TWENTY-SIXTH ANNUAL DEAN JEROME PRINCE MEMORIAL EVIDENCE COMPETITION

No. 10-134

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

- against -

ARMAND LAMONDE,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

RECORD ON APPEAL

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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF BOERUMX	
UNITED STATES OF AMERICA,	INDICTMENT
-against-	Cr. No. 10-76
ARMAND LAMONDE	
X	

The Grand Jury charges as follows:

RELEVANT PERSONS AND ENTITIES

- 1. The Defendant, **ARMAND LAMONDE** ("**LAMONDE**"), born Timothy Hardin on September 6, 1974, is a fashion designer and photographer residing in Boerum City, Boerum.
- 2. Boerum Fashion Week ("Fashion Week") is a prominent fashion-industry event held semiannually in Boerum City, Boerum, in Cadman National Park.
- 3. Located in Boerum City, Cadman National Park is part of the United States National Park System and hosts hundreds of Boerum City events each year.
- 4. Fashion Week consists of various runway shows and photography showcases, allowing designers and fashion houses to display their latest collections. Industry parties follow the exhibitions in the Cadman Park tents rented by designers. Admission to all events is by invitation only and is generally limited to the fashion industry, the fashion press, celebrities, the rich, powerful and famous.
- 5. During Fashion Week, it is customary for participating designers to stay at the State-Star Hotel, a luxury hotel located on Cadman National Park grounds.

COMMON ALLEGATIONS

- 6. On September 9, 2009, **LAMONDE** attended an after-party at Cadman Park for a Boerum Fashion Week show.
- 7. At the party, **LAMONDE** met A.L., a 23-year-old runway model. After a few minutes of conversation, **LAMONDE** excused himself and returned with two glasses of champagne,

- one of which he gave to A.L.
- 8. At approximately 10:00 p.m., A.L. told **LAMONDE** that she was tired and wanted to go home. **LAMONDE** offered to drive her back to her apartment. As they were leaving the party, **LAMONDE** told A.L. that he had forgotten his car keys in his State-Star Hotel room and asked her to accompany him to his room to retrieve them. Eager to leave the noisy party, A.L. agreed.
- 9. **LAMONDE** and A.L. arrived at the hotel room at approximately 10:30 p.m. At approximately 11:00 p.m., **LAMONDE** offered A.L. champagne. Although A.L. turned down the champagne, **LAMONDE** poured her a glass anyway. After substantial coaxing by **LAMONDE**, A.L. agreed to one glass of champagne on the condition that **LAMONDE** take her home right afterwards.
- 10. At approximately 11:20 p.m., A.L. began to feel nauseated and dizzy, and passed out shortly after.
- 11. While A.L. was unconscious, **LAMONDE** had sexual intercourse with her.
- 12. The following morning, September 10, 2009, at approximately 9:00 a.m., A.L. woke up in **LAMONDE's** bed. A.L. was completely naked and had a bluish-purple rash on her lower legs, a side effect unique to the date-rape drug known as Nok-Out. A.L. had no memory of the events that occurred between approximately 11:20 p.m. on September 9, 2009, and the time that she woke up on September 10, 2009, at approximately 9:00 a.m. She quickly dressed and left the hotel.
- 13. A.L. left **LAMONDE**'s hotel room at approximately 9:15 a.m. on September 10, 2009. By noon of that day, the rash was gone.
- 14. At approximately 8:00 p.m. on September 10, 2009, A.L. went to the Boerum City Hospital. A rape kit and a toxicology exam were administered at approximately 8:30 p.m. that evening.
- 15. The rape kit revealed the presence of seminal fluid in A.L.'s vagina. Subsequent DNA testing matched this fluid to **LAMONDE**.
- 16. Although the toxicology report found no presence of Nok-Out in A.L's system, Nok-Out is known to leave the system rapidly. Nok-Out is completely undetectable in the blood after eight hours and in urine after twelve hours. The tell-tale rash vanishes within twelve hours.

COUNT ONE Payed Sayual Abusa by O

(Aggravated Sexual Abuse by Other Means) 18 U.S.C. § 2241(b)

The Grand Jury charges:

- 17. The allegations contained in paragraphs 1 through 16 of this Indictment are realleged and incorporated by reference as if fully set forth herein.
- 18. On or about September 9, 2009, in the Eastern District of Boerum, in the special maritime and territorial jurisdiction of the United States, Defendant **LAMONDE** knowingly and without the knowledge or permission of A.L., administered a drug intoxicant or other similar substance to A.L., thereby substantially impairing A.L.'s ability to appraise or control her conduct, and then engaged in a sexual act with A.L. in violation of Title 18, Section 2241(b) of the United States Code.

February 2, 2010

/s/

JACK RICHARDS
FOREPERSON

KEVIN BAYNE
UNITED STATES ATTORNEY
EASTERN DISTRICT OF BOERUM

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF BOERUM

UNITED STATES OF AMERICA

-- against --

AFFIDAVIT OF LILA BASSET IN SUPPORT OF THE GOVERNMENT'S MOTION TO ADMIT EVIDENCE UNDER FED. R. EVID. 413

ARMAND LAMONDE

STATE OF BOERUM)
: SS.:
COUNTY OF BOERUM)

- I, Lila Basset, being duly sworn, declare under penalty of perjury:
 - My name is Lila Basset. I was born on October 20, 1985, in the State of Boerum. I
 currently live in Livingston City, Boerum. I work as an account manager for Boerum
 State Financial Investments. I attended Boerum University, where I received my
 Bachelor's degree in finance in 2008.
 - 2. I met Armand LaMonde in the spring of 2002 when I was in my sophomore year of high school at Joralemon South High School. I was on Joralemon South's girls' varsity lacrosse team at the time. I was 16 years old. Armand was 27 years old. Armand was aware of my young age because my coach had submitted a team roster to him to aid him in writing captions for our pictures. The roster reflected our names, jersey numbers, and date of birth.
 - 3. Armand was a photographer for one of the local newspapers, the Court Street Chronicle, and often took pictures of Joralemon South's sports teams for the paper. My lacrosse team was favored to win the state championship in 2002, so the Chronicle had

- photographers at all of our games and most of our practices. Most of the time it was Armand covering the team, but occasionally someone else would fill in.
- 4. Armand was very friendly with our team, and as the season went on, he began coming early to games or hanging around after they were finished. He also frequented practices more often toward the middle and end of the season. My teammates and I loved when Armand was around because our coach always seemed to go easier on us when we had spectators. Armand was also very good looking, so of course, none of us minded having him around on a regular basis.
- 5. At that time, I was also a member of our school's newspaper and in the process of applying for the editor-in-chief position. I was toying with the idea of becoming a journalist, and having Armand around gave me the opportunity to talk to someone in the newspaper business. The first time I approached Armand, I was very nervous because he was so much older and seemed so confident; needless to say, I was quite intimidated. The intimidation quickly dissipated. Armand really had a way of making me feel comfortable. He spoke to me about what I should do to get on the right track for a journalism career. He stressed the importance of making connections with those in the business and offered to help me in any way he could. Over the next few weeks, we spoke more and more often after practice. My friends all thought I was crazy, but I knew Armand was flirting with me.
- 6. In the beginning of April, Armand offered to help me put the finishing touches on my editor-in-chief application. He suggested meeting at Starbucks after practice one day, but I knew my parents would not like me hanging out with someone so much older. I asked

- if there was anywhere more private we could go, and he mentioned we could go to his apartment.
- 7. On April 11, 2002, I told my parents I would be working on a school project at a friend's house and would not be home for dinner. My parents never asked who the friend was, so I figured I technically hadn't lied to them. After practice I met Armand at his car and we drove to his apartment. Armand had a studio apartment about 15 minutes away from my school. I'll admit that I was a little uncomfortable when we first arrived; Armand had not mentioned he lived in a studio so I was unprepared to be hanging out in what was essentially his bedroom.
- 8. Armand had prepared pasta for dinner and made me a plate. He then offered me a glass of red wine. I had never had alcohol before, but did not want Armand to know that, so to play cool, I eagerly accepted. The first few sips were extremely bitter, but I had heard the more you drank the better it tasted so I took a few big gulps. Armand and I started to work on my application as we ate. I continued to sip on the wine, and every time my glass got low, Armand would fill it back up. I guess I really didn't know anything about alcohol back then because I didn't realize how little it would take to make my mind fuzzy.
- 9. We finished eating and I was having trouble focusing on my application. I don't know if it was the wine or my nerves, but I just could not concentrate. Armand suggested that we take a break and watch TV instead for a little, and I agreed. We sat on his futon and he put his arm around me. I was so excited, because finally I knew that the flirting had not been all in my head, and I couldn't wait to tell my friends. A few minutes later, Armand

- leaned in and kissed me. One thing led to another, and I may have gotten carried away in the moment, because we ended up having sexual intercourse.
- 10. After having sex, I wasn't really sure what to think. I was excited about what had just happened but felt nervous and confused at the same time. I think I immediately started to suspect going to Armand's apartment that evening might have been a mistake. The sex was consensual, and I would never allege otherwise, but looking back at my life now I know I made a poor decision that night.
- 11. Around 9:00 p.m. that night, I knew I had to get going to meet my curfew. Armand offered to drive me home, but I really didn't want my parents to see him drop me off.

