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The Dark Cloud of Collateral Consequences: Ex-Offenders Serving Civilly Imposed Sentences Post-Incarceration

“Rape Shield” Statutes: Overview; Fed.R.Evid. 412; Mode of Dress, Statements of Sexual Nature or Intention

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Editor-in-Chief's Foreword

Michael H. Graham, Professor of Law at the University of Miami, is a distinguished authority on the law of evidence. His prodigious scholarship encompasses both practitioner and student texts including the Handbook of Federal Evidence, now in its seventh edition, and the *Handbook of Illinois Evidence*, now in its tenth edition.

Commencing with issue 4 of volume 41 of this journal, Professor Graham initiated a series of advanced workshops on evidence and trial advocacy. Many, but not all articles of this series will begin with a hypothetical presenting complex issues. Next follows discussion, leading to a suggested answer applying the Federal Rules of Evidence. Footnotes are employed sparingly, mostly to present illustrative support found in state decisions. Federal authority in support is rarely cited. Such authority may be found in corresponding sections of Graham, *Handbook of Federal Evidence* (7th ed. Thomson/West 2011) (*Handbook*) supplemented annually. The *Handbook* is also available on Westlaw. Finally, each article will conclude, where appropriate, with a section called “State Law Variations,” representing state decisions that vary in some interesting aspect from the resolution of the same question in federal courts. Accordingly, this series of articles presents to the practicing attorney the possibility of making alternative arguments based on state authority. For further discussion as to utilization of such state resources, see the *Preface* to the seventh edition of the *Handbook*. Citations and other references are formatted in the manner of the *Handbook*.

Hypothetical

Problem: A woman in her late thirties visits Miami on business. She arrives on a Friday to enjoy the weekend prior to her meetings the next week. On Friday night she goes to a restaurant/bar on Key Biscayne called Sundays on the Bay. She meets a man and invites him back to her hotel room at the Sheraton Royal Biscayne Hotel where they engage in consensual sex. On Saturday evening she again visits Sundays on the Bay, this time returning home alone. She maintains that during the early morning a man entered her room on the ground floor through a sliding door and raped her. The assailant is not the man she slept with on Friday.

At trial the defendant's attorney presenting a consent defense would like to cross-examine the alleged victim and/or proffer extrinsic evidence concerning: (1) the fact she had consensual sex on Friday with an almost perfect stranger, (2) the fact she is unmarried yet on birth control pills, (3) that she previously had an abortion, (4) has a reputation for first date sex in Lincoln, Nebraska, where she is from, (5) has three prostitution arrests as a teenager, and (6) filed a sexual harassment suit against a former employer which was dismissed by the court.

In addition, the woman on Saturday afternoon sends a text message to her BFF (7) that her encounter of Friday was not sufficiently satisfying, (8) that she will be a cougar on the prowl and fully expects to make a good looking gentleman “very lucky” that evening, and (9) that the alleged victim wore an extremely revealing and sexy outfit to Sundays on the Bay later that Saturday evening.

The evidence shows that the alleged victim displays vaginal bruises. Defendant is prepared to call witnesses who will testify (10) that the alleged victim prefers “rough sex” arguing that her injuries could have come from her Friday night escapade. Such witnesses do not include her sex partner on Friday who is unidentified and thus can't be located. Defense counsel also wants to cross-examine as to the foregoing.

As the trial judge, applying [Fed.R.Evid. 412](#), what cross-examination and/or defendant's proffered evidence would you permit?

Fed.R.Evid. 412 SEX OFFENSE CASES: THE VICTIM'S SEXUAL BEHAVIOR OR PREDISPOSITION

(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 written 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.

Overview

Over the last four decades, Congress and numerous state legislatures perceived a need to protect the privacy of an alleged rape victim from unwarranted public intrusion, and to make the prosecution of rape cases more effective and equitable for rape victims. In particular, the ordeal a woman had to undergo at trial was felt to account for the reluctance of many women to report a rape or to participate in the prosecution of an alleged rapist. Reassessment of the actual probative value in today's sexually liberated society of other sexual behavior in light of the jury's likelihood to overvalue such conduct was also one of the critical underpinnings of the legislative response in the form of statutes through the United States controlling the admissibility of evidence of past sexual behavior and predisposition of the alleged victim.

To illustrate, in permitting use on cross-examination of the prosecutrix of the fact of her cohabitation with a young man a few months prior to the alleged rape, the Eighth Circuit in the majority opinion in [Packineau v. U.S., 202 F.2d 681, 685–86 \(8th Cir. 1953\)](#), decided in 1953 declared:

That her story of having been raped would be more readily believed by a person who was ignorant of any former unchaste conduct on her part than it would be by a person cognizant of the unchaste conduct defendants offered to prove against her seems too

clear for argument. ... To an ordinary person called on to make an appraisal of Loretta's accusation that one of the young men with whom she was out for dalliance on this night had raped her, the reaction would certainly be very different if it were known that she had been openly co-habiting with a young man only a few months before than it would be if she were the unsophisticated young lady she appeared to be.

In overruling *Packineau* in *U.S. v. Kasto*, 584 F.2d 268, 271–72, 3 Fed. R. Evid. Serv. 20 (8th Cir. 1978), the Eighth Circuit in 1978 stated:

We believe that Judge Sanborn's dissent has withstood the test of time and is supported both in logic and in human experience. The fact that a rape victim has engaged in consensual sexual relations with the defendant in the past under similar conditions may have some logical relevance to the question of consent to the act charged, and evidence of prior sexual activity with the defendant under dissimilar circumstances may also have some logical relevance, but '(w)hen both identity of persons and similarity of circumstances are removed, ... probative value all but disappears.' Ordovery, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 Cornell L.Rev. 90, 106 (1977). Although Judge Sanborn's dissenting views were limited to the elicitation of such evidence during the cross-examination of the prosecutrix, we feel that the same logic applies to direct examination testimony sought to be introduced by the defense. We, therefore, conclude that absent circumstances which enhance its probative value, evidence of a rape victim's unchastity, whether in the form of testimony concerning her general reputation or direct or cross-examination testimony concerning specific acts with persons other than the defendant, is ordinarily insufficiently probative either of her general credibility as a witness or of her consent to intercourse with the defendant on the particular occasion charged to outweigh its highly prejudicial effect.

Fed.R.Evid. 412

Congress drafted [Fed.R.Evid. 412](#) without the aid of a proposal from an Advisory Committee appointed by the Supreme Court. [Fed.R.Evid. 412](#) provides that in a criminal proceeding involving alleged sexual misconduct, [Fed.R.Evid. 412](#), and only [Fed.R.Evid. 412](#), governs the admissibility of reputation and opinion evidence relating to any alleged victim's sexual predisposition as well as the admissibility of evidence of specific instances of conduct of any alleged victim offered to prove that the alleged victim engaged in other sexual behavior.

[Fed.R.Evid. 412](#) 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 is designed to encourage victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders. [Fed.R.Evid. 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.

In a criminal proceeding the introduction of reputation and opinion evidence as well as the introduction of evidence of specific instances of conduct of an alleged victim involving other sexual behavior offered to prove the alleged victim's sexual predisposition is never admissible, as substantive evidence or for impeachment, [Fed.R.Evid. 412\(a\)\(2\)](#). Evidence as to specific instances of conduct offered to prove that any alleged victim engaged in other sexual behavior for a purpose other than to prove the alleged victim's sexual predisposition is similarly not admissible as substantive evidence or for impeachment, [Fed.R.Evid. 412\(a\)\(1\)](#), unless the evidence meets an exception: (1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence, [Fed.R.Evid. 412\(b\)\(1\)\(A\)](#); (2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of

the sexual misconduct offered by the accused to prove consent or if offered by the prosecution, [Fed.R.Evid. 412\(b\)\(1\)\(B\)](#); or (3) evidence the exclusion of which would violate the constitutional rights of the defendant, [Fed.R.Evid. 412\(b\)\(1\)\(C\)](#).

Similarly, in a civil proceeding involving alleged sexual misconduct, [Fed.R.Evid. 412](#), and only [Fed.R.Evid. 412](#), governs the admissibility of reputation and opinion evidence relating to any alleged victim's sexual predisposition as well as the admissibility of evidence of specific instances of conduct of any alleged victim offered to prove that the alleged victim engaged in other sexual behavior as substantive evidence or for impeachment. Pursuant to [Fed.R.Evid. 412\(b\)\(2\)](#), in a civil proceeding the introduction of opinion and reputation evidence as well as the introduction of evidence of specific instances of conduct of the alleged victim involving sexual behavior is admissible to prove the alleged victim's reputation “only if the victim has placed it in controversy.” The alleged victim may place reputation in controversy without making a specific allegation in a pleading. Evidence of specific instances of conduct as well as evidence in the form of reputation or opinion evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible as substantive evidence or for impeachment if it is otherwise admissible under the Federal Rules of Evidence and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party, [Fed.R.Evid. 412\(b\)\(2\)](#).

