – False Statement to a Federal Agency.[2]

Counts Two and Three charge Defendant with substantive counts of making materially false statements to federal law enforcement agents about the facts related to his examination of L.F., in violation of Title 18, United States Code, Section 1001. (Doc. 1.) Title 18, United States Code, Section 1001, makes it a federal crime for anyone to willfully make a false or fraudulent statement to a department or agency of the United States. To prove Defendant guilty of this offense the government must prove the following:

---

[2] Judicial Council of the Eleventh Circuit, *Pattern Jury Instructions (Criminal Cases)*, Special Instruction 36, p. 247 (2010).

First: That Defendant made the statements, as charged;

Second: That the statements were false;

Third: That the falsity concerned a material matter;

Fourth: That Defendant acted willfully, knowing that the statements were false; and

Fifth: That the false statements were made or used for a matter within the jurisdiction of a department or agency of the United States.

3. Title 18, United States Code, Section 2244(b) – Abusive Sexual Contact.[3]

Count Four charges Defendant with abusive sexual contact with a patient, in violation of Title 18, United States Code, Section 2244(b) (Doc. 1.) Section 2244(b) requires the government to prove the following:

First: That Defendant knowingly engaged in sexual contact with the victim, as charged in the indictment;

Second: That the sexual contact occurred without the victim's permission; and

Third: That the acts occurred within the territorial jurisdiction of the United States.

[3] Judicial Council of the Eleventh Circuit, *Pattern Jury Instructions (Criminal Cases)*, adapted from Special Instruction 81.1, p. 460 (2010).

4. Title 18, United States Code, Section 113(a)(5) – Simple Assault.[4]

Finally, Count Five charges Defendant with simple assault of L.F., in violation of Title 18, United States Code, Section 113(a)(5). To prove Defendant guilty of this offense the government must prove the following:

First: That Defendant assaulted the victim, as charged; and

Second: That the act occurred within the territorial jurisdiction of the United States.

III.
ARGUMENT AND CITATIONS OF AUTHORITY

THE COURT SHOULD DENY DEFENDANT'S MOTION BECAUSE EVIDENCE OF VICTIM'S PAST HISTORY OF CHILD SEXUAL ABUSE IS IRRELEVANT UNDER RULE 401, INADMISSIBLE PURSUANT TO RULE 412, AND, EVEN IF ADMISSIBLE, EXCLUDABLE UNDER RULE 403 BECAUSE ANY PROBATIVE VALUE OF THE EVIDENCE IS FAR OUTWEIGHED BY ITS UNDULY PREJUDICIAL EFFECT AND RISK OF CONFUSING THE JURY.

Defendant fails to show how the victim's admitted history of being sexually abused as a child is relevant to any issue in the case under Federal Rules of Evidence, Rule 401, or to demonstrate that the evidence is admissible pursuant to any of the exceptions enumerated under Federal Rules of Evidence, Rule 412. Defendant is charged with sexually assaulting the victim by unlawfully groping her during a

[4] Judicial Council of the Eleventh Circuit, *Pattern Jury Instructions (Criminal Cases)*, adapted from Special Instruction 1.2, p. 108 (2010).

physical examination, and then lying to federal investigators about the circumstances of the incident. When she appeared before a federal grand jury the victim explained that her emotional and psychological response to Defendant's conduct was impacted by sexual abuse she suffered as a child. Defendant fails to articulate how the victim's explanation of how she was impacted by her childhood trauma is relevant to any defense to the charges in this case, or to any other constitutional privilege. Further, evidence about the victim's childhood sexual abuse is not admissible pursuant to other exceptions allowed under Rule 412. The case does not involve evidence related to an alternative source of semen, injury or other physical evidence, nor is the victim's consent an issue, given that Defendant does not claim a prior sexual relationship with the victim, and denied touching the victim's breasts or genital area at all during his examination of the victim. Moreover, even if the Court were to determine that this evidence is relevant to some issue in the case, it should still be excluded, because any probative value of the evidence is slight, while the risk of prejudice to the victim, and confusion of the relevant issues in the case, is extreme. Accordingly, the Court should deny Defendant's motion.