 Instead, I asked if he would drop me back off at the school as I lived only a block away and could walk home from there.
- 12. The next day, I called one of my friends from the lacrosse team and began to tell her what happened with Armand, including the details of how we drank wine and had sex. My mother was walking by my room and overheard this conversation. She immediately began to question me about where I was the previous night. I told my mother that the "friend" I had been working with was a 27-year-old photographer from the Court Street Chronicle, and I then confessed to our sexual encounter.
- 13. My mother was understandably quite upset and immediately called the Court Street

 Chronicle asking about Armand and questioning what kind of employer does not
 supervise its employees appropriately. She felt the Chronicle should have looked further
 into Armand's character and not assigned "someone like him" to work on a high school

campus. She threatened to sue the Chronicle over the incident, and mentioned she was going to call the authorities and have Armand arrested.

- 14. From what I understand, the Chronicle settled the issue with my parents for a sum of money. The Chronicle was an up-and-coming newspaper and though they believed they had done nothing wrong, they did not want to risk damage to the newspaper's reputation. My parents never told me how much money they received, but they said that it went to my college fund.
- 15. Armand was fired from his job, and after hearing that, my mother decided not to call the police. She said she didn't want to put me through the process of pressing charges and thought that, under the circumstances, Armand's punishment was sufficient. While I do regret the decisions I made back in April 2002, I do not hold Armand responsible. I consented to sex with him, though after a few too many glasses of wine. I am happy that our relationship never turned into a criminal case.

	/s/
	Lila Basset
Sworn to and subscribed before me this 3rd day of May, 2010.	
/s/	
Notary	<u> </u>

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF BOERUM	
UNITED STATES OF AMERICA	: 3

-- against --

AFFIDAVIT OF DEFENSE COUNSEL IN SUPPORT OF MOTION TO ADMIT EVIDENCE PURSUANT TO FED. R. EVID. 412(B)(1)(C)

ARMAND LAMONDE
-----X
STATE OF BOERUM)

. .

: ss.:

COUNTY OF BOERUM)

Ian Shuster, an attorney admitted to practice in the United States District Court for the Eastern District of Boerum, swears to the truth of the following under the penalty of perjury, except for those facts stated upon information and belief, which he believes to be true.

- 1. I am affiliated with the law firm of Shuster and Sylvester, counsel for the Defendant, and am generally familiar with the facts and circumstances of this action based on a review of the case file and the investigation materials contained therein. This affidavit is submitted in support of the Defendant's motion to admit evidence of the complainant's past sexual behavior pursuant to Federal Rule of Evidence 412(b)(1)(C).
- In September of 2009, the Defendant, Armand LaMonde, born Timothy Hardin in 1974, attended Boerum Fashion Week in Cadman National Park, located in Boerum City, Boerum.
- 3. Mr. LaMonde, a fashion designer and photographer, reserved two rooms—one for himself and the other for his intern Betty Moon—at the State-Star Hotel in Cadman National Park, where he stayed throughout Fashion Week.

- 4. Upon information and belief, on the evening of September 9, 2009, following one of the fashion exhibits, Mr. LaMonde attended a party held in one of the Cadman Park tents. At some point during the evening he engaged in conversation with the director Claire Eastwick. It was widely known that Ms. Eastwick was attending Fashion Week in an effort to identify models to cast in a new documentary she planned to produce and direct.
- 5. Upon information and belief, immediately after Mr. LaMonde's conversation with Ms. Eastwick ended, he was approached by the complainant, a runway model named Abigail Larkin. The complainant was under the mistaken impression that Mr. LaMonde shared a professional connection with Ms. Eastwick. Mr. LaMonde jokingly told the complainant that he was "great friends" with Ms. Eastwick and that if the complainant was seeking a part in Ms. Eastwick's film he might put in a good word in for her.
- 6. Upon information and belief, for the rest of the evening, the complainant pursued a plan to seduce Mr. LaMonde, who she believed was in a position to help her secure a role in Ms. Eastwick's film. She questioned Mr. LaMonde repeatedly about his industry connections and, later that evening, she asked Mr. LaMonde if she could accompany him to his hotel room in the State-Star. Mr. LaMonde agreed.
- 7. Upon information and belief, shortly after arriving at Mr. LaMonde's room in the State-Star, at the complainant's suggestion, Mr. LaMonde and the complainant had consensual sexual intercourse. Upon information and belief, the complainant willingly spent the night with Mr. LaMonde in the State-Star, and there was absolutely no indication that she was unwell or unaware of what transpired at any point that evening.

- 8. Upon information and belief, the next morning the complainant gave Mr. LaMonde copies of her business card and questioned him about what steps he would take to put her in touch with Ms. Eastwick. When Mr. LaMonde admitted that he did not know Ms. Eastwick at all, and that they had simply been engaged in a casual conversation the night before, the complainant became upset, saying that Mr. LaMonde had "cheated" her.
- 9. Upon information and belief, Mr. LaMonde explained that he had only been joking about his relationship with Ms. Eastwick, but when he asked the complainant if he could see her again, she stormed out of the hotel room. At that point, it was clear to Mr. LaMonde that the complainant attempted to use him to get a role in the new Eastwick film.
- 10. Subsequent to his arrest and indictment, he accordingly suggested that his counsel investigate the complainant's past relationships.
- 11. Counsel's investigations have revealed that the complainant once threatened falsely to accuse an instructor's assistant, Alex Mejia, of rape in retaliation for an unfavorable review she received in a Boerum College acting class in 2005. In addition, just one year later, in 2006, the complainant engaged in consensual intercourse with Mr. Matthew Lamberson in exchange for a highly coveted modeling contract. The very next year, 2007, she had sexual relations with Mr. Barney Smokes in order to win an appearance in certain televised lingerie commercials.
- 12. These three incidents, supported by affidavits, demonstrate a pattern of sexual behavior on the part of the complainant. Her encounter with Mr. LaMonde is yet another instance of the complainant engaging in consensual sexual activity with an individual who she believes will help her advance in her career. In particular, as Mr. Mejia's affidavit makes

clear, when the complainant does not get the benefit of the sexual bargain she believes she has struck, she retaliates by claiming rape. Mr. LaMonde now finds himself the victim of a false criminal accusation.

13. Accordingly, the aforementioned evidence, described in paragraph 11 above, should be admitted pursuant to Federal Rule of Evidence 412(b)(1)(C) because it is evidence that is critical to Mr. LaMonde's ability to present a meaningful defense in this case and have a fair trial. More particularly, it strongly suggests Ms. Larkin consented to sexual relations with Mr. LaMonde who, therefore, had no reason to administer Nok-Out drops to a willing, adult sexual partner. It is also strong evidence that Ms. Larkin will make untruthful statements about her consent to sexual relations when she feels misled and vengeful.

WHEREFORE, it is respectfully urged that Defendant's motion be granted in its entirety.

	/s/
	Ian Shuster
Sworn to and subscribed before me this 5 th day of September, 2010.	
/s/	
Notary	_

UNITED STATES DIS EASTERN DISTRICT	
UNITED STATES OF	AMERICA
against	
ARMAND LAMONDI	E
STATE OF BOERUM)
COUNTY OF BOERUN	: ss.: M)

AFFIDAVIT OF ALEX MEJIA IN SUPPORT OF DEFENDANT'S MOTION TO ADMIT EVIDENCE UNDER FED. R. EVID. 412(b)(1)(C)

- I, Alex Mejia, being duly sworn, declare under penalty of perjury:
 - 1. My name is Alex Mejia. I was born on January 23, 1982, in New Jersey. I currently live in Remsenville, Boerum, where I work as a lighting director for BL&S Productions.
 - 2. I met Abigail Larkin in the fall of 2005 at Boerum College. At the time, I was a graduate student at Boerum College and was working as an Instructor's Assistant for an acting class called "Constructing the Character." Abigail Larkin was a student enrolled in the course.
 - 3. Abigail was a very enthusiastic student, but she did not show much talent. She received a dismal midsemester review, and I recall that the instructor, Professor Elaine DeStefano, suggested that Abigail might want to consider returning to modeling.
 - 4. It was after the midsemester review that Abigail began to hang back after each class to talk to me. She frequently expressed concerns about finding work as an actress. She once told me that she first began taking acting classes at Boerum College in 2004 but had

- still not been able to secure one promising role. She particularly wanted to break into film, but all she could manage to do was find occasional work as an extra.
- 5. During these meetings, Abigail would frequently ask what I thought of her performance in class and if there was anything she could do to improve. She once asked me about my role in final evaluations and I admit I might have overstated the degree of sway I had over Professor DeStefano's review. Our conversations had become somewhat flirtatious by that time, but I got the impression that Abigail might not have been so interested in talking to me if she knew that I had no influence over student evaluations.
- 6. At the end of our final class, in November 2005, Abigail asked me if she could accompany me home. I agreed and shortly thereafter we ended up having sexual intercourse. This occurred at Abigail's suggestion.
- 7. I did not see or hear from Abigail again until mid-January 2006. At that point, fall semester evaluations had been released. I ran into Abigail on campus and upon seeing me she flew into a rage. She demanded to know why she received such a horrible final review.
- 8. I explained to Abigail that student evaluations were prepared by Professor DeStefano, out of my control, and that maybe acting just was not her forte. Abigail retorted that she would never have slept with me had she known "how useless" I was. The argument continued to escalate until finally Abigail threatened to tell the school that I had raped her.
- 9. I went home feeling shaken, but later that day I received a call from Abigail who apologized profusely, explaining that she had been upset by the harsh final review from

Professor DeStefano. She explained that she had made the threat in anger and assured me that she did not intend to make a claim to the school or the police.