A party intending to offer evidence under subdivision (b) must pursuant to [Fed.R.Evid. 412\(c\)\(1\)](#) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial, and must serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative. Before admitting evidence under [Fed.R.Evid. 412](#) the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard, [Fed.R.Evid. 412\(c\)\(2\)](#). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise, [Fed.R.Evid. 412\(c\)\(2\)](#).

The Advisory Committee's Note asserts that the reason for extending the rule in all criminal cases to protect any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused 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, for example, 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 Advisory Committee's Note also asserts that the reason for extending [Fed.R.Evid. 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. Accordingly, [Fed.R.Evid. 412](#) now 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.

[Fed.R.Evid. 412](#) applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation. [Fed.R.Evid. 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, [Fed.R.Evid. 404\(b\)\(2\)](#). 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 [Fed.R.Evid. 412](#). The witness will, however, be protected by other rules such as [Fed.R.Evid. 404](#) and [608](#), as well as [Fed.R.Evid. 403](#).

The terminology “alleged victim” is used because there will frequently be a factual dispute as to whether sexual misconduct occurred. The Advisory Committee's Note indicates that the terminology “alleged victim” does not connote any requirement that the misconduct be alleged in the pleadings. [Fed.R.Evid. 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 [Fed.R.Evid. 404](#) nor [Fed.R.Evid. 412](#) operates to bar the evidence; [Fed.R.Evid. 401](#) and [403](#) control. [Fed.R.Evid. 412](#) does, however, apply in a Title VII action in which the plaintiff has alleged sexual harassment.

The Advisory Committee's Note also indicates that 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 [Fed.R.Evid. 412](#). However, this evidence is subject to the requirements of [Fed.R.Evid. 404](#).

[Fed.R.Evid. 412\(a\)](#). Except as provided in [Fed.R.Evid. 412\(b\)](#) discussed infra, evidence offered to prove the victim's “other” sexual behavior or alleged sexual predisposition is barred in both civil and criminal proceedings by [Fed.R.Evid. 412\(a\)](#). 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 such as the use of a condom. Evidence, which might otherwise be admissible under [Fed.R.Evid. 402](#), [404\(b\)\(2\)](#), [405](#), [607](#), [608](#), [609](#), or some other evidence rule, must be excluded when [Fed.R.Evid. 412](#) so requires. The word “other” is used to suggest some flexibility in admitting evidence “intrinsic” to the alleged sexual misconduct. [Fed.R.Evid. 412\(a\)](#) also excludes all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition, including 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 contravenes [Fed.R.Evid. 412](#)'s objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless a [Fed.R.Evid. 412\(b\)](#) exception is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible.

[Fed.R.Evid. 412\(b\)\(1\)](#). In a criminal case, evidence is admissible under [Fed.R.Evid. 412\(b\)\(1\)](#) pursuant to three possible exceptions, provided the evidence also satisfies other requirements for admissibility specified elsewhere in the Federal Rules of Evidence, including [Fed.R.Evid. 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,” i.e., evidence in the form of reputation or opinion testimony relating to past sexual behavior of the alleged victim is inadmissible.

Under the exception in subdivision (b)(1)(A), evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged is admissible when offered to prove that another person was the source of semen, injury or other physical evidence, if otherwise admissible under the Federal Rules of 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. Evidence offered for a specific purpose identified in this subdivision may still be excluded if it does not satisfy [Fed.R.Evid. 401](#) or [403](#).

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 by the accused to prove consent, or offered by the prosecution, if otherwise admissible under the Federal Rules of Evidence. Admissible pursuant to this exception would be evidence of prior instances of sexual activities between the alleged victim and the accused, as might be, subject to [Fed.R.Evid. 401](#) and [403](#), 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. With respect to the prosecution offering such evidence, for example, in a prosecution for child sexual abuse, evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution, [Fed.R.Evid. 404\(b\)\(2\)](#), is admissible under [Fed.R.Evid. 414\(a\)](#) to show a pattern of behavior. Evidence relating to the victim's alleged sexual predisposition is not admissible pursuant to any of the exceptions provided in [Fed.R.Evid. 412\(b\)\(2\)](#).

Under the exception in 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. The scope of this subdivision is of course uncertain.

The Advisory Committee's Note provides the example of statements in which the victim has expressed an intent to have sex with the first person encountered on a particular occasion as statements that “might not be excluded without violating the due process right of a rape defendant seeking to prove consent.” In addition, evidence that tends to prove that the victim has been convicted of prostitution, that rebuts prosecution evidence relating to the victim's sexual activities, that establishes that the alleged victim has a history of falsely reporting sexual assault, and where either consent or fabrication is the defense in the case, evidence of specific past sexual acts occurring within the prior year tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case of issue, have each been specifically included as admissible in at least one state statute on the same subject. To this list may be added others such as where the alleged victim has a motive to falsely accuse the defendant. For example, a young girl who is late returning home may falsely accuse someone of rape in order to provide an explanation of her tardiness.

The decision of the congressional drafters of [Fed.R.Evid. 412](#) to forego more specific enumeration of exceptions to the general policy of excluding evidence of past sexual conduct of the alleged victim, in favor of a single general provision providing for admissibility where constitutionality required has little to recommend it. Moreover, although [Fed.R.Evid. 412](#) fails to extend the exception for “constitutionality required” evidence of past sexual conduct to evidence of reputation and opinion, it is not clear that under certain circumstances, such as when reputation or opinion testimony is offered to establish the effect knowledge of such reputation had on the accused's belief that the woman was consenting, admissibility may not be constitutionally required. Everything considered, including the fact that a sexual offense as a federal crime is relatively rare, the reason for Congressional enactment of [Fed.R.Evid. 412](#) seems more an attempt to influence state legislatures and courts than to govern the admissibility of evidence in federal trials. As a show of concern, [Fed.R.Evid. 412](#) is salutary. As an attempt to address the serious problem raised by the concept of a rape shield statute, [Fed.R.Evid. 412](#) is less successful than is expected of a Federal Rule of Evidence. The fact that [Fed.R.Evid. 412](#) was drafted by Congress without the assistance of a proposal originating with an Advisory Committee probably has a lot to do with the deficiencies exhibited.

[Fed.R.Evid. 412\(b\)\(2\)](#). 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. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

The balancing test of [Fed.R.Evid. 412\(b\)\(2\)](#) 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 to 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 [Fed.R.Evid. 403](#). First, it reverses the usual procedure spelled out in [Fed.R.Evid. 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) raises the threshold for admission by requiring that the probative value of the evidence substantially outweigh the specified dangers. Finally, the [Fed.R.Evid. 412](#) test puts “harm to the victim” on the scale in addition to prejudice to the parties.

[Fed.R.Evid. 412\(c\)](#). The subdivision dealing with the procedure for determining admissibility provides both for a motion at least 14 days before trial as well as for a late motion for good cause shown. In deciding whether to permit late filing, the court may take into account 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 [Fed.R.Evid. 412](#) will not become apparent until trial.

[Fed.R.Evid. 412\(c\)](#) provides that before admitting evidence that falls within the prohibition of [Fed.R.Evid. 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 continue to be governed by [Fed.R.Civ.P. 26](#). The Advisory Committee's Note opines that in order not to undermine the rationale of [Fed.R.Evid. 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 also 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. A confidentiality order should be presumptively granted as well.

Unfair prejudice. [Fed.R.Evid. 412\(b\)\(1\)](#) provides that in criminal cases evidence meeting the requirements of an exception to the bar to admissibility contained in subdivisions (A), (B), and (C), is admissible only “if otherwise admissible under these rules.” The Advisory Committee's Note specifically mentions as applicable [Fed.R.Evid. 403](#). In civil cases the exception to the bar to admissibility contained in subdivision (b)(2) provides for a balancing test, i.e., the probative value of the evidence must substantially outweigh the “danger of harm to the victim” and “of unfair prejudice to any party.” Neither phrase is defined in either [Fed.R.Evid. 412](#) or the Advisory Committee's Note. The term “harm to the victim” is undoubtedly intended to protect the witness from harassment and undue embarrassment, [Fed.R.Evid. 611\(a\)\(3\)](#), as well as foster the interests of society in encouraging victims to actively redress claims. How this interest in protecting alleged victims and thereby encouraging the prosecution of meritorious civil claims is to be integrated into any equation evaluating probative value versus unfair prejudice is extremely unclear.