A. Evidence of Victim's Prior History of Child Sexual Abuse is Irrelevant Under Federal Rules of Evidence, Rule 401

First, Defendant fails to demonstrate how evidence of the victim's prior history of child sexual abuse is relevant to his defense against allegations that he conspired

to, and did, make false statements to federal agents about his examination of L.F., and that he sexually assaulted L.F. Federal Rules of Evidence, Rule 401, defines "relevant evidence" as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Here, Defendant claims that the Court should allow the admission of evidence concerning the victim's past history of sexual abuse to: (1) explain why L.F. delayed reporting Defendant's assault of her; (2) prove her bias, and motivation to fabricate claims of assault, against Defendant; (3) show that her "prior sexual experiences influenced her perception" of the event that is the subject of the criminal charges in this case; and (4) in the alternative, establish that the victim is lying about the sexual abuse she suffered as a child and, therefore, is lying about the instant charge. Defendant's Brief ("Def. Br.") at 5-6.

Defendant bases his claims on testimony given by L.F. before the grand jury on March 9, 2010. During her testimony, L.F. divulged to the grand jury that her mother's boyfriend had molested her from the time she could "remember" until age 17. Govt. Ex. A at 6, lines 4-8. L.F. said that she wanted the grand jury to be aware of the issue so that they would "understand a little bit of why I reacted [to Defendant's assault] the way that I did." Govt. Ex. A at 6, lines 9-10. In explaining why she didn't confront Defendant while in the examination about his fondling of her breasts,

L.F. explained that she "froze" and "felt like I was a kid again in there where I knew it was wrong but I couldn't say anything." Govt. Ex. A at 17, lines 7-9. Further, in concluding her testimony to the grand jury, L.F. described how Defendant's assault brought back the memories of her child sexual abuse. Govt. Ex. A at 32-34.

At no time did L.F. tell the grand jury that her childhood sex abuse had caused her to be confused about whether Defendant had inappropriately touched her breasts and made attempts to touch her genital area. Rather, L.F. explicitly told the grand jury that she was sharing her past of child sexual abuse to explain *how* she reacted to Defendant's assault. Nothing about L.F.'s description of the trauma she suffered from child sex abuse bears any relevance to a defense to the charges of violations of Title 18, United States Code, Section 2244(b) (abusive sexual contact), or Section 113(a)(b) (simple assault), or to any other criminal charge alleged in the indictment. Further, Defendant's assertion that the evidence should be admitted to explain L.F.'s "delayed" reporting of the incident is both legally and factually without merit. L.F. reported the incident to a friend while she was still at the hospital. (Doc. 1 at 5.) On the day after the incident, L.F. reported the assault in greater detail to her social worker. (Doc. 1 at 7.) Moreover, even such a slight delay by the victim in reporting the details of the assault do not justify admission by the Court of evidence so unduly prejudicial and potentially confusing to the jury. Therefore, the Court should exclude it.

B. Evidence of Victim's Prior History of Child Sexual Abuse is Inadmissible Pursuant to Federal Rules of Evidence, Rule 412

Second, evidence about the victim's childhood sexual abuse is not admissible pursuant to any exception allowed under Rule 412. The case does not involve evidence related to an alternative source of semen, injury or other physical evidence, nor is the victim's consent an issue. As a result, the Court should again deny Defendant's motion.

Rule 412 generally bars evidence about any victim's "past sexual behavior" or "alleged sexual predisposition." F. R. Evid. 412(a). The rule provides that such evidence is "generally inadmissible" to prove "that any alleged victim engaged in other sexual behavior" or "any alleged victim's sexual predisposition." F. R. Evid. 412(a)(1) & (2). Rule 412 does permit such evidence to be admitted during a criminal case under certain exceptions, and if otherwise admissible under the rules of evidence, where: (A) evidence of specific instances of sexual behavior by the alleged victim is offered to prove that a person other than the accused was the source of semen, injury or other physical evidence; (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct is offered by the accused to prove consent by the victim; and (C) the exclusion of the evidence would violate the constitutional rights of the defendant. F. R. Evid. 412(b)(1)(A) - (C). A district court's determination of whether to exclude or admit

evidence pursuant to Rule 412 is reviewed for abuse of discretion. *See United States v. Culver*, 598 F.3d 740, 749 (11th Cir. 2010).

The avowed purpose of Rule 412 is "to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives" (*See* 124 Cong. Rec. H 11944 (1978)) and to encourage reporting of sexual assaults and to prevent wasting time on collateral and irrelevant matters.[5] The advisory committee elaborated further on the intent and spirit of the rule in 1994, writing:

> 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 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 Notes (1994).