10. I have had no contact with Abigail Larkin since this unfortunate incident.

	/s/
	Alex Mejia
Sworn to and subscribed before me this 11 th day of June, 2010.	
/s/	
Notary	<u> </u>

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF BOERUMX
UNITED STATES OF AMERICA
against
ARMAND LAMONDE
STATE OF BOERUM)
: ss.: COUNTY OF BOERUM)
COUNTY OF BOLKOW)

AFFIDAVIT OF MATTHEW LAMBERSON IN SUPPORT OF DEFENDANT'S MOTION TO ADMIT EVIDENCE UNDER FED. R. EVID. 412(b)(1)(C)

- I, Matthew Lamberson, being duly sworn, declare under penalty of perjury:
 - My name is Matthew Lamberson. I was born on November 3, 1977, in California. I
 currently live in Fulton City, Boerum, where for the last eight years I have worked as a
 talent agent for ELT Model Management ("ELT"), one of the nation's top modeling
 agencies.
 - 2. I met with Abigail Larkin in late 2006 at the request of a friend who is a scout for ELT. I liked Abigail's look, but ELT had recently signed a few new models of a similar type. I felt she was not what we wanted at the time. Still, my friend knew Abigail from some modeling work that Abigail had done in high school, and I agreed to meet with her as a favor.
 - 3. I met with Abigail at my office for a few hours one afternoon in November 2006. She explained to me that she had not worked in a while because she had been trying to become an actress but that things had not worked out as she planned.

- 4. I was candid, explaining that Abigail really was not what ELT needed at the moment. I told her that we had just signed a few other very young looking models and that, frankly, I was not sure she had what it took to make it in the industry. ELT provides full representation for their models and we only sign the best.
- 5. Abigail assured me that she had given up on acting and that she desperately wanted a contract with ELT. She said she knew she was right for ELT and that I must have thought so too if I agreed to invite her in for an interview.
- 6. In response, I explained to Abigail that I was only meeting with her as a favor for a friend. In my view, that was how business got done. I admit, though, that Abigail was sexy and I wanted to hook up with her.
- 7. I had to be a little direct in my proposal, but by the end of the meeting we agreed that if Abigail would come home with me that night, I would sign her to a two-year exclusive contract with ELT.
- 8. I saw Abigail that same evening at my apartment, at which time we had consensual sex.

 The following day I made sure that Abigail signed a highly sought-after contract with

 ELT.

	/s/
	Matthew Lamberson
Sworn to and subscribed before me this 30 th day of May, 2010.	
/s/	
Notary	_

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF BOERUM	
X	
UNITED STATES OF AMERICA	AFFIDAVIT OF BARNEY SMOKES IN SUPPORT OF
against	DEFENDANT'S MOTION TO
	ADMIT EVIDENCE UNDER
ARMAND LAMONDE	FED. R. EVID. 412(b)(1)(C)
X	
STATE OF BOERUM)	
: ss.:	
COUNTY OF BOERUM)	

- I, Barney Smokes, being duly sworn, declare under penalty of perjury:
 - 1. My name is Barney Smokes. I was born on May 22, 1971, in Nevada. I currently live in Fulton City, Boerum. I have worked as a talent manager for ELT Model Management ("ELT"), one of the nation's top modeling agencies, for over ten years.
 - 2. In 2007, I procured a contract for ELT with Scentazzo, a big-budget lingerie designer.

 Under the contract I was responsible for securing models for a number of television commercials set to advertise Scentazzo's new teen underwear line.
 - 3. By mid-June of 2007 Scentazzo and I had almost come to a final determination as to which ELT models would be appearing in the commercials.
 - 4. At that same time, Abigail Larkin, a model ELT had signed in 2006, got wind of the new contract and began to haunt my office, insisting that she was perfect for the Scentazzo commercials.
 - 5. Abigail is known at ELT for being better suited for print modeling than television modeling. However, she was very young-looking and had the right body type for

Scentazzo's new teen line. Nonetheless, I was initially unwilling to risk disappointing anyone at Scentazzo by assigning Abigail to the commercials.

- 6. After I told Abigail that I did not think she was right for the job, she asked me if I would let her take me out for a drink to give her a chance to persuade me otherwise. I agreed, and that evening we went to a local bar. We both had a few drinks, and by the end of the night, we had engaged in sexual intercourse at my place.
- 7. The following day, I arranged for Abigail to be assigned to the Scentazzo commericials.
- 8. I contacted Armand LaMonde with this information because I believed it might shed some light on Abigail's actions.

	/s/
	Barney Smokes
Sworn to and subscribed before me this 15 th day of May, 2010.	
/s/	
Notary	_

UNITED STATES DIS EASTERN DISTRICT	OF BOERUM	
UNITED STATES OF	AMERICA	
against		
ARMAND LAMONDE		
STATE OF BOERUM)	
COUNTY OF BOFRUM	: ss.:	

AFFIDAVIT OF FIONA YARIS IN OPPOSITION TO DEFENDANT'S MOTION TO PRECLUDE EVIDENCE UNDER FED. R. EVID. 801(d)(2)(D)

- I, Fiona Yaris, being duly sworn, declare under penalty of perjury:
 - 1. My name is Fiona Yaris. I was born on November 18, 1985, in the State of Boerum. I live in Fulton, Boerum, and work primarily from home as a freelance graphic designer.
 - 2. I attended the Technological Institute of Fashion at the same time as Betty Moon. We were the same class year, and although I was a graphic design major and she was a fashion business major, we took several courses together. We became friends and decided to share a two-bedroom apartment in Boerum City after we graduated in May 2009. At the time we were living together Betty was working as an intern for Armand LaMonde. We were still living in that apartment at the time of the incident during Fashion Week and of Betty's death, but I have since moved to Fulton.
 - 3. On the evening of September 10, 2009, we were sitting in the kitchen, drinking a couple of mojitos and getting ready to go out to White Satin, one of our favorite clubs. Betty had just returned home that day from Fashion Week, and she said that LaMonde had given

- her a couple of weeks off because he was planning to travel. She was going to leave the next day to visit friends in another state.
- 4. Betty told me that she had something on her mind. She said that she had stopped by her boss's hotel room late that morning to pick up a package he wanted mailed when she saw that his most expensive suit was lying crumpled on the floor (her boss apparently wasn't there but had left the door open for her). She told me that she decided to take the suit to the hotel's dry-cleaning service but that when she checked the pockets she found a small dropper bottle labeled "Nok-Out." She said she put it in her handbag and took it home with her.
- 5. Betty said she suspected it was some kind of date-rape drug, and I told her I had heard of Nok-Out—that I had heard it was very powerful and hard to trace. I suggested to her that maybe she should go to the police, but she said she was scared to get mixed up in anything and that maybe there was some explanation. I was concerned, but we were running late to meet friends of ours, so I didn't press the issue.
- 6. At around 3:30 a.m. on September 11, 2009, after we left White Satin, Betty darted out into the street to hail a cab and was struck by a car. She died later that day from her injuries.
- 7. On the evening of September 13, 2009, I was at home, curled up on the couch and crying about what had happened to Betty. I had left the television on, and there was a report on the local news about a suspected rape at Fashion Week. I heard the name Armand LaMonde and remembered what Betty had told me about the Nok-Out. I went to her

room	and	che	cked	her	han	dbag,	and	I f	ound t	he bo	ttle.	I imme	ediate	ely v	vent	to th	e po	olice
statio	n wi	th it	and	told	the	story	to aı	10	officer,	who	took	down	a rep	ort a	and 1	took	the	bottle.