As used in [Fed.R.Evid. 403](#), unfair prejudice refers to an undue tendency of an item of evidence to suggest a decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt, retribution or horror. With respect to evidence of the alleged victim's other sexual behavior, it is on the basis of an adverse emotional reaction to the other sexual behavior of the alleged victim. The emotional reaction may take various forms such as, “this kind of woman doesn't deserve to be protected” or “why should we send a man to jail for having intercourse with a woman who voluntarily sleeps with every Tom, Dick and Harry.” Evidence of other sexual behavior may in addition raise the dangers of confusion of the issue—creating a side issue unduly distracting the jury from the main issue, and misleading the jury—the possibility of the jury overvaluing the probative value of the past sexual conduct evidence for a reason other than an emotional one. The danger of misleading the jury is substantial.

Mode of Dress; Statements of Sexual Nature or Intention

Mode of dress. Pursuant to [Fed.R.Evid. 412\(a\)\(2\)](#) in a criminal case evidence offered to prove any alleged victim's sexual predisposition is inadmissible. Predisposition means bent, inclination, predilection, proclivity, mindset, etc., to commit a particular disputed act with a particular mental state central in the litigation. Mode in the context of dress refers to fashion or style, manner, method or way of doing or acting. Mode of dress may refer to either the way a person generally dresses or may refer to how that particular person was dressed at the time of conduct relevant in the litigation.

With respect to the initial meaning of mode of dress, the Advisory Committee's Note to the 1994 Amendment to [Fed.R.Evid. 412](#) indicates that subject to [Fed.R.Evid. 412\(b\)\(2\)](#), which relates solely to a civil case, overall mode of dress is precluded predisposition evidence:

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 [Fed.R.Evid. 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.

On the other hand, mode of dress in the sense of the alleged victim's clothing worn at the moment in question is admissible at constituting an instance of sexual behavior by the alleged victim with the person accused of the sexual conduct offered to prove consent, [Fed.R.Evid. 412\(b\)\(1\)\(B\)](#). Thus, the fact that a woman sitting on a bar stool was wearing an extremely short skirt, etc., is rightly admitted in a sexual battery prosecution when the accused asserts after picking up the woman at the bar, they engaged in consensual sex.

Following the admission of such evidence in a sexual battery prosecution in Florida which resulted in the acquittal of the accused, under substantial public pressure the Florida legislature amended the Florida Rape Shield Statute, 794.022, to provide in subdivision (3) that “Notwithstanding any other provision of law, evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense *incited* the sexual battery shall not be admitted,” a proviso that does not attempt to bar admissibility of evidence that might be constitutionally required to be admissible in any event on the issue of consent but solely to preclude a particular different argument, i.e., incitement, an argument that appears otherwise irrelevant and improper.

Statements of sexual nature or intention. The Advisory Committee's Note to the 1994 Amendment to [Fed.R.Evid. 412](#) speaks on three separate occasions as to the admissibility of statements of a sexual nature or intention. In discussing the scope of [Fed.R.Evid. 412\(a\)\(1\)](#) barring evidence offered to prove that the alleged victim engaged in other sexual behavior, the Advisory Committee's Note asserts,

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 [Fed.R.Evid. 412](#) is broad enough to encompass the behavior of the mind.”).

In addition, with respect to the exception in subdivision (b)(1)(B) relating to evidence of specific instances of sexual behavior with respect to the person accused of sexual misconduct,

[A]dmissible 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 voice sexual fantasies involving the specific accused.

Finally, with respect to constitutional required exception of subdivision (b)(1)(C), the Advisory Committee's Note opines that,

[f]or 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.

In short, “fantasies”, “dreams”, and statements of sexual desire and/or intent to act of a general nature are inadmissible pursuant to [Fed.R.Evid. 412](#), while “fantasies”, “dreams” and statements of sexual desire and/or intent to act with the accused or with the “first person encountered on a particular occasion” as reasonably construed, are admissible pursuant to [Fed.R.Evid. 412](#).

Hypothetical—Suggested Answer

The trial judge should decide that pursuant to [Fed.R.Evid. 412](#) the defendant may not inquire as to any of the first four items on cross-examination nor offer extrinsic evidence establishing any of the first four items. [Fed.R.Evid. 412\(a\)\(1\)](#) bars introduction in any civil or criminal proceeding involving alleged sexual misconduct, subject to stated exceptions that are not applicable, evidence offered to prove any alleged victim engaged in other sexual behavior. Items (1), (2) and (3), i.e., consensual sex on Friday, birth control pills, and abortion, are thus inadmissible. [Fed.R.Evid. 412\(a\)\(2\)](#) bars introduction in any civil or criminal proceeding involving alleged sexual misconduct, subject to stated exceptions that are not applicable, evidence offered to prove any alleged victim's sexual predisposition. Item (4), i.e., reputation, is thus inadmissible. As to item (5), the prostitution arrest, admissibility would occur only if constitutionally required, [Fed.R.Evid. 412\(b\)\(1\)\(C\)](#), and clearly prostitution in the case at hand is remote and completely unrelated to a standard consent defense, there being no assertion that compensation was involved in any manner. Item (6), sexual harassment suit, is inadmissible as constituting an assertion of a prior false complaint of sexual battery as the evidence indicates solely that the complaint was not proven and not that it was false. Item (7), comprising the alleged victim's assessment of Friday's sexual encounter, is of a general nature not involving the accused and is thus precluded evidence of sexual disposition. Item (8), someone's going to get “very lucky” tonight, is a statement close enough to the Advisory Committee Note's example of a declaration of being a cougar on the prowl intending to have sex with the first person encountered to be constitutionally required to be admitted, [Fed.R.Evid. 412\(b\)\(1\)\(C\)](#). Next, the wearing of an extremely revealing and sexy outfit, i.e., mode of dress, item (9), is admissible evidence of a specific instance of conduct between the alleged victim with respect to the person accused of sexual misconduct offered by the accused to prove consent, [Fed.R.Evid. 412\(b\)\(1\)\(B\)](#).

With respect to evidence of vaginal bruising, item (10), [Fed.R.Evid. 412\(b\)\(1\)\(A\)](#) provides an exception permitting admissibility in a criminal case of evidence of specific instances of sexual behavior of the alleged victim's offered to prove that a person other than the accused was the source of the alleged victim's injury. Thus, if the criminal defendant had been able to locate her sex partner on Friday who was prepared to testify that their consensual sex was rough enough to have caused the bruises later observed, cross-examination and extrinsic evidence of the rough consensual sex on Friday would have been admissible. However, the alleged victim's sex partner on Friday is unidentified and thus not available as a witness. The evidence the defendant is actually capable of introducing is not evidence of a specific instance of conduct that could account for the vaginal bruises but rather evidence of previous rough sex that could not have caused the vaginal bruises observed offered to show sexual predisposition of the alleged victim for the inference that she acted in conformity therewith on Friday night resulting in the vaginal bruises. Such evidence fall outside the [Fed.R.Evid. 412\(b\)\(1\)\(A\)](#) exception and is thus inadmissible; inquiry on cross-examination and extrinsic evidence are both precluded.