[5] In 1994, the Rule was amended and broadened to apply to civil or criminal proceedings involving all alleged "sexual misconduct." Fed. R. Evid. 412, Advisory Committee Notes (1994).

Evidence that might otherwise be admissible under some other evidentiary rule must be excluded if Rule 412 so requires. Thus Rule 412 bars admission of evidence offered to prove that any alleged victim engaged in other sexual behavior. "Sexual behavior" includes all "activities that involve actual physical conduct, i.e. sexual intercourse or sexual contact" or that imply sexual intercourse or sexual contact, such as use of contraceptives, birth of an illegitimate child, or diagnosis of a venereal disease. Fed. R. Evid. 412, Advisory Committee Notes, Subdivision (a) (1994). The reference to "sexual predisposition" is "designed to exclude evidence that . . . the proponent believes may have a sexual connotation for the fact finder," such as "the alleged victim's mode of dress, speech, or lifestyle." *Id*. The provision is also designed to include exclusions of evidence that "does not directly refer to sexual activities or thoughts, but that the proponent believes may have a sexual connotation for the fact finder." *See* Advisory Committee Notes (1994). *See generally Sheffield v. Hilltop Sand & Gravel Co*, 895 F. Supp. 105, 107-109 (E.D.Va. 1995) (explaining 1994 Amendments).

Further, under Rule 412, courts must exclude evidence of past sexual conduct. The Eleventh Circuit recently applied the rule in *Culver*, 598 F.3d 740. In *Culver*, the defendant was convicted of producing child pornography by filming his step-daughter who was 13 years-old. 598 F.3d at 745. The defendant argued on appeal that he

should have been allowed to present evidence of the child's sexual history to rebut evidence offered by the government that he was responsible for condoms found in the girl's bedroom. *Id.* at 749. The Eleventh Circuit upheld the district court's exclusion of the evidence of the child's prior sexual history pursuant to Rule 412, holding that admitting the evidence to prove an alternative source for the condoms was irrelevant to the issue of the identity of the female on the tape, whom the government alleged to be the victim. *Id*. at 749-50. The *Culver* court concluded that allowing the defense to raise the victim's alleged sexual past would have confused the jury and harassed the victim. *Id*. at 749. On the issue of identity, however, the district court did allow cross-examination of the victim concerning the fact that she had a boyfriend, and had shaved her pubic area (as was depicted in the pornography). *Id*. at 750.

In refusing to allow evidence concerning the victim's sexual history on matters not related to her identity, the *Culver* court relied on Eleventh Circuit precedent as well as on cases from other circuits. *See United States v. Sarras*, 575 F.3d 1191, 1213 (11th Cir. 2009) (finding that victim's other sexual conduct was irrelevant to issue of identification in child pornography production case); *United States v. Dogskin*, 265 F.3d 682 (8th Cir. 2001) (holding that evidence that witness saw victim in bed with man on morning after rape inadmissible under Rule 412); *United States v. Powell*, 226 F.3d 1181 (10th Cir. 2000) (affirming the exclusion of evidence of victim's past

sexually suggestive and flirtatious behavior with other men); *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995) (holding that evidence regarding victim's sexual relations with her boyfriend was inadmissible); *United States v. Saunders*, 943 F.2d 388 (4th Cir. 1991) (upholding exclusion of evidence of victim's sexual relationship with another person); *United States v. Black*, 666 F.2d 43 (4th Cir. 1981) (finding that evidence of victim's alleged promiscuity was barred by Rule 412).

In this case, neither of the exceptions at Rule 412 allows for the admission of evidence concerning L.F.'s child sexual abuse. In the first instance, Defendant denies the assault conduct in its entirety. Therefore, he cannot offer "evidence of specific instances of sexual behavior by the alleged victim" to prove that another person "was the source of semen, injury or other physical evidence." Fed. R. Evid. 412(b)(1)(A). Second, there is no allegation that Defendant had prior interactions, sexual or otherwise, with L.F. Consequently, he is prohibited from offering "evidence of specific instances of sexual behavior" between himself and the victim to prove consent. Fed. R. Evid. 412(b)(1)(B). Furthermore, Defendant denies touching L.F.'s breasts or genital area – accordingly, he cannot claim to offer the evidence to prove that L.F. consented to conduct that he insists never occurred.