	/s/
	Fiona Yaris
Sworn to and subscribed before me this 20 th day of July, 2010.	
/s/	
Notary	_

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF BOERUM	
X	
UNITED STATES OF AMERICA	AFFIDAVIT OF
	JACQUELINE KATZ-ELIOT
	IN OPPOSITION TO
against	DEFENDANT'S MOTION TO
_	PRECLUDE EVIDENCE UNDER
ARMAND LAMONDE	FED. R. EVID. 801(d)(2)(D)
X	
STATE OF BOERUM)	
: ss.:	
COUNTY OF BOERUM)	

- I, Jacqueline Katz-Eliot, being duly sworn, declare under penalty of perjury:
 - My name is Jacqueline Katz-Eliot. I was born on March 25, 1987, in the State of Boerum.
 I currently live in the city of Schermerhorn, State of Boerum. I work in the marketing department of Louane Coiffure, Ltd., a fashion design and retail company.
 - 2. I became an intern for Armand LaMonde in February of 2009. I had recently graduated from Boerum City State Polytechnic University with a degree in fashion marketing, and I responded to an advertisement he posted to dregslist.com seeking interns. I remember that the ad had some impressive-sounding quotes about him from publications I had never heard of. I hadn't heard of Armand either, but I was somewhat desperate for work experience, so I responded.
 - 3. Armand responded to my e-mail the same day, and he interviewed me the next day in a local coffee shop. He was a bit vague about himself and the job, but he said he had "big things" in the works and that he was going to need help. He did promise that I'd get a lot

- of valuable industry experience, but he also said he would need me to handle "administrative tasks and personal matters" from time to time.
- I started my internship the next week, and about two weeks after that, in March 2009,
 Betty Moon started as an intern as well.
- 5. The internship was an unpaid position, as it was advertised, and Betty Moon told me that her position was also unpaid.
- 6. Armand's office and studio were in Wayckbusch, a run-down section of Boerum City, in a loft space where he also lived. Betty and I both came in five days a week, usually around 10:00 a.m., and generally stayed until at least 6:00 p.m. though sometimes later.
- 7. For the most part, Betty and I did the same sort of work. Sometimes we would help to set up equipment and prep models for photo shoots. Sometimes we would help him draft press-releases or put together press packets to be sent to various media. Sometimes we did vague "market research" assignments. But he would also ask us to run a lot of personal errands for him things like picking up food, even bringing his dog to the groomer. At times I felt like he really just wanted us to be unpaid personal assistants.
- 8. Armand would also strongly encourage us to attend fashion industry parties and events with him, although after I went to a few, I realized that I wasn't going to meet any real industry luminaries by hanging around Armand and also that he seemed to be treating me and Betty as arm-candy.
- 9. When I'd talk to Betty in private, I'd often complain about the internship, but Betty seemed to believe in Armand and thought that she was going to get somewhere in the fashion industry by sticking with him.

10	. My internship lasted about five months until, in July, 2009, a friend of my parents let me
	know about an entry-level opening with Louanne Coiffure. It was a low-level office
	assistant job, but it paid, and it seemed like much more of an opportunity than Armand
	LaMonde, in any case.
	/s/

	/s/
	Jacqueline Katz-Eliot
Sworn to and subscribed before me his 20 th day of July, 2010.	
/s/	
Notary	_

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF BOERUM						
UNITED STATES OF AMERICA						
- against -	Cr. No. 10-76					
ARMAND LAMONDE	X					
September 18 and 19, 2010						
HONO	DECISIONS ON PRE-TRIAL MOTIONS BEFORE THE PRABLE JENNIFER WU, NITED STATES DISTRICT COURT					
APPEARANCES:						
For the United States of America:	Kevin Bayne United States Attorney by Sheila Murphy Assistant United States Attorney 240 Federal Plaza Santa Neila, Boerum 40322					
For Defendant Armand LaMonde:	Ian Shuster Shuster and Sylvester 3 Park Towers Santa Neila, Boerum 40322					
Court Reporter:	Melissa Aldito 240 Federal Plaza					

Santa Neila, Boerum 40322

- 1 <u>CLERK:</u> United States of America versus Armand LaMonde. Counsel, note your appearance on
- 2 the record.
- 3 MS. MURPHY: Sheila Murphy for the United States.
- 4 MR. SHUSTER: Ian Shuster of Shuster and Sylvester for the Defendant, Armand LaMonde.
- 5 THE COURT: Good afternoon. First, for the record, due to the sensitive matters that we will
- 6 discuss today, this is an in-camera hearing, and the record will be sealed. Okay, so, I understand
- 7 that we have three separate motions before us today. We have one Government motion seeking
- 8 to allow evidence of a prior sexual assault committed by the Defendant, pursuant to Rule 413.
- 9 MR. MURPHY: That is correct.
- 10 THE COURT: And we also have two defense motions. The first motion moves to admit under
- Rule 412 three separate instances of the alleged victim's prior sexual conduct, is that correct?
- 12 MR. SHUSTER: Yes, Judge.
- 13 THE COURT: And the second defense motion moves to suppress out-of-court statements made
- by a Ms. Betty Moon, based on the hearsay rules?
- 15 MS. MURPHY: Yes, Judge.
- 16 MR. SHUSTER: Yes, Judge.
- 17 THE COURT: All right then, I'd like to first address the 413 issue. Ms. Murphy, would you like
- 18 to give me the background to this motion?
- MS. MURPHY: Your Honor, in support of this motion we have filed with the court an affidavit
- 20 prepared by Ms. Lila Basset, the witness whose testimony we seek to admit at trial.
- 21 THE COURT: Noted. You may proceed.
- 22 MS. MURPHY: Thank you. Judge, during our investigation into the Defendant, we learned that
- 23 Defendant Armand LaMonde was involved in an incident of statutory rape when he was 27-years

- old. Mr. LaMonde was a photographer for a local newspaper assigned to take pictures of a high
- 2 school girls' lacrosse team. While photographing the team, Defendant LaMonde met a 16-year-
- 3 old lacrosse player named Lila Basset.
- 4 THE COURT: What year was this?
- 5 MS. MURPHY: About eight years ago, in 2002.
- 6 THE COURT: You may proceed.
- 7 MS. MURPHY: Thank you. After giving Ms. Basset alcohol, Defendant LaMonde engaged in
- 8 sexual intercourse with her. This conduct was in violation of the statutory rape legislation in
- 9 Boerum State, which sets the age of consent at 17. Though criminal charges were never filed
- against Defendant LaMonde, we have located Ms. Basset, who has agreed to testify to the
- underlying conduct at trial. The details of what she will testify to are in her affidavit.
- 12 <u>THE COURT:</u> Very well, what are your arguments as to the admissibility of this evidence?
- 13 MS. MURPHY: Federal Rule of Evidence 413 provides that, quote, in a criminal case in which
- the defendant is accused of an offense of sexual assault, evidence of the defendant's commission
- of another offense or offenses of sexual assault is admissible, and it may be considered for its
- bearing on any matter to which it is relevant, unquote. Section (d)(2) provides that, and I quote,
- 17 offense of sexual assault means a crime under Federal law or law of a state that involved contact,
- 18 without consent, between any part of the defendant's body... and the genitals ... of another
- 19 person, end of quote. Under Boerum law, Ms. Basset had not yet reached the age of consent and
- 20 so legally could not consent to the sexual intercourse with Mr. LaMonde. The statutory rape of
- 21 Ms. Basset therefore falls under 413(d)(2) and should be admitted.
- 22 THE COURT: But the Defendant was never arrested for or convicted of statutory rape?
- 23 MS. MURPHY: No, your Honor, but Ms. Basset's testimony will prove its occurrence.

- 1 THE COURT: Does the defense dispute that this sexual encounter occurred?
- 2 MR. SHUSTER: No, your Honor, we acknowledge its occurrence. However, we argue that Mr.
- 3 LaMonde's prior sexual encounter is not admissible under 413, and even if the evidence would
- 4 be admissible under 413, we argue that the Rule itself is unconstitutional as it violates a
- 5 defendant's Fifth Amendment right to Due Process.
- 6 <u>THE COURT:</u> What is your argument on why Mr. LaMonde's prior sexual assault would not be
- 7 admissible under 413?
- 8 MR. SHUSTER: Judge, the evidence is not admissible because the conduct in question is not a
- 9 prior sexual assault under Rule 413. Mr. LaMonde's sexual contact was fully consensual as Ms.
- Basset makes clear in the Government's own affidavit that they are presenting here today.
- 11 THE COURT: Did Mr. LaMonde not engage in sexual intercourse with Ms. Basset when she
- was only 16 years old, in violation of the Boerum state criminal code?
- 13 MR. SHUSTER: Yes, but
- 14 THE COURT: Ms. Murphy, if the evidence that the Government intends to offer at trial is
- evidence of a consensual sexual act, how can it be admissible under 413?
- 16 MS. MURPHY: Your Honor, what Mr. LaMonde did with Ms. Basset, regardless of whether or
- 17 not Ms. Basset believes it to be consensual, was a violation of the criminal code of the State of
- 18 Boerum, which clearly states in section 120.00, its statutory rape provision, that minors under the
- 19 age of 17 are considered incapable under the law of consenting to sex with an individual over the
- age of 21. If we look to section (d)(2) of Rule 413, it clearly states that an offense of sexual
- 21 assault is one involving nonconsensual sexual contact between any part of the defendant's body
- 22 and the genitals of another person in violation of state or federal criminal law. Here, we have a
- crime under state law, clearly defined in section 120.05. Since Mr. LaMonde admits to having