State Law Variations

Age inappropriate sexual knowledge. [White v. State, 367 Ark. 595, 242 S.W.3d 240, 246–47 \(2006\)](#) (“In cases involving the rape of a minor, we have uniformly and consistently excluded evidence of the minor's prior sexual activity because the only two issues to be determined are the fact of the occurrence of the prohibited activity and the age of the minor. *Townsend*, supra; [Standridge v. State, 357 Ark. 105, 161 S.W.3d 815 \(2004\)](#) (holding that the four-year-old victim's testimony falls squarely within the ambit of § 16-42-101(b), which excludes evidence of a victim's prior allegations of sexual conduct with any other person, which allegations the victim asserts to be true). In *Townsend*, we adopted the following five factors for which a defendant must offer proof to admit evidence of a child's prior sexual conduct for the limited purpose of proving an alternative source of sexual knowledge: (1) that the prior act clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect. *Id.*”); [State v. Marks, 2011 UT App 262, 262 P.3d 13, 27 \(Utah Ct. App. 2011\)](#), cert. denied, [272 P.3d 168 \(Utah 2012\)](#) (“From these decisions, we conclude that Utah, like most other jurisdictions, recognizes the relevance of the complainant's past sexual conduct to rebut the sexual innocence inference in appropriate cases. See [State v. Molen, 148 Idaho 950, 231 P.3d 1047, 1051–52 \(Ct. App. 2010\)](#) (collecting cases and stating that ‘the vast majority of courts have held that evidence of a child victim's prior exposure to sexual conduct may be relevant to show an alternative basis for the child's sexual knowledge’); [Grant, 75 F.Supp.2d at 214–15](#) (collecting cases). However, as

with the introduction of sexual activity evidence generally, its admission for purposes of rebutting a sexual innocence inference is highly dependent upon the facts and circumstances of the particular case.”); [Com. v. Beaudry](#), 63 Mass. App. Ct. 488, 826 N.E.2d 782, 788–89 (2005), judgment rev'd on other grounds, 445 Mass. 577, 839 N.E.2d 298 (2005) (“In Massachusetts, as in most jurisdictions, evidence of a victim's age-inappropriate sexual knowledge may be admitted for the purpose of supporting an inference of sexual abuse. As we stated in [Com. v. Darby](#), 37 Mass. App. Ct. 650, 654, 642 N.E.2d 303 (1994), ‘[w]e agree that evidence demonstrating a child's inappropriate sexual knowledge may be relevant in a sexual abuse case.’ Where such evidence is introduced, a defendant is entitled (provided an appropriate foundation for inquiry has been established, see [Com. v. Savage](#), 51 Mass. App. Ct. 500, 504, 746 N.E.2d 1029 (2001) to demonstrate the existence of alternative sources of such knowledge, including especially prior instances of abuse. See [Com. v. Ruffen](#), 399 Mass. 811, 815, 507 N.E.2d 684, 83 A.L.R.4th 675 (1987); [Com. v. Scheffer](#), 43 Mass. App. Ct. 398, 399, 683 N.E.2d 1043 (1997).”).

DNA. [State v. Smith](#), 280 Conn. 285, 907 A.2d 73, 81–82 (2006) (“The court did, in fact, base its determinations, namely, that the report be admitted in redacted form only and that the accompanying expert testimony should be similarly limited, on the considerations underlying § 54-86f; that is, that only evidence relevant to the case, rather than evidence designed merely to cast the character of T as generally unchaste, be admitted. Prior to hearing Adamowicz' testimony, the trial court posed this question to defense counsel: ‘Why would such evidence ... be relevant to the case? ... [W]hy would it be relevant to the issue of whether your client engaged in the conduct that is charged against him in the information?’ The court thus made clear that the factor that would guide it in determining whether to allow the testimony was whether the testimony was relevant. Furthermore, in limiting the scope of the expert testimony, the trial court articulated its concern ‘to avoid ... anything that would raise in the jury's mind the question as to whether the alleged victim in this case has engaged in any sexual conduct with anyone other than the people-the defendant in this case.’ By making clear that it would not permit any exploration into the irrelevant and impermissible issue of whether T had engaged in sexual encounters prior to the assault, the court signaled that its concern was to allow only evidence that it considered relevant to the case. During the proceeding, the court also repeatedly clarified that its ruling limiting the scope of expert testimony and redacting the DNA report was based on its concern that nothing be admitted into evidence in violation of § 54-86f. Thus, despite the court's characterization of the hearing as one designed to preserve the defendant's record on appeal, it served precisely the purpose intended by a hearing conducted pursuant to § 54-86f.”).

Door opening; refutation. [State v. Ritrovato](#), 280 Conn. 36, 905 A.2d 1079, 1091–92 (2006) (“In the present case, the trial court did not dispute that T testified about her prior sexual conduct during direct examination. T's description of her two conversations with the defendant, in which she told him that she was a virgin, her testimony that the defendant took her virginity and her testimony regarding the notation on her calendar, clearly meet the threshold requirement for the admission of impeachment evidence under § 54-86f(2). The trial court nonetheless ruled to exclude the evidence on the ground that it lacked credibility and relevance and because it was highly prejudicial to T. We conclude that the trial court's ruling cannot be upheld on either ground. ... Turning next to the potentially prejudicial effect of the impeachment evidence, ‘[t]he test for determining whether evidence is unduly prejudicial is not whether it is damaging ... but whether it will improperly arouse the emotions of the jury.’ (Internal quotation marks omitted.) [State v. Dehaney](#), 261 Conn. 336, 358, 803 A.2d 267 (2002). In this case, the proposed testimony consisted of T's statements to B that she was not a virgin and that she had had sex with six previous boyfriends in New Mexico, and T's statement to Janine Ritrovato that she had come to Connecticut, in part, because she had been sleeping with her best friend's boyfriend behind her back. Considered in isolation, these statements might be regarded as unduly prejudicial. Viewed in context, however, we conclude that their probative value on the issue of T's credibility outweighed their prejudicial effect.”); [Docekal v. State](#), 929 So. 2d 1139, 1143 (Fla. 5th DCA 2006) (“On direct examination, the victim justified her decision to allow Docekal to sleep in her bed with an explanation that was tenuous in light of her conduct on the previous night. The misleading impression left by the State's direct examination was that she did not believe that a married man would initiate a sexual encounter with her. See [Romero](#), 901 So.2d at 267. Docekal's proposed cross-examination would have modified the State's direct examination by removing this misleading impression. See id. ... The victim's credibility was critically important in this ‘classic swearing match,’ and the trial court's failure to permit Docekal's cross-examination cannot be considered harmless beyond a reasonable doubt. [State v. DiGuilio](#), 491 So. 2d 1129 (Fla. 1986); [Davis v. State](#), 527 So. 2d 962, 963 (Fla. 5th DCA 1988).

Hearing; conduct of. [LaPointe v. State](#), 225 S.W.3d 513, 519–20 (Tex. Crim. App. 2007):

What we do find persuasive, however, is this Court's interpretation of the precursor statute, § 21.13. In *Allen v. State*, we upheld the constitutionality of this provision against a Confrontation Clause challenge. In doing so, we discussed a North Carolina decision, *State v. Fortney*, which upheld its own rape-shield provision. We quoted extensively from the *Fortney* opinion's language, which included a statement that past sexual history could be litigated at “an in camera hearing where opposing counsel may present evidence, cross-examine witnesses, and generally attempt to discern the relevance of proffered testimony in the crucible of an adversarial proceeding away from the jury.” We commented that, while the North Carolina statute “is not totally like § 21.13, it is similar in many respects and the language in *Fortney* is here instructive.” After discussing *Fortney*, we further stressed the importance of balancing the victim's privacy interests with the confrontation right of the defendant by having the trial court hold a hearing that gives the defendant the opportunity to demonstrate the admissibility of the evidence:

The constitutional right to confront adverse witnesses is fundamental and is of such importance that a State's interest in protecting a certain class of witnesses from embarrassment must fall before the right of confrontation and cross-examination. Thus a statute that purports to prohibit completely the introduction of the victim's consensual sexual activity with persons other than the defendant is unconstitutional unless given a judicial gloss requiring a hearing out of the jury's presence so that the defendant, upon motion, may be given an opportunity to demonstrate that due process requires the admission of such evidence because probative value in the context of that particular case outweighs its prejudicial effect on the prosecutrix.

In making these comments, we cited the New Hampshire case of *State v. Howard*. A review of *Howard* reveals that our comments were a close paraphrase of the language in that case. The *Howard* opinion went on to more fully describe the procedure to be followed. The Supreme Court of New Hampshire explained that the victim's right to privacy was protected “at least to the extent that hearings held on the admissibility of the victim's prior sexual activity may, upon request of the victim and in the exercise of sound discretion by the trial justice, be closed to those not party to the proceeding. Such pretrial procedures enable the court to balance and safeguard the rights of all the parties as applied to the facts of a particular case and avoid unnecessary prejudice to either the victim or the accused.” From the comments in *Allen*, and its reliance on *Fortney* and *Howard*, we conclude that the *Allen* decision construed § 21.13 narrowly to avoid a constitutional violation and that, under this narrowing construction, the trial court was empowered to exclude spectators, but not the parties, from the in camera admissibility hearing.

Because [Fed.R.Evid. 412](#) essentially lifted the pertinent language from § 21.13, *Allen*'s interpretation of the statute logically applies to the rule as well. Moreover, *Allen* was decided just two weeks before the adoption of the Texas Rules of Criminal Evidence, of which [Fed.R.Evid. 412](#) was a part, and the Court even mentioned the proposed rules elsewhere in the opinion. Given those circumstances, we believe this result was likely the Court's intent in patterning [Fed.R.Evid. 412\(c\)](#) on the statutory language.