Moreover, and for those reasons more fully outlined above, the exclusion of this evidence does not violate the constitutional rights of Defendant. Fed. R. Evid.

412(b)(1)(C). For instance, as an example of evidence that may be admissible pursuant to Rule 412(b)(1)(C), the Advisory Committee Notes observe that "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 to prove consent." Advisory Committee Note (1994). According to the legislative history, this exception "is intended to cover those infrequent circumstances where, because of an unusual chain of circumstances, the general rule of inadmissibility, if followed, would result in denying the defendant a constitutional right." 124 Cong. Rec. H11944 (daily ed. Oct. 10, 1978) (statement of Rep. Pease). Defendant's stated claims for admitting evidence concerning the victim's child sexual abuse do not satisfy this threshold.

Likewise, the Court should reject Defendant's claim that the evidence is admissible to demonstrate the victim's bias and motive to fabricate the allegations. Impeaching the victim's truthfulness and attempting to show her capability to fabricate a story are not recognized exceptions to Rule 412. *See United States v. Torres*, 937 F.2d 1469 (9th Cir. 1991) (finding that evidence of incident that occurred approximately six months after alleged aggravated sexual abuse of victim was not admissible under Rule 412, therefore court rejected defendant's argument that the evidence was admissible because it was relevant to victim's credibility); *see also*

United States v. Withorn , 204 F.3d 790, 795 (8th Cir. 2000); and *United States v. Richards*, 118 F.3d 622 (8th Cir. 1997). Accordingly, the Court should deny Defendant's motion.

C Evidence of Victim's Prior History of Child Sexual Abuse, even if Relevant and Arguably Admissible Under Rule 412,Should Still be Excluded as Unduly Prejudicial Pursuant to Federal Rules of Evidence, Rule 403

Third, the Eleventh Circuit, and numerous other appellate courts, have held that a trial court does not abuseits discretion by limiting or prohibiting defense counsel's cross-examination of witnesses on their pastsexual experiences, even when relevant, when such testimony would be more prejudicial than probative. *Culver*, 598 F.3d 740 at 749 (concluding, in rejecting a defendant's motion to allow evidence under Rule 412, that "'[t]rial judges retain wide latitude . . . to impose reasonable limits on [testimony] based on concerns about, among other things, harassment, prejudice, confusion of the issues . . . or interrogation that is repetitive or only marginally relevant" (*quoting Delaware v. Van Arsdall* , 475 U.S. 673, 679 (1986)); *see also United States v. Anderson*, 139 F.3d 291 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 158 (1998) and *United States v. Griffith* , 284 F.3d 338 (2d Cir. 2002) (holding that evidence of past sexual behavior of victims inadmissible in transportation of minors for purposes of prostitution case); *Agard v. Portuondo*, 117 F. 3d 696, 702 - 703 (2d Cir. 1997) (finding no violation of Confrontation Clause or Due Process where cross-

examination questions were limited regarding victim's prior experience with anal intercourse because of highly prejudicial nature of testimony), *rev'd on other grounds*, 529 U.S. 1461, 120 S. Ct. 1119 (2000); *United States v. Bittner*, 728 F.2d 1038, 1042 (8th Cir. 1984) (ruling no abuse of discretion in preventing cross-examination of witness regarding prior sexual incident with boyfriend on relevancy and undue prejudice grounds).

In *Anderson* and *Griffith*, for example, the defendants were convicted of transporting individuals in interstate commerce with the intent that these persons engage in prostitution. *See Anderson*, 139 F. 3d at 291 and *Griffith*, 284 F. 3d at 342. The Second and First Circuits upheld the district courts' decisions to limit the questioning of the minor victims concerning their relationships with men, sexual history and even prior drug use *Anderson*, 139 F.3d at 303; *Griffith*, 284 F.3d at 351-352. The courts reasoned that the limitations were not a violation of the defendants' Sixth and Fourteenth Amendment fair trial rights since the cross-examination would be irrelevant in proving the alleged offenses.