- sexual intercourse with Ms. Basset, we also have the contact. Under Boerum state law, we have a
- 2 lack of consent. This is a perfect fit.
- 3 <u>THE COURT</u>: How do you respond to this, Mr. Shuster?
- 4 MR. SHUSTER: We do not disagree that in Boerum, state law explicitly provides that persons
- 5 under the age of 17 are incapable of consenting to sexual contact. However, federal sexual
- 6 assault law contains no provision similarly limiting the meaning of the term "consent." Mr.
- 7 LaMonde could never have been prosecuted under federal law for this conduct.
- 8 THE COURT: But is it not true that we've technically satisfied all of the elements of Rule
- 9 413(d)(2) when we apply the state criminal law in this case?
- 10 MR. SHUSTER: Yes, your Honor, but that is not what should be controlling here. Congress
- enacted the Federal Rules of Evidence to ensure consistency. But if federal courts base their
- decisions regarding admissibility on state laws, we will see major and arbitrary inconsistencies in
- the application of Rule 413, which is already a controversial provision. If Mr. LaMonde had
- 14 engaged in this behavior in a state where sexual assault law is consistent with federal law, it
- would be inadmissible, but since it occurred in Boerum, it will be admissible. The only way to
- insure consistency is to ask whether the sexual contact in this case was consensual in fact and
- whether it was consensual under federal criminal law. The answer to both questions is yes.
- 18 Therefore, it is not admissible under Rule 413.
- 19 THE COURT: Ms. Murphy, anything else?
- 20 MS. MURPHY: It is a commonly held understanding that statutory rape violations such as these
- are crimes of strict liability not because the states are trying to be hard on offenders, but because
- 22 victims of these crimes are assumed incapable of giving consent. The State of Boerum merely
- codified this understanding. And when Congress used the term "consent" in Rule 413, it used

- 1 that term in its commonly understood legal sense, including the age-old notion that minors are
- 2 incapable of consent. Since legal consent was not possible here, the Defendant is morally
- 3 culpable under the laws of the state of Boerum.
- 4 THE COURT: I have your argument. Now, Mr. Shuster, what is your second argument for
- 5 inadmissibility?
- 6 MR. SHUSTER: Your Honor, Rule 413 violates Due Process whenever, as here, it is used to
- 7 demonstrate propensity to commit the charged act. There is a long-standing history of not
- 8 admitting evidence of a defendant's prior bad acts for propensity purposes. Yet Rule 413 allows
- 9 in evidence of a prior sexual assault, for just those reasons, admitting it for, quote, its bearing on
- anything to which it is relevant, unquote. This violates Due Process because it violates
- 11 fundamental notions of fairness and justice.
- 12 THE COURT: What are your arguments for violation of fundamental fairness?
- 13 MR SHUSTER: First, admission of Mr. LaMonde's prior sexual encounter with Ms. Basset will
- create a strong bias against Mr. LaMonde, as such evidence is unduly prejudicial. Second, this
- evidence undermines the presumption of innocence and creates the danger of the jury convicting
- 16 Mr. LaMonde for what he has done in the past, rather than for what he is charged with in the
- 17 present case.
- 18 THE COURT: Ms. Murphy, what is your response to Mr. Shuster's arguments?
- MS. MURPHY: Judge, we are sensitive to the defense's concerns, but we believe that Rule 413
- 20 adequately protects a defendant's Due Process rights. First, the rule has a notice requirement,
- 21 which we faithfully abided by. Second, Rule 413 is subject to the probative versus prejudice
- Rule 403 balancing test, so any unduly prejudicial evidence would not be admissible. Defendant
- 23 LaMonde's rights are satisfactorily protected.

- 1 MR. SHUSTER: Your Honor, those protections are far from adequate. The notice requirement
- does little to protect a defendant's rights. More importantly, 403 balancing is simply inadequate
- 3 in these types of cases because by its terms, 413 considers evidence of propensity to be
- 4 probative, not prejudicial. This renders 403 balancing meaningless, a mere formality inadequate
- 5 to protect Due Process rights.
- 6 <u>THE COURT:</u> Ms. Murphy, do you have a response?
- 7 MS. MURPHY: Certainly, your Honor. Again, we acknowledge that this type of evidence does
- 8 have a risk of prejudicing a defendant. But as we explain in our brief, this does not render 413
- 9 unconstitutional. Moreover, we are confident that, in this case, the probative value will certainly
- 10 outweigh prejudicial effect.
- 11 THE COURT: What is the probative value in this case?
- MS. MURPHY: First, the evidence is extremely probative to rebut Defendant LaMonde's claim
- that the sex was consensual and that he did not need to give her Nok-Out, because she freely
- 14 consented to have sex with him. The use of propensity evidence reduces the "he said she said"
- problem and is critical in assessing a defense where the credibility of the accused is critical.
- 16 Second, the circumstances of the prior assault are strikingly similar to the instant case, as argued
- in our brief. For example, he gave both victims consciousness-altering substances—alcohol and
- Nok-Out.
- 19 THE COURT: For the record, Ms. Murphy, do we have evidence that the bottle allegedly found
- 20 in the Defendant's suit pocket actually contained the drug known as Nok-Out?
- 21 MS. MURPHY: Yes, we have a toxicology report to that effect.
- 22 MR. SHUSTER: While the substance may indeed be the unpronounceable narcotic drug known
- as Nok-Out, no fingerprints other than those of Mr. LaMonde's intern and her roommate were

- found on the bottle. And, as I will shortly argue, the bottle is linked to Mr. LaMonde only by the
- 2 inadmissible hearsay statement of his intern.
- 3 <u>THE COURT</u>: Very well, counselors, but back to the matter at hand. Ms. Murphy argued that
- 4 the similarity of the two incidents gave the prior sexual assault great probative weight. How do
- 5 you respond?
- 6 MR. SHUSTER: I would like to reiterate that Rule 413 violates Due Process whenever the
- 7 evidence is relevant only to prove propensity, and so the evidence is automatically inadmissible
- 8 irrespective of its alleged probative value. I would also add that similarity of a prior incident to a
- 9 charged incident only increases the danger that a defendant will be convicted because of past
- actions, the presumption of innocence having become a presumption of guilt.
- 11 THE COURT: One last matter on this issue. Ms. Murphy, does the Government argue that in the
- event that the prior incident is inadmissible under 413, that it is alternatively admissible under
- the Rule 404(b) provision for evidence of other crimes?
- 14 MS. MURPHY: No, your Honor, we are not arguing admissibility under Rule 404(b).
- 15 THE COURT: All right. Now, Mr. Shuster, I'd like to turn to the evidence the defense is seeking
- to submit concerning Ms. Larkin's past sexual conduct—the three prior incidents. How is Ms.
- 17 Larkin's past conduct relevant to these charges, Mr. Shuster?
- 18 MR. SHUSTER: Your Honor, these three incidents, together with the encounter with Mr.
- 19 LaMonde, show a pattern of Ms. Larkin engaging in sexual activity for the purpose of advancing
- 20 her career. They tend to prove not only that the complainant is willing to engage in sexual
- 21 relations with individuals who promise to help her, but also that she is willing to claim rape when
- she does not get the results that she bargained for. These three incidents clearly corroborate Mr.
- 23 LaMonde's account of what happened on September 9th and 10th. Significantly, the earliest of

- the three incidents, concerning Mr. Mejia, involves a threatened rape accusation. Her encounter
- with Mr. LaMonde is yet another instance of Ms. Larkin engaging in sexual activity with
- 3 someone whom she understood to be in a position to help her career. These three incidents are
- 4 critical to Mr. LaMonde's defense that the sexual activity was entirely consensual and that he did
- 5 not give Ms. Larkin Nok-Out.
- 6 THE COURT: And how is this evidence admissible despite the proscriptions of Rule 412, the
- 7 rape shield provision?
- 8 MR. SHUSTER: The Defendant has a right under the Fifth and Sixth Amendments to introduce
- 9 this evidence. The rape-shield rule itself acknowledges that right by providing an exception in
- Rule 412(b)(1)(C) for, quote, evidence the exclusion of which would violate the constitutional
- rights of the Defendant, unquote. Mr. LaMonde's ability to mount a meaningful defense in this
- case is obliterated without this evidence. The constitutional right to present a full defense was
- 13 recognized in <u>Chambers v. Mississippi</u>.
- MS. MURPHY: Your Honor, that right is limited by other legitimate concerns, among them,
- keeping out prejudicial and irrelevant evidence. Whether Ms. Larkin previously engaged in
- 16 consensual sexual activity with other individuals has no bearing on whether the Defendant gave
- her Nok-Out on the night in question. The suggestion that the victim was willing before so she
- 18 was probably willing again—that is exactly the inference and character assassination the rape-
- shield statute was meant to prohibit.
- 20 MR. SHUSTER: The Government attempts to characterize these incidents as run-of-the-mill
- sexual encounters. In fact, they are unusual and highly relevant incidents, which show a
- 22 willingness on the part of the complainant to use sex as a bargaining chip. Together, these three
- instances of past conduct powerfully support Mr. LaMonde's defense.