The State also argues that the policy interest behind [Fed.R.Evid. 412](#) of protecting the victim's privacy requires interpreting the rule to allow the trial court to exclude the defendant and his attorney from the hearing. But, as we recognized in *Allen*, the victim's privacy interest must be balanced against the defendant's right to confrontation. [Fed.R.Evid. 412](#) balances those interests by closing the hearing to spectators, so that

only a minimum number of people—the witness, the parties and their attorneys, the judge, and the court reporter—are privy to the information revealed.

We conclude that the in camera proceeding contemplated by [Fed.R.Evid. 412](#) is an adversarial hearing at which the parties are present and the attorneys are permitted to question witnesses. We overrule the State's third and fourth grounds for review. Given our disposition of those grounds, we need not reach the State's first two grounds relating to the preservation of constitutional error, and those are dismissed.

HIV status. [Fells v. State](#), 362 Ark. 77, 207 S.W.3d 498, 502 (2005) (“The issue of whether a victim's HIV status falls under the purview of the rape-shield statute is one of first impression. We hold that the HIV status of a rape victim is protected under Arkansas's rape-shield statute. The statute prohibits the use of past sexual behavior to embarrass and degrade victims; its purpose is to shield rape victims from public humiliation. [Short v. State](#), 349 Ark. 492, 79 S.W.3d 313 (2002). While it is possible to contract HIV through blood transfusions or other means, the public generally views it as a sexually-transmitted disease. In the minds of the jurors, evidence that S.H. was HIV-positive would be tantamount to evidence of her prior sexual behavior.”).

Impeaching with false prior denial of unrelated sexual activity not permitted. [State v. Mars](#), 116 Haw. 125, 170 P.3d 861, 873–74 (Ct. App. 2007):

Although our supreme court has not yet directly addressed this specific situation, courts in other jurisdictions have done so. In [Jones v. Goodwin](#), 982 F.2d 464 (11th Cir.1993), defendant Russell Lee Jones claimed that the trial court denied his constitutional right of confrontation by excluding evidence that (1) the rape victim had lied to her treating doctor by stating that she had been a virgin prior to the assault, and (2) the treating doctor had determined that the victim's hymen was not intact prior to the rape. *Id.* at 469–70. Jones argued that he should have been allowed to impeach the victim's credibility by introducing both pieces of evidence. *Id.* The Eleventh Circuit ruled that “[b]ecause the jury received no evidence as to Keys' pre-rape virginity, Jones' desire to impeach Keys' out of court virginity statement is of no constitutional moment; Jones merely sought to establish that Keys previously had told an out of court lie. The trial court correctly excluded Jones' proffered evidence because it would have impeached nothing.” *Id.*

Similarly, in [United States v. White Buffalo](#), 84 F.3d 1052 (8th Cir.1996), defendant Ernest White Buffalo contended that the district court violated his constitutional right to impeach the alleged rape victim's credibility. *Id.* at 1054. White Buffalo contended that the victim lied to her treating doctor by saying that she did not have sexual intercourse within the seventy-two hours prior to the rape, when the laboratory results of a test for semen suggested otherwise. *Id.* White Buffalo proposed to offer the victim's denial of earlier sexual intercourse and then introduce the test results to impeach her credibility. *Id.* at 1053. The district court ruled the evidence inadmissible under [Federal Rules of Evidence \(FRE\) Rule 412](#). *Id.* at 1054. The Eighth Circuit held that “[b]ecause the victim's statement about unrelated consensual sexual intercourse was of little or no probative value on the question of whether she falsely accused Ernest of rape, the exclusion of the test results did not deprive Ernest of a constitutional right.” *Id.*; see [Kemp v. State of Florida](#), 464 So.2d 1238, 1240 (Fla. Dist. Ct. App. 1985) (rape victim falsely told the examining physician that she was a virgin; court holds that evidence about that false statement was not “relevant and material to any issue ...”); [23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5387 at 576–77 \(1980\)](#) (“The difficulty with a blanket endorsement of specific contradiction in the context of sexual history is that this might permit the defense to circumvent [FRE Rule 412] by asking the victim about some irrelevant fact solely for the purpose of impeaching [sic] her with evidence of prior sexual behavior.”). But see [State v. LaClair](#), 121 N.H. 743, 433 A.2d 1326 (1981) (evidence that rape victim either lied to a law enforcement officer that she had been a virgin prior to the rape, or lied during a deposition while under oath

that she had not been a virgin, was admissible since her inconsistent statements under the circumstances cast some doubt on her credibility).

It was not an abuse of discretion for the trial court here to refuse to allow [Minor 1](#) to be impeached by evidence that he had falsely denied having prior sexual experiences when he was interviewed by Dr. Salle. Such evidence would have had limited probative value given the circumstances of the statement, i.e., a 15 year old being asked intimate questions by a stranger.

Motive to make a false complaint. [State v. Drewry, 2008 ME 76, 946 A.2d 981, 990 \(Me. 2008\)](#) (“Nevertheless, pursuant to the defendant's right to present a proper defense and to cross-examine witnesses, there are circumstances in which a victim's past sexual behavior may be admissible, including: “to expose a possible motive to lie,” “to rebut the presumption of a victim's sexual naivete,” “when the prosecution has ‘opened the door’ by offering evidence of the victim's chastity,” or “when a statement by the victim about past sexual conduct is relevant for impeachment.”” *Id.* ¶13, 803 A.2d at 457 (quotation marks omitted).”); [Com. v. Northrip, 2008 PA Super 35, 945 A.2d 198 \(2008\)](#) (“We find this evidence relevant to establish a potential motive by S.F. to fabricate her allegations against Appellant. Mary Northrip's testimony, if believed, created a timeline in which S.F. may have become gradually more concerned about the possibility that Appellant would inform S.F.'s overprotective mother of S.F.'s behavior with K.R. Although the Commonwealth argues that ‘there is no evidence to indicate that [S.F.] knew that Mary Northrip had communicated this information to Appellant,’ or ‘that Appellant communicated anything to [S.F.] about these actions,’ Commonwealth's Brief at 8, Mary's testimony clearly indicates that S.F. inquired as to whether Mary and Appellant would talk to S.F.'s mother. Moreover, when considering S.F.'s motive to fabricate, it is irrelevant whether Mary actually communicated with Appellant or whether Appellant actually knew of their behavior. Instead, the relevant consideration is whether S.F. feared that Appellant knew about her and K.R., and whether she felt compelled to fabricate allegations about Appellant as a reactive measure. The trial court did not offer any opinion as to Mary's credibility and made only a boilerplate finding that Appellant failed to prove S.F. ‘was fearful to a level sufficient to motivate her to fabricate accusations of repeated sexual abuse by her father.’ Trial Ct. Op. at 6.”); [People v. Owens, 183 P.3d 568, 574 \(Colo. App. 2007\)](#) (“Instead, we conclude that the evidence here falls within an exception listed in the statute. The evidence of the alleged victim's romantic-and, indeed, sexual-relationship with the friend was relevant to a material issue in the case, namely, the victim's motive to lie. See [Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S. Ct. 1431, 1436, 89 L. Ed. 2d 674, 20 Fed. R. Evid. Serv. 1 \(1986\)](#) (‘[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby “to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.”’ (quoting [Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111, 39 L. Ed. 2d 347 \(1974\)](#))).”); [People v. Golden, 140 P.3d 1, 6 \(Colo. App. 2005\)](#) (“Here, the statute would not have been violated had defendant been allowed to inquire into the victim's prior inconsistent statements acknowledging a committed romantic relationship. The victim would not have been subjected to a fishing expedition into her past sexual conduct. Rather, the inquiry would have called into question her credibility and her possible motive in telling her roommates that she had been sexually assaulted. Such an inquiry is proper under our state's rules of evidence. See [§ 16-10-201, C.R.S.2004; CRE 607, 613; People v. Card, 42 Colo. App. 259, 596 P.2d 402 \(App. 1979\)](#). And, if necessary, any allusion to the victim's sexual orientation could be redacted from any questions, answers, and prior statements without diminishing the purpose and effect of the challenge to the victim's credibility.”).