Similarly, in *Bittner*, the court concluded that the trial court did not abuse its discretion in prohibiting the cross-examination of a witness regarding a past sexual incident with a boyfriend in a kidnaping case. 728 F.2d at 1042. The court reasoned that the prior sexual incident was more prejudicial than probative and was not relevant

to the alleged offense. *Id.*; *see also United States v. Ramone*, 218 F. 3d 1229, 1234 (10th Cir. 2000) (holding that in prosecution under 18 U.S.C. §§ 2422(b) and 2423 (b), refusal to allow defendant to cross-examine minor victim as to unrelated encounter with another man she met on the Internet did not violate defendant's Sixth Amendment rights to confrontation, since the evidence was substantially more prejudicial than probative); *United States v. Byrne*, 171 F.3d 1231, 1234 (10th Cir. 1999) (finding that in aggravated sexual abuse case, evidence concerning victim's alleged acknowledgment of prior unusual sexual practices was properly excluded).

In the present case, admission by the Court of evidence concerning the victim's past child sexual abuse, even if marginally probative of some issue in the case, is far outweighed by the extreme risk of undue prejudice to the victim, and potential confusion of the relevant issues for the jury. The Court should especially be concerned about the undue risk of prejudice given Defendant's final assertion that the evidence should be admitted because "the defense is not confident, at this point . . . [that L.F.] has been the victim of a prior sexual assault." Def. Br. at 6. This is pure speculation and an absolutely insufficient basis for admitting such evidence under Rule 412, and is in fact, a claim at direct odds with the intent of the rule.

Additionally, the cases cited by Defendant in his brief are inapposite to the facts that confront the Court here. For example, Defendant relies on *Olden v. Kentucky*,

488 U.S. 227 (1988), in which the Supreme Court held that the district court had erred in excluding evidence under Rule 412 in a kidnaping, rape and sodomy trial. 488 U.S. 227 at 232-34. In *Olden*, the trial court had refused to allow an African American defendant to cross examine the victim about the fact that, at the time of the alleged assault, she was living with a boyfriend and, therefore, had lied about her consensual sex acts with the defendant out of fear of jeopardizing her relationship with her boyfriend. 488 U.S. at 230-32.

Next, Defendant cites *Lewis v. Wilkinson*, 307 F.3d 413 (6th Cir. 2002). In that case, the Sixth Circuit concluded that the trial court had improperly excluded, in violation of the Confrontation Clause, evidence from a rape victim's diary that she was tired of being victimized by men and would refuse to "'give into them'" any longer. 307 F.3d at 419-20.

Defendant also relies on *United States v. Bear Stops*, 997 F.2d 451 (8th Cir. 1993), a case in which the district court erred by excluding evidence that a child victim, in a case involving aggravated sexual abuse, had been previously anally assaulted by three boys, none of whom was the defendant. 997 F.2d at 453-54. The court determined that the district court had abused its discretion in prohibiting this evidence which, had it been admitted, might have supported the defendant's defense that another person caused the victim's injuries. *Id*. at 454, 457.

However, in each of these cases the evidence concerning the victims' prior sexual history bore directly on the bases of the defendant's defense to the criminal charges. Defendant has failed to make such a showing here. Therefore, the Court should deny his motion.

IV.
CONCLUSION

Therefore, for the foregoing reasons, and pursuant to Federal Rules of Evidence, Rules 401, 403 and 412, the Court should exclude evidence related to the victim's prior child sex abuse history and any expert testimony offered by the defense on the matter. However, should the Court decide to conduct an in camera hearing, the government requests that the victim be given the right to be heard at the hearing

prior to the Court's determ ination of whet her to admit such evidence, and that the proceeding, and records related to it, be sealed.

This 26th day of July, 2010.

Respectfully submitted,

SALLY QUILLIAN YATES
UNITED STATES ATTORNEY

/S/KATHERINE MONAHAN HOFFER
KATHERINE MONAHAN HOFFER
Georgia Bar No. 045737
kathy.hoffer@usdoj.gov

/S/RICHARD S. MOULTRIE, JR.
ASSISTANT UNITED STATES ATTORNEY
Georgia Bar No. 527275
richard.moultrie@usdoj.gov
600 U.S. Courthouse
75 Spring St., S.W.
Atlanta, GA 30303
(404)581-6000
(404)581-6181 (Fax)

CERTIFICATE OF SERVICE

This is to certify that the above was prepared using Times New Roman 14 point font, and that I have this day served upon the persons listed below a copy of the foregoing document by mail:

Edward T. Garland, Esq.
Counsel for Defendant [redacted]
3151 Maple Drive, N.E.
Atlanta, GA 30305-2500

This 26th day of July, 2010.

/s/Katherine Monahan Hoffer
KATHERINE MONAHAN HOFFER
Assistant United States Attorney