- 1 MS. MURPHY: If the Defendant's story is that Ms. Larkin has falsely accused him of drugging
- 2 her and having sex with her while she was unconscious in retaliation for lying to her about his
- 3 Hollywood connections, Mr. LaMonde can take the stand and tell his story. He can also cross-
- 4 examine Ms. Larkin. Any probative value evidence of her prior sexual encounters may have is
- 5 far outweighed by the unfair assault on Ms. Larkin's character and the extreme prejudice to the
- 6 prosecution. We are not here to put Ms. Larkin on trial. The Supreme Court has made clear that a
- 7 defendant's right to present relevant evidence is qualified. In Lucas and Rock, the Court stated
- 8 that the Defendant's right may bow to other legitimate interests.
- 9 MR. SHUSTER: Judge, this isn't a situation where the complainant's past conduct is based in
- 10 rumor. We have three individuals who are willing put their own reputations on the line to testify
- 11 to their personal experiences with the complainant. The evidence is clear-cut, and the events are
- quite recent. Mr. LaMonde's version of events might seem unbelievable to a jury unless it hears
- about these similar incidents. Judge, the prior false accusation alone—
- 14 MS. MURPHY: Let me correct you, Mr. Shuster. There was a prior threat of an accusation, not
- 15 an actual accusation.
- 16 MR. SHUSTER: Nonetheless, that incident alone is highly probative of whether Larkin
- 17 fabricated her claim that Mr. LaMonde raped her.
- MS. MURPHY: It's also the most remote incident of the three, Judge. And in any event, this
- incident comes within the exclusionary provision of Rule 412. It is inextricably linked with the
- 20 complainant's past sexual behavior.
- 21 MR. SHUSTER: Your Honor, by the plain language of 412, a false claim of rape is not covered.
- 22 A false accusation is not physical conduct; it goes to a witness's credibility.

- 1 MS. MURPHY: Rule 412 also covers activities of the mind. And questioning a victim about
- 2 rape claims she made in the past puts her on trial about her sexual history.
- 3 MR. SHUSTER: Judge, Rule 412 is not triggered simply because the subject matter of the
- 4 falsity is of a sexual nature. And excluding a prior rape claim would violate the Defendant's
- 5 Confrontation Clause rights. The evidence is offered to show that the complainant had a motive
- 6 to fabricate the rape charge against him. This is a specific motive-based theory as described in
- 7 Davis v. Alaska.
- 8 MS. MURPHY: Your Honor, <u>Davis</u> requires more than an isolated past event. The Defendant's
- 9 theory is nothing more than pure propensity.
- 10 <u>THE COURT:</u> All right. Let's move on to the defense's hearsay motion. Mr. Shuster?
- MR. SHUSTER: Thank you. Your Honor, we have been informed that the prosecution intends to
- present the testimony of one Fiona Yaris. Ms. Yaris was the roommate of the late Betty Moon,
- who was Mr. LaMonde's intern at the time of the incident. She accompanied him to the Fashion
- Week event, although she was of course staying in her own room. Ms. Yaris Ms. Moon's
- 15 roommate is expected to testify that Ms. Moon had a conversation with her on the night before
- her of Ms. Moon's death, and that Ms. Moon allegedly told Ms. Yaris about a drug she
- allegedly found in a suit belonging to Mr. LaMonde. The prosecution intends to use this out-of-
- 18 court statement to prove that the drug was found in Mr. LaMonde's clothing. Therefore it's
- classic hearsay. It's an out-of-court statement being used to prove —
- THE COURT: I am familiar with the definition of hearsay, thank you. But wasn't Ms. Moon
- employed by Mr. LaMonde at the time, and if so, why couldn't her statement be introduced as an
- admission of an agent or servant under Rule 801(d)(2)(D)?

- 1 MR. SHUSTER: For two reasons, your Honor. First of all, an intern is not a servant or agent as
- 2 contemplated by the rule.
- 3 <u>THE COURT</u>: Was she paid by Mr. LaMonde?
- 4 MR. SHUSTER: No, your Honor, she was not paid at all. And that's one of the key things that
- 5 distinguishes Ms. Moon from an employee here. Though she did perform various tasks for Mr.
- 6 LaMonde and accompany him to events, she received no consideration for her services, and
- 7 therefore there could not have been the kind of employment or agency relationship that would
- 8 allow her statement to be treated as an admission of Mr. LaMonde under the rule.
- 9 THE COURT: What about the work experience and resume credit, as it were. Isn't that why
- young people do internships? I don't suppose they do it purely for fun.
- MR. SHUSTER: Certainly there is some intangible benefit, but I don't believe it's enough to
- create the kind of alignment of interests needed for an 801(d)(2)(D) admission. After all, even
- paid independent contractors are generally not treated as employees under the rule. Further, even
- assuming arguendo that she was an employee, the conversation at issue here took place well
- outside the employment context. Ms. Moon and Ms. Yaris were in their kitchen, drinking
- 16 cocktails and getting ready to go out to a club. The conversation took place in a casual setting
- 17 far removed from work.
- 18 THE COURT: But does the rule take into account the setting of the conversation? It only states
- 19 that the conversation must take place, and I quote, "during the existence of the relationship" the
- 20 employment relationship.
- MR. SHUSTER: I believe it does contemplate the context, and I believe it should. To allow in a
- 22 conversation in this kind of setting, far away from the workplace, with a friend, on the eve of a
- vacation, merely because it happens to take place while a person is employed which we don't

- 1 concede that she was to do so would seem to stretch the definition of an admission almost
- 2 beyond recognition.
- 3 <u>THE COURT:</u> Very well, I have your brief. I'd like to hear from Ms. Murphy.
- 4 MS. MURPHY: Thank you. Your Honor, if I may take Mr. Shuster's second point first, I
- 5 absolutely believe that this statement is within the meaning of the rule, which, as you pointed
- 6 out, only requires that it be "during the existence of the relationship." I see nothing in the rule
- 7 limiting this to workplace settings, and I know of no case law that does so.
- 8 <u>THE COURT</u>: But why should we treat this as an admission?
- 9 MS. MURPHY: Your Honor, as I said, because both the language of 801(d)(2)(D) and the case
- law require us to do so.
- 11 THE COURT: Yes, I know the cases you cite in your brief. But I don't see any cases that look
- 12 like the situation we have here. Now, we've taken a lot of time, so perhaps you can address the
- other point why should an unpaid intern be treated as an employee under the rule?
- 14 MS. MURPHY: The rule says "servant or agent," your honor, not "employee," and regardless,
- we don't believe the title "intern" should control here. Although she was not paid, Ms. Moon
- functioned in every way like an employee. She worked consistently for at least 40 hours a week,
- and she performed the same tasks that an employed personal assistant would. We know that in
- many industries it's become more common to use so-called "interns" to do the exact same things
- 19 employees would do, and these interns do so not merely, as you said, for fun, but because they
- 20 hope to advance their careers. So the term "intern" should not be dispositive and it should not bar
- admissions that would otherwise come in under 801(d)(2)(D).
- 22 THE COURT: Anything else?
- 23 MS. MURPHY: No. Thank you, your Honor.

- 1 <u>THE COURT</u>: Anything to add, Mr. Shuster?
- 2 MR. SHUSTER: No, your Honor. I believe I have addressed Ms. Murphy's points in my
- 3 argument and in my brief.

4 * * * * *

DECISIONS ON PRE-TRIAL MOTIONS

2 September 19, 2010, 9:00 a.m.

1

3 4 THE COURT: Good morning, counselors. After careful consideration of the issues presented, I 5 have reached a decision on the motions. Since counsel have indicated that they have no 6 objection to my announcing my decision from the bench, I will do so. You may pick up copies 7 of the formal order and decision from my clerk tomorrow. 8 The prosecution's motion in limine seeking to admit evidence of the Defendant's prior 9 uncharged sexual assault is denied. First, the alleged prior offense itself, a statutory rape under 10 state law, is simply not a sexual assault within the meaning of Rule 413. Moreover, Rule 413 11 violates the Due Process Clause of the Fifth Amendment to the United States Constitution when, 12 as here, it allows the admission of evidence of a defendant's prior sexual conduct as propensity 13 evidence. The admission of such evidence violates the fundamental concepts of justice which 14 underlie the long-standing general rule prohibiting the use of evidence of a defendant's prior bad 15 acts to show propensity. The Government argued that sexual propensity evidence should be 16 treated differently than non-sexual propensity evidence, but we find no support for such an 17 argument. With respect to Defendant's motion to admit evidence of the complainant's past sexual conduct, 18 19 that motion is granted, over the Government's objections based on Rule 412. I find the evidence 20 highly relevant and critical to the Defendant's defense and that to exclude it would constitute an 21 unconstitutional restriction on his right to confrontation. Moreover, at a minimum, the admission 22 of the earliest incident concerning the complainant's threat to falsely accuse Alex Mejia of rape

- 1 is compelled both because such incidents do not fall within the purview of Rule 412 and also
- 2 because the exclusion here would violate the Confrontation Clause.
- 3 I also grant the Defendant's motion to suppress out-of-court statements by the Defendant's
- 4 former intern, Betty Moon. I conclude that those statements are inadmissible hearsay. The
- 5 testimony of Fiona Yaris regarding the alleged September 9, 2009 statements of the late Ms.
- 6 Moon does not fall within Rule of Evidence 801. The prosecution seeks to admit Ms. Yaris'
- 7 testimony under Rule 801(d)(2)(D), which provides that a statement is not hearsay if the
- 8 statement is an admission made by "the party's agent or servant concerning a matter within the
- 9 scope of the agency or employment, made during the existence of the relationship." Betty Moon
- was not an "agent or servant," nor was the statement made "during the existence of the
- relationship." Accordingly, Defendant's motion to preclude admission of Ms. Moon's statements
- is granted.