Pattern of conduct. [State v. Sheline, 955 S.W.2d 42, 46 \(Tenn. 1997\)](#):

As we consider these arguments, we first turn to the language of [Fed.R.Evid. 412\(c\)\(4\)](#), which requires a pattern of sexual behavior. Although there is no Tennessee case on the issue, it is clear that a “pattern” of sexual conduct requires more than one act of sexual conduct. Cohen, Paine and Sheppard, *Tennessee Law of Evidence*, § 412.4 at 236. The plain language of the rule speaks of “specific instances” of sexual conduct with “persons” other than the defendant. Moreover, other jurisdictions have consistently

observed that a “pattern” of sexual conduct denotes repetitive or multiple acts and not just an isolated occurrence. See [State v. Ginyard](#), 122 N.C.App. 25, 468 S.E.2d 525 (1996); [State v. Woodfork](#), 454 N.W.2d 332 (S.D.1990); [Kaplan v. State](#), 451 So.2d 1386, 1387 (Fla.App.1984); [State v. Patnaude](#), 140 Vt. 361, 438 A.2d 402 (1981); [State v. Jones](#), 62 Haw. 572, 617 P.2d 1214 (1980); [Parks v. State](#), 147 Ga.App. 617, 249 S.E.2d 672 (1978).

The rule also requires that the pattern consist of sexual behavior so distinctive and so closely resembling the defendant's version that it tends to prove that the victim consented to the act charged. The advisory comments to [Fed.R.Evid. 412](#) use the word “signature” cases to describe the distinctive behavior required. As the Illinois Supreme Court has said, the sexual conduct must be “so unusual, so outside the normal, that it had distinctive characteristics which make it the complainant's modus operandi.” [People v. Sandoval](#), 135 Ill.2d 159, 142 Ill.Dec. 135, 147–48, 552 N.E.2d 726, 738 (1990); see also [State v. Crims](#), 540 N.W.2d 860 (Minn.App.1995); [Jeffries v. Nix](#), 912 F.2d 982, 986 (8th Cir.1990). Moreover, to have probative value on the issue of consent, the pattern of distinctive sexual conduct must closely resemble the defendant's version of facts. [Cohen, et al.](#), *supra*, § 412.4 at 246–47.

Physical evidence. [Ex parte Dennis](#), 730 So.2d 138, 141 (Ala.1999) (“Dennis argues that the trial court violated his right to due process by excluding evidence that he says indicates a third person's sexual activity with the victim caused the physical condition presented by the prosecution as evidence of rape. Although this Court has not addressed such an argument before, we note that other jurisdictions have held that admission of evidence offered to show that a physical injury or condition of the victim could have been inflicted by someone other than the accused is constitutionally required in some cases. See [Williams v. State](#), 681 N.E.2d 195, 201 (Ind. 1997); see also [Tague](#), *supra* (concluding that because the prosecution introduced evidence showing that 11-year-old victim was not a virgin, with hope that the jury would infer that the defendant caused the hymenal condition, it was constitutional error for the court to apply the rape-shield law to preclude testimony that the victim's father had molested the victim several times before the charged crimes); [U.S. v. Bear Stops](#), 997 F.2d 451, 38 Fed. R. Evid. Serv. 352 (8th Cir. 1993) (admission of evidence regarding facts of sexual assault by third persons was constitutionally required, to show alternative explanation for physical and mental abuse); [Neeley v. Com.](#), 17 Va. App. 349, 437 S.E.2d 721 (1993) (rape defendant's constitutional rights of compulsory process, confrontation, and due process entitled him to introduce evidence of victim's prior sexual behavior to explain presence of hair fragment found in cervix, even though such evidence fell outside an exception to Virginia's rape-shield statute; evidence tended to rebut assertion that the defendant was the source of the hair fragment, which was the only significant physical evidence of guilt); [U.S. v. Begay](#), 937 F.2d 515, 33 Fed. R. Evid. Serv. 895 (10th Cir. 1991) (where prosecution specifically relied on victim's enlarged hymen as evidence of molestation, Confrontation Clause mandated admission of evidence of another source of that condition); [State v. Pulizzano](#), 155 Wis. 2d 633, 456 N.W.2d 325 (1990) (constitutional guarantees of confrontation and compulsory process required that the defendant be able to cross-examine seven-year-old victim about prior sexual assault in order to rebut prosecution's suggestion that the victim could have possessed explicit sexual knowledge only if defendant had committed the charged sexual assault); [State v. Douglas](#), 797 S.W.2d 532 (Mo. Ct. App. W.D. 1990) (reversing first-degree-sexual-assault conviction because the defendant was not allowed to offer evidence that the victim had engaged in intercourse with another person, following expert testimony that a medical examination of the victim disclosed an absence of hymenal tissue).

Prior abuse relevant to CSAAS expert testimony. [State v. Schnabel](#), 196 N.J. 116, 952 A.2d 452, 461 (2008) (“It was not disputed that when the allegations of sexual abuse first arose, Cindy only revealed that she was abused by defendant and made no reference to the abuse by her brother. It was not until after several interviews with Sergeant Spiers that first Jane and then Cindy revealed that they had been sexually abused by another person, and the statements of the sisters concerning the abuse by their brother differed in some respects from the testimony John gave to the Grand Jury. Thus, there were credibility issues among the stories advanced by the three children. Just as important, the CSAAS testimony of Dr. D'Urso provided a ‘ring of

truth’ to the testimony of the sisters. Without knowing that the victims had previously been abused by their brother, the jury was asked to evaluate the CSAAS testimony of Dr. D’Urso on an incomplete record.”).

Prior accusations; admissible absent evidence of falsity. [Fehringer v. State](#), 976 So. 2d 1218, 1221–22 (Fla. 4th DCA 2008) (“We agree that defense counsel should be allowed to inquire about a prior accusation of sexual assault, even where the victim has not previously recanted that allegation. It may be that the prior accusations will cast doubt on the current one by, for example, being remarkably similar in content, or made against a person similar to the defendant. Absent a specific proffer and without any context in which to view the admissibility of testimony in this case, we can offer only general guidance. It appears, however, that the trial court’s refusal to permit cross-examination about the prior accusation could have resulted in an abuse of discretion. In any event, clear error has been shown by the trial court’s refusal to permit even a proffer of that testimony so as to permit meaningful review.”).

Prior false accusations; establishing falsity. [State v. Wears](#), 222 W. Va. 439, 665 S.E.2d 273, 280 (2008) (“This Court created a test in [Quinn](#) to determine whether such evidence fell outside of the scope of our rape shield law. Therein, we held that like many other jurisdictions which have faced this issue, we believe that “[r]equiring strong and substantial proof of the actual falsity of an alleged victim’s other statements is necessary to reasonably minimize the possibility that evidence which is within the scope of our rape shield law, [W. Va.Code, 61-8B-11 \(1986\)](#) and [West Virginia Rules of Evidence 404\(a\)\(3\)\(1994\)](#), is not erroneously considered outside of its scope.’ *Id.* at Syl. Pt. 2. ‘If the trial court finds that there is a strong probability that the alleged victim of a sexual offense has made other statements which are false about being the victim of sexual misconduct, evidence relating to those statements may be considered by the court outside of the scope of our rape shield law, [W. Va.Code 61-8B-11 \(1986\)](#) and [West Virginia Rules of Evidence 404\(a\)\(3\)\(1994\)](#).’ *Id.* at Syl. Pt. 4.”); [State v. Tarrats](#), 2005 UT 50, 122 P.3d 581, 586 (Utah 2005) (“Thus, in accord with other jurisdictions that have decided the matter, we hold that protection of the purposes of our rape shield law requires that the defendant make a threshold showing of the falsity of prior allegations by a preponderance of the evidence before he can use those allegations to impeach the accuser’s testimony at trial. Through this mechanism, we can better ensure that admissible evidence of false rape allegations is brought before a jury, and that inadmissible evidence of truthful prior allegations is not introduced to confuse or prejudice their truth-uncovering role.”); [State v. Guenther](#), 181 N.J. 129, 854 A.2d 308, 322–23 (2004) (“Those jurisdictions that permit evidence of prior false criminal accusations in sexual crime cases condition the admissibility of such evidence on a preliminary judicial finding. Some jurisdictions require that the prior accusation be shown to be ‘demonstrably false.’ See, e.g., [Little, supra](#), 413 N.E.2d at 643 ([State v. Sieler](#), 397 N.W.2d 89, 92 (S.D. 1986)); [Berry v. Com.](#), 84 S.W.3d 82, 91 (Ky. Ct. App. 2001). Others have articulated varying standards of proof for determining whether the witness made the accusation and whether it was false: clear and convincing evidence, [Gordon, supra](#), 770 A.2d at 704, 705 (N.H.); preponderance of the evidence, [Morgan v. State](#), 54 P.3d 332, 339 (Alaska Ct. App. 2002); or ‘a reasonable probability of falsity,’ [Smith, supra](#), 377 S.E.2d at 160(Ga.); [Barber, supra](#), 766 P.2d at 1290 (Kan.Ct.App.); [CLINEBELL, SUPRA](#), 368 S.E.2D at 266 (Va.). See also [Smith, supra](#), 743 So.2d at 203 (La.) (stating judge must determine ‘whether reasonable jurors could find, based on the evidence presented by defendant, that the victim had made prior false accusations’.”); [State v. Freeman](#), 970 So. 2d 621, 625–26 (La. Ct. App. 1st Cir. 2007), writ denied, 977 So. 2d 930 (La. 2008) (“In [Smith](#), the victim admitted that she made prior accusations of improper sexual behavior, and two witnesses corroborated that fact. At least one independent witness testified that the victim recanted those accusations. [Smith](#), 743 So.2d at 200–201, 203. As noted by the trial court, [Smith](#) is distinguishable from the instant case in that the defense herein offered no evidence that the victim ever retracted the prior allegation of abuse, and there was no independent witness to testify that the allegation was false. Instead, the defense argued that the mere fact that the trial on the prior allegations resulted in an acquittal indicated the victim’s allegations were false. We disagree. The fact that another individual accused of raping the victim was acquitted does not establish that the accusation against that individual was false. At best, this evidence proves only that the State failed to meet its burden of proving the offenses charged.”); [Garcia v. State](#), 228 S.W.3d 703, 706 (Tex. App. Houston 14th Dist. 2005), petition for discretionary review refused, (Dec. 14, 2005):