* * *

Boerum Criminal Code

Relevant Sections

B.C.C. §120.00

Definitions. For the purposes of Section 120 of this chapter, the terms used shall have the following meanings ascribed to them:

- a) "Accused" means a person accused of an offense prohibited by Section 120 of this chapter.
- b) "Consent" means a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use or threat of force by the accused shall not constitute consent. For the purposes of Section 120.05 of this chapter, a person under 17 years of age is deemed incapable of consenting to sexual conduct with a person 21 years of age or older.
- c) "Penetration" means any physical contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person with the sex organ or anus of another person, including, but not limited to, oral copulation, anal sex and vaginal sex.
- d) "Victim" means a person alleging to have been subjected to an offense prohibited by Section 120 of this chapter.

B.C.C. §120.05

Criminal Sexual Abuse of a Minor

- a) The accused commits criminal sexual abuse of a minor if he or she:
 - 1. being 21 years of age or older;
 - 2. commits an act of sexual penetration with a victim who was at least 13 years of age but under 17 years of age when the act was committed.
- b) Sentence

Criminal sexual abuse of a minor is a Class B felony and is punishable by a sentence of up to 15 years of incarceration, a \$100,000 fine, or both.

UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT -----X UNITED STATES OF AMERICA,

Appellant,

No. 10-647

-against-

ARMAND LAMONDE,

Defendant-Appellee.

October 28, 2010

Before MCSWEENEY, TODARO, and NG, Circuit Judges.

OPINION OF THE COURT

LESLIE TODARO, Circuit Judge.

This interlocutory appeal, brought by the United States pursuant to 18 U.S.C. § 3731,¹ arises directly from the District Court's rulings against the Government on three pretrial motions: (1) denying the Government's motion seeking to admit evidence of a prior sexual assault by the Defendant; (2) granting a defense motion seeking to admit evidence of three instances of the alleged victim's past sexual behavior and alleged sexual predisposition; and (3) granting a

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¹ The Government may appeal directly from a pre-trial order of a district court suppressing or excluding evidence where, as here, the United States Attorney certifies that the evidence is substantial proof of a fact material in the proceedings. *See* 18 U.S.C. § 3731 (2006). Moreover, with respect to a ruling admitting evidence of a complainant's past sexual behavior, the right of interlocutory appeal "is a necessary corollary of [Rule 412's] explicit protection of the privacy interests Congress sought to safeguard." *Cf. Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (finding a victim's right of interlocutory appeal from an order admitting evidence of prior sexual behavior). The Defendant does not contest that this issue is properly before the court.

defense motion to exclude certain out of court statements made by Defendant's intern. For the reasons that follow, we too reject the Government's arguments and affirm the decisions below.

I. Factual Background

Defendant-Appellee Armand LaMonde ("LaMonde"), stands indicted on one count of aggravated sexual abuse under 18 U.S.C. § 2241(b). According to the indictment, on September 9, 2009, LaMonde knowingly and without permission administered a date-rape drug known as Nok-Out to Abigail Larkin ("Larkin"), thereby substantially impairing her ability to appraise or control her conduct, and then engaged in sexual intercourse with Larkin.

The following factual summary is drawn from the allegations in the indictment and the record of the pretrial motions. During September 2009, Boerum City, Boerum, hosted its semiannual Boerum Fashion Week ("Fashion Week") in Cadman National Park ("Cadman Park"). Fashion Week is an invitation-only event, and admission is generally limited to the fashion industry, the fashion press, celebrities, and the rich and famous. Notably, this year the famed movie director Claire Eastwick was making an appearance at Fashion Week, seeking models for a documentary focusing on the world of fashion. Defendant, an up-and-coming designer and freelance photographer, attended Fashion Week with his intern, Betty Moon. LaMonde had reserved two separate rooms at the State-Star Hotel, located on Cadman Park grounds, for himself and Moon during Fashion Week. Larkin, a runway model and aspiring actress, was also in attendance throughout the week.

It is undisputed that at some point during an after-party on the evening of September 9, 2009, LaMonde and Larkin met and conversed for much of the evening. It is also undisputed that the director, Ms. Eastwick, happened to be a guest at the same party. Both sides also agree that LaMonde and Larkin left the party together, that Defendant accompanied Larkin to his hotel

room in the State-Star and that sometime after approximately 11:20 p.m. that same night,

Defendant engaged in sexual intercourse with Larkin. Beyond these facts, the two sides agree on

little.

"She Says"

Larkin maintains that during the after-party, at approximately 10:00 p.m., after drinking a glass of champagne with LaMonde, Larkin told him that she was tired and wanted to go home. LaMonde offered to drive her home to her apartment but asked her to first accompany him to his State-Star Hotel room to retrieve his car keys. Larkin agreed. She maintains that once they reached the hotel room, LaMonde pressured her to have another glass of champagne. She agreed, on the condition that LaMonde would drive her home directly thereafter. Larkin claims that at approximately 11:20 p.m., she began to feel nauseated and dizzy. She lost consciousness totally, awakening the following morning at 9:00 a.m., in Defendant's hotel room, finding herself naked in LaMonde's bed. At that time, she observed a bluish-purple rash on her lower legs, which she recognized as a bizarre but fleeting side effect unique to the date-rape drug known as Nok-Out. She quickly dressed and left the hotel.

Larkin claims that she went home feeling panicked, and later that day on September 10, 2009, she reported to police that she had been drugged and raped. At that point there was no physical evidence that Larkin had been administered the infamous Nok-Out drug because it leaves the body so quickly. A rape kit confirmed the presence of semen that had been deposited within the last twenty-four hours. There was no evidence of force. Subsequent DNA tests found that LaMonde was the source of the semen.

As noted above, the Defendant does not deny having sexual intercourse with the complainant. Rather, the defense maintains that the sex was consensual and that he did not give Nok-Out, or any other drug, to Larkin. Defendant's version of events is that at the party on the evening of September 9, 2009, he found himself engrossed in conversation with the director, Ms. Eastwick, who was on the lookout for models to cast in her upcoming documentary. When the conversation ended, and Ms. Eastwick had drifted away, LaMonde was approached by a young model, Larkin, who seemed very interested in his relationship with Ms. Eastwick. LaMonde claims that he jokingly told Larkin that he was "great friends" with Ms. Eastwick and that, if Larkin was looking to land a part in Ms. Eastwick's film, he could probably put in a good word for her. According to LaMonde, Larkin was very friendly for the rest of the evening, and they continued to discuss LaMonde's industry connections. At the end of the evening, Larkin asked if she could accompany LaMonde to his hotel room. LaMonde agreed. Shortly after arriving at the State-Star, at what LaMonde claims was Larkin's initiation, they had sexual intercourse.

LaMonde claims that the next morning, Larkin immediately brought up the director and what steps he could take to put them in touch. At that point, LaMonde explained that he did not really know Ms. Eastwick—that he had, in fact, just met her that previous night. The complainant became angry, and it became clear to LaMonde that Larkin's understanding was that if she slept with LaMonde, he would help her secure a role in Ms. Eastwick's film.

LaMonde insists that the allegations of drugging and rape are in retaliation for his failure to live up to his end of the "bargain" that Larkin believed they had struck. He claims that Larkin never mentioned that she was feeling ill, that she appeared cognizant of what went on the entire evening, that she readily consented to sexual relations with him, and that he did not drug her.

"The Intern Says"

Later in the morning of September 10, LaMonde's intern Moon, knowing LaMonde had by that time left for another fashion event, entered his hotel room, which LaMonde had left open for her. She picked up a package to mail as LaMonde had requested the day before, and she also picked LaMonde's suit up from the floor, intending to bring it to the dry-cleaner located on the ground floor of the hotel. In the process of picking up the suit, Moon discovered a dropper bottle labeled "Nok-Out" in a pocket of the suit. She put it in her handbag and took it home with her. Later that day, while preparing to go out for the evening and drinking mojitos, Moon described the events of the morning, including the bottle and how she discovered it, to her friend and roommate Fiona Yaris. Moon was scheduled to begin a several-week vacation the following day, but she died in the early morning hours of September 11, after being struck by a car. Later, Ms. Yaris handed the bottle over to the police upon hearing of the rape charges against LaMonde. The contents of the bottle were tested and determined to be the narcotic drug commonly known as Nok-Out. The only fingerprints on the bottle belong to Ms. Moon and Ms. Yaris. Ms. Yaris is the only person who can testify as to how Ms. Moon happened upon the bottle of Nok-Out.

II. Procedural Background

LaMonde was arrested on September 13, 2009. After he waived his *Miranda* rights, he admitted to having sexual intercourse with Larkin, but insisted that the sex was consensual and denied knowing anything about the bottle of Nok-Out allegedly discovered in his hotel room by his intern.

On February 2, 2010, the Grand Jury returned a one-count indictment charging LaMonde with aggravated sexual abuse under 18 U.S.C. § 2241(b).