Ordinarily, specific instances of a witness’s misconduct may not be used to demonstrate a witness’s untrustworthy nature. *Id.* at 225; [TEX.R. EVID. 608\(b\)](#). However, the Confrontation Clause may occasionally require admissibility of evidence that the Rules of Evidence would exclude. [Lopez](#), 18 S.W.3d at 225. In determining whether evidence

must be admitted under the Confrontation Clause, the trial court must balance the probative value of the testimony against the risk its admission entails. *Id.* at 222. For evidence of extraneous allegations to be admissible to impeach the credibility of the complaining witness, and thus have a probative effect, there must be a showing that the accusations were false. *Lape v. State*, 893 S.W.2d 949, 956 (Tex.App.-Houston [14th Dist.] 1994, pet. ref'd); *Hughes v. State*, 850 S.W.2d 260, 262 (Tex.App.-Fort Worth 1993, pet. ref'd).

Here, appellant sought to demonstrate the falsity of the subsequent allegation through the testimony of Juan Castro, who denied he sexually assaulted his daughter, as well as by the fact that no charges were filed after a police investigation. Simple denial testimony is insufficient to establish falsity because it is inherently self-serving and unreliable. *Quinn v. Haynes*, 234 F.3d 837, 850 (4th Cir.2000); see also *Karnes v. State*, No. 05-92-02719-CR, 1994 WL 67725, at *1–2 (Tex.App.-Dallas March 4, 1994) (not designated for publication) (holding the trial court did not abuse its discretion in excluding evidence where the only evidence of false accusations was the denial by the persons accused and their assertions that they were not prosecuted). Additionally, the dismissal of charges against Castro does not prove that the allegations made by V.C. were false. See *Lopez*, 18 S.W.3d at 222 (finding where charges dropped, this could simply indicate a lack of evidence to prove the allegation at that time, or an administrative decision that, despite the allegation's validity, the parties would best be served by closing the case); see also *Hughes v. Raines*, 641 F.2d 790, 792 (9th Cir.1981) (holding defendant's denial and the non-prosecution of another for a rape alleged by the same complaining witness does not demonstrate falsity).

Thus, we hold that the trial court did not abuse its discretion because the proffered evidence does not establish falsity. Without proof that the allegation against Juan Castro was false, the evidence would have had no probative value in impeaching V.C.'s testimony and would have served only to unduly prejudice and confuse the jury. See *Lopez*, 18 S.W.3d at 226. Accordingly, we overrule appellant's first point of error.

Roadcap v. Com., 50 Va. App. 732, 653 S.E.2d 620, 624 (2007) (“A mere assertion of falsity (even by the alleged prior abuser) does not lay a satisfactory foundation. Such an assertion is ‘inherently self-serving and does not, by itself, establish falsity.’”); *Richardson v. Com.*, 42 Va. App. 236, 590 S.E.2d 618, 621 (2004). Unless the prior claims of sexual abuse are ‘patently untrue’ on their face, *Clinebell*, 235 Va. at 325, 368 S.E.2d at 266 (dismissing as ‘obviously false’ a claim by a prepubescent child that she was pregnant), the defendant must proffer evidence sufficient to persuade a trial court of a ‘reasonable probability that the victim's allegations were false,’ *Richardson*, 42 Va.App. at 242, 590 S.E.2d at 621.”); *People v. Bridgeland*, 19 A.D.3d 1122, 796 N.Y.S.2d 768, 770 (4th Dep't 2005) (“Questioning concerning prior false allegations of rape or sexual abuse is not always precluded (see CPL 60.42; *People v. Mandel*, 48 N.Y.2d 952, 953-954, 425 N.Y.S.2d 63, 401 N.E.2d 185 (1979); *People v. Harris*, 132 A.D.2d 940, 941, 518 N.Y.S.2d 269 (4th Dep't 1987), and the determination whether to allow such questioning ‘rests within the discretion of the trial court’ (*Harris*, 132 A.D.2d at 941, 518 N.Y.S.2d 269, 151 A.D.2d at 982, 542 N.Y.S.2d 71; see *People v. Sprague*, 200 A.D.2d 867, 868, 606 N.Y.S.2d 815 (3d Dep't 1994). The court precluded questioning concerning the statements to the mother and the psychologist based in part on the court's determination that defendant failed to establish that the prior allegation was in fact false. We conclude that the court thereby abused its discretion. Here, the complainant's conflicting statements established a good faith ‘basis for the allegation that the prior complaint was false’ (*People v. Gozdalski*, 239 A.D.2d 896, 897, 659 N.Y.S.2d 677 (4th Dep't 1997); see *Harris*, 151 A.D.2d at 982, 542 N.Y.S.2d 71), and defendant established that the allegation ‘may have been false’ (*People v. Badine*, 301 A.D.2d 178, 180, 752 N.Y.S.2d 679 (2d Dep't 2002); see generally *Mandel*, 48 N.Y.2d at 953, 425 N.Y.S.2d 63, 401 N.E.2d 185). Additionally, we conclude that defendant established that ‘the

particulars of the complaints, the circumstances or manner of the alleged assaults or the currency of the complaints were such as to suggest a pattern casting substantial doubt on the validity of the charges made by the [complainant]’ (*Mandel*, 48 N.Y.2d at 953, 425 N.Y.S.2d 63, 401 N.E.2d 185). Indeed, it appears that the motive of the complainant for making the instant allegations attributed to the complainant by the investigating officer in his initial report is strikingly similar to the complainant’s motive in making the prior allegation.”); *Morrison v. State*, 824 N.E.2d 734, 739–40 (Ind. Ct. App. 2005) (“The admission of evidence relating to a victim’s past sexual conduct is governed by *Indiana Evidence Rule 412*. *Rule 412* provides that, with very few exceptions, in a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted into evidence. *Evid. R. 412*. Certain evidence of a victim’s past sexual conduct may be admitted, provided that it falls within one of the following exceptions: (1) evidence of the victim’s or of a witness’s past sexual conduct with the defendant; (2) evidence that shows that some person other than the defendant committed the act upon which the prosecution is founded; (3) evidence that the victim’s pregnancy at the time of trial was not caused by the defendant; or (4) evidence of conviction for a crime to impeach under *Rule 609*. *Id.* In addition to these enumerated exceptions, a common-law exception has survived the 1994 adoption of the *Indiana Rules of Evidence*. See *Sallee*, 785 N.E.2d at 650. This exception provides that evidence of a prior accusation of rape is admissible if: (1) the victim has admitted that his or her prior accusation of rape is false; or (2) the victim’s prior accusation is demonstrably false. *Id.* Prior accusations are demonstrably false where the victim has admitted the falsity of the charges or they have been disproved. *Fugett v. State*, 812 N.E.2d 846, 849 (Ind. Ct. App. 2004); see also *Perry v. State*, 622 N.E.2d 975, 980 (Ind. Ct. App. 1993).”).

Prior false accusations; no constitutional right to cross-examine. *Pantoja v. State*, 990 So. 2d 626, 631–32 (Fla. 1st DCA 2008), decision approved, 59 So. 3d 1092 (Fla. 2011), cert. denied, 132 S. Ct. 496, 181 L. Ed. 2d 389 (2011) (“Several federal courts of appeals have concluded that there is no constitutional error in prohibiting cross-examination of a witness regarding an alleged false accusation against someone other than the defendant. See, e.g., *Boggs v. Collins*, 226 F.3d 728, 739, 2000 FED App. 0327P (6th Cir. 2000) (concluding that a defendant who was convicted of rape was not constitutionally entitled to cross-examine the victim regarding an alleged prior false accusation of rape against another person, as his sole basis for such cross-examination was to show that if she lied once, she would do it again); *Hogan v. Hanks*, 97 F.3d 189, 192 (7th Cir. 1996) (upholding a state court’s decision to disallow questioning of a rape victim regarding two alleged prior false accusations where state law required evidence that the prior reports were ‘demonstrably false’ before permitting such questioning); see also *State v. Raines*, 118 S.W.3d 205, 213 (Mo. Ct. App. W.D. 2003) (noting that the majority of the federal appellate courts that have addressed the issue have found no violation of the Confrontation Clause where a trial court has prevented cross-examination for the sole purpose of showing that a witness has a ‘tendency to lie, based on a pattern of past lies’). Applying *Davis*, the Seventh Circuit held that impeachment with evidence of a prior false report constitutes a general credibility attack for which there is no constitutional entitlement. *Boggs*, 226 F.3d at 739. The following language from *Boggs* is instructive:

No matter how central an accuser’s credibility is to a case—indeed, her credibility will almost always be the cornerstone of a rape or sexual assault case ... -the Constitution does not require that a defendant be given the opportunity to wage a general attack on credibility by pointing to individual instances of past conduct ... Under *Davis* and its progeny, the Sixth Amendment only compels cross-examination if that examination aims to reveal the motive, bias or prejudice of a witness/accuser.

Id. at 740. The Sixth Circuit, in *Hogan*, noted that the Supreme Court had never held ‘or even suggested’ that a prohibition against using specific acts of misconduct to impeach a witness posed constitutional problems. 97 F.3d at 191.”).

Prostitution. *State v. Gregory*, 158 Wash. 2d 759, 147 P.3d 1201, 1218–19 (2006), as corrected, (Dec. 22, 2006) (“Even if we assume for the sake of argument that *Gregory* is correct on this point, the defense’s offer of proof established only remote prostitution activities. The trial court concluded that R.S.’s prior acts of prostitution were too remote to be relevant, a determination that was, as discussed above, well within the discretion of the trial court. If R.S.’s prior prostitution activities were too remote to be relevant to the issue of consent, then certainly they were too remote to be relevant to whether she lied to get revenge for lack of payment. ... *Gregory* also cites to cases from other states to support his argument. In one case, the court speculated that evidence of prostitution would have supported the defendant’s argument that the rape story was fabricated in

retaliation for failure to pay for sex. Yet this statement was dicta, and the prostitution was not remote. *Com. v. Davis*, 438 Pa. Super. 425, 652 A.2d 885, 889 (1995). In other cases, the evidence in question would have been relevant, where here it was not. See *Com. v. Joyce*, 382 Mass. 222, 415 N.E.2d 181, 183–84 (1981) (police interrupted the encounter between the victim and the defendant and she had recently been charged for prostitution under similar circumstances); see also *Lewis v. State*, 591 So. 2d 922, 923 (Fla. 1991); *State v. Jalo*, 27 Or. App. 845, 557 P.2d 1359, 1360 (1976) (sexual history of young victims was relevant because making a false accusation would have kept the youth from getting in trouble for consensual sexual activity). In another case, the prior exchange of sex for drugs was relevant because it had occurred only one week before the incident in question. See *Johnson v. State*, 332 Md. 456, 632 A.2d 152, 153–54 (1993). None of these cases stands for the proposition that remote prostitution convictions should be admitted to show motive for the victim to fabricate a rape accusation. We conclude that R.S.'s remote acts of prostitution are not relevant to show a motive to lie, and we reiterate that a defendant has no constitutional right to present irrelevant evidence. In sum, the trial court's evidentiary rulings pursuant to the rape shield statute were proper.”); *Carlyle v. State*, 945 So. 2d 540, 545–46 (Fla. 2d DCA 2006) (“Here, the victim's admission that she had previously engaged in prostitution does not support the defense that she had engaged in consensual sex with Carlyle for several reasons. For example, there was no evidence that the victim's prior prostitution involved sex for drugs or involved someone she met for the first time at a party, as opposed to her claim of prior escort employment. Moreover, there was no claim that the victim initially came into contact with Carlyle and Cook while she was engaged as a prostitute or an escort. The prior evidence as noted by the trial court ‘was more working out of an escort service.’ The defense argued ‘prostitution is prostitution’ and this is enough to establish the pattern necessary for admissibility. The difficulty with this argument is that it is too generic and at best, as noted by the trial court, does not ‘prove or disprove consent in this issue.’ In other words, there were no details developed concerning the prior prostitution acts that distinctively resembled the victim's conduct, under Carlyle's version, that would lead to the conclusion that consent occurred.”); *State v. DeJesus*, 270 Conn. 826, 856 A.2d 345, 354–55 (2004):

In the present case, as in *Demers*, the excluded evidence of the victim's prior prostitution deprived the jury of the necessary contextual framework to evaluate properly the defendant's version of events. Without such evidence, the jury was left to speculate as to why the defendant provided, and the victim accepted, the money that both agreed had been exchanged. Because the jury could have inferred, from the evidence presented, that the victim needed money from the fact that she had gone to the defendant's residence looking for work, it reasonably could have concluded that she accepted the money when it was offered because she needed money. Had the jury been allowed to consider the excluded evidence, however, it reasonably could have concluded, contrary to this explanation for why she accepted the money, that the victim accepted the money because she had performed an act of prostitution for which she expected payment. The evidence, therefore, was relevant to establish the victim's consent to the sexual intercourse, rather than her general unchaste character as prohibited by the rape shield statute. See H. Galvin, “*Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*,” 70 *Minn. L.Rev.* 763, 807 (1986).

Also, without evidence of the victim's prior history of prostitution, the jury heard no evidence to explain why she would have had a reason to fabricate a sexual assault allegation against the defendant. “[A]ny limitation on the impeachment of a key government witness is subject to the most rigorous appellate review.” *State v. Colton*, *supra*, 227 Conn. at 250, 630 A.2d 577. If the jury had been allowed to consider the excluded evidence, it reasonably could have found, contrary to the implication that she simply needed money, that the victim demanded a fee for her services as she had done in the past. Further, it could have found that, when the defendant paid only part of the fee, the victim insisted that he pay the balance, and that, when he refused to do so and indicated that he would not do so in the future, she decided to fabricate a charge of sexual assault. In this context, the jury could have inferred that when the victim stated, “I warned you,” as she was leaving the apartment, she was warning the defendant about the consequences of failing to pay the additional \$20, as opposed to his interpretation that she was warning him about the herpes.

Evidence suggesting a motive for a false allegation was relevant to the jury's assessment of the victim's credibility. Indeed, the prosecutor admitted as much in closing argument when he encouraged the jurors to ask themselves what motive the defendant and the victim would have to give false information. The

prosecutor then went on to ask the jury, “What reason is there for [the victim] to give false information about what happened that morning?” The excluded evidence could have provided a reasonable answer to that question, but without it, the jury was left without any basis to impute to the victim a motive to testify falsely.

Having established that the excluded evidence was sufficiently relevant to the issue of consent, because it implicated both the victim's consent to the sexual intercourse and her motive to testify falsely, that its exclusion could have violated the defendant's constitutional rights, we next must determine whether the evidence was so material to that issue that its exclusion did violate his constitutional rights. Subdivision (4) of § 54-86f requires that, to be admissible, evidence must be “so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights.” We conclude that evidence of the victim's prior history of prostitution and the defendant's knowledge of that history was sufficiently material to the issue of consent that its exclusion violated the defendant's constitutional rights. As a result, the evidence was admissible under § 54-86f (4). The trial court's evidentiary ruling was both improper and of constitutional magnitude, and *that ruling* requires reversal.