The Pre-trial Motion

Shortly after LaMonde's indictment, the Government moved in limine to admit under Rule 413 evidence of a 2002 sexual assault by the Defendant, committed in violation of a Boerum State statute. Allegedly, in 2002, LaMonde engaged in sexual intercourse with a sixteen-year-old high school student when he was twenty-seven years old, thus committing statutory rape. LaMonde was never criminally charged in connection with this incident.

For its part, the defense moved to admit under Rule 412(b)(1)(C) evidence relating to three of the complainant's past sexual encounters with individuals other than the Defendant. He argues that these three incidents support his defense that Larkin freely consented to sexual intercourse and lied about being unconscious. Specifically, the Defendant sought to introduce testimony that Larkin once threatened to accuse an instructor's assistant of rape when she did not receive a favorable review in her acting class and that on two other occasions she engaged in sexual intercourse with fashion industry figures in order to obtain desirable modeling contracts.

The defense also moved to exclude the out-of-court statements the intern made to her roommate relating to the discovery of the bottle of Nok-Out. The Government contends that the statements were admissible under Rule 801(d)(2)(D) as statements by an agent of a party opponent concerning a matter within the scope of employment and during the existence of the employment relationship.

The District Court heard argument on these motions in limine and granted LaMonde's motion to exclude the intern's statement. The court also granted LaMonde's motion to admit the three sexual incidents involving Larkin. It denied the Government's motion to admit evidence of Defendant's prior sexual assault.

The Government appealed all of these decisions to this Court.

III. Analysis

A. Defendant's Prior Sexual Assault—Rule 413

As noted, the District Court denied the Government's motion to admit, pursuant to Rule 413, evidence of the Defendant's previous alleged sexual misconduct, to wit, a "statutory rape" under the law of the State of Boerum. The admissibility of this evidence under Rule 413 presents two separate issues. The first is whether evidence of Defendant's prior sexual assault is the type of conduct admissible pursuant to Rule 413. Assuming, arguendo, that it is admissible under Rule 413, the second issue is whether admitting this evidence against the Defendant at trial violates his constitutional right to Due Process.

Rule 413 permits evidence of other sexual assaults to be admitted at a criminal defendant's sexual assault trial for "its bearing on any matter to which it is relevant." Fed. R. Evid. 413. At the time of its enactment by Congress in 1994, Rule 413 was widely considered by the legal community to be a dramatic departure from traditional rules of evidence. At the crux of its detractors' complaints was the fact that Rule 413 makes evidence of a defendant's other sexual misconduct admissible as evidence of defendant's propensity to commit the charged offense. As such, Rule 413 departs from the common law rule governing evidence of prior bad acts, codified in the Federal Rules of Evidence, which provides that such evidence is not admissible at trial "to prove the character of a person in order to show action in conformity therewith," that is, in order to demonstrate the Defendant's propensity to commit bad acts. Fed. R. Evid. 404(b).

² The Advisory Committee on Evidence Rules convened after congressional passage of Federal Rules of Evidence 413, 414, and 415 in October 1994, and the "overwhelming majority" of the judges, lawyers, and law professors present opposed the new rules, with the only supporting party being the U.S. Department of Justice. Fed. R. Evid. 413 advisory committee's note.

1. Admissibility Under Rule 413

The Government sought to admit evidence of the then twenty-seven-year-old Defendant's statutory rape of sixteen-year-old Lila Bassett. Defendant concedes that he had intercourse with Bassett, but the defense characterizes the incident as factually, if not legally, consensual. The Defendant's conduct violated the criminal code of the state of Boerum, which criminalizes acts "of sexual penetration" committed by persons 21 or older with "victims" between the ages of 13 and 17.

In subsections (d)(1) – (d)(5), Rule 413 permits the prosecution to present evidence of "an offense of sexual assault," falling within any of the five separate categories.³ Conceding that none of the other four categories is applicable, the Government argues that the evidence here is admissible pursuant to Rule 413(d)(2).⁴ That Rule, enacted presumably as a fail-safe to authorize the admission of evidence of sexual assault crimes not covered by Chapter 109A, allows evidence of an incident involving sexual contact "without consent" between the

³ Rule 413(d) provides as follows:

For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

- (1) any conduct proscribed by chapter 109A of title 18, United States Code;
- (2) contact, without consent, between any part of the Defendant's body or an object and the genitals or anus of another person;
- (3) contact, without consent, between the genitals or anus of the Defendant and any part of another person's body;
- (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

⁽⁵⁾ an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4). Fed. R. Evid. 413(d).

In particular, the Government agrees that subsection (d)(1) is inapplicable. That provision allows for evidence of conduct proscribed by state law if that conduct is also prohibited under Chapter 109A of Title 18 of the United States Code, which concerns "sexual abuse" crimes. However, unlike the Boerum statute, which criminalizes adult sexual intercourse with a child under the age of 17, Chapter 109A only criminalizes sexual intercourse by an adult with a child under the age of 16. Thus, 413(d)(1) is plainly inapplicable here.

Defendant and another person in violation of state or federal law. The Government contends that the evidence of sexual intercourse between the Defendant and Ms. Bassett, which both parties agree occurred, was without consent under the Boerum Criminal Code and is therefore admissible. In particular, the Government points to Boerum Criminal Code §120.00(b), providing that "a person under 17 years of age is deemed incompetent to consent to sexual conduct with a person who is 21 years of age or older." Therefore, goes the argument, since Ms. Bassett was legally incapable of giving consent at the time of the sexual contact, the incident at issue is evidence of "an offense of sexual assault" without consent under Rule 413.

We reject the contention that a state statute presuming a person's incapacity to consent renders evidence of statutory rape admissible under Rule 413(d)(2) without a showing of actual lack of consent. Taken in its plain meaning, "consent" is willing participation. Nothing in the language of Rule 413 suggests otherwise, nor is there any provision concerning a presumption of incapacity to consent contained in the Federal statutes that prohibit sexual assault. *See* 18 U.S.C. §§2241 et seq. Thus, there must be a showing that there was a lack of consent *in fact* before evidence of prior sexual contact may be admitted as an "offense of sexual assault" under Rule 413(d)(2). Holding otherwise would subject defendants to the vagaries of state law and result in the inconsistent application of Rule 413.

Notably and conclusively, in her affidavit, Ms. Bassett swears that the sexual conduct was in fact consensual. Thus, it does not constitute an "offense of sexual assault" under Rule 413. We therefore affirm the District Court's decision that the proffered evidence is inadmissible.

2. Due Process

The District Court held that Rule 413 violates the Due Process Clause of the Fifth Amendment when it is used solely for the purpose of demonstrating propensity, as the Government seeks to do in this case. Rule 413 provides that evidence of the defendant's commission of another offense of sexual assault is admissible "for its bearing on any matter to which it is relevant," thus allowing such evidence to be used to prove propensity. This differs from the Federal Rules' treatment of non-sexual prior bad acts, which can never be used to show propensity; instead, evidence of non-sexual prior bad acts is only admissible in very limited circumstances, such as to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Fed. R. Evid. 404(b). The Government has not asserted that the evidence of Defendant's prior sexual assault should be admissible for any of those reasons.

Defendant contends that allowing evidence of his prior sexual assault under Rule 413 will violate his constitutional right to Due Process by denying him a fair trial. He argues that admission of the prior act of sexual assault will create a strong bias against him in the minds of the jurors. Defendant further asserts that this evidence undermines the presumption of innocence and creates the danger of convicting a Defendant based on what he has done in the past rather than on the proof of the present criminal charges. We agree.

The Due Process Clause is violated when those "fundamental conceptions of justice which lie at the base of our civil and political institutions" are denied. *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). The Supreme Court has not yet reached or expressed an opinion on whether the Due Process Clause would be violated by a law permitting the use of prior bad acts to show propensity to commit a charged

crime. See Estelle v. McGuire, 502 U.S. 62, 75 n.5 (1991). The Supreme Court, however, has long recognized that courts that "follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." Michelson v. United States, 335 U.S. 469, 474 (1948). We agree with the defense that the long-standing prohibition on the use of prior bad acts as propensity evidence supports a conclusion that admission of such evidence violates the Due Process Clause by denying "fundamental concepts of justice." See Lovasco, 431 U.S. at 790; see also Cox v. State, 781 N.W.2d 757 (Iowa 2010) (so concluding under the Due Process Clause of the State Constitution, Art. 1 §9). Put simply, the danger of bias and dilution of the Government's burden of proof renders Rule 413 unconstitutional whenever, as it was apparently designed by its drafters to do, it renders admissible prior sexual assault as evidence of propensity to commit the charged crime.

According to the Government, the Rule 403 balancing test, which is applicable to propensity evidence sought to be admitted under Rule 413, *see*, *e.g.*, *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998); *see also* 140 Cong. Rec. H8968-01, H8991 (Aug. 21, 1994) (statement of Rep. Molinari), provides adequate safeguards against the admission of highly prejudicial evidence against a defendant, by requiring the trial judge to balance the probative value of sexual propensity evidence against its prejudicial effect. The 403 balancing test requires for exclusion that the prejudicial effect of evidence must substantially outweigh its probative value. However, since Rule 413 in effect makes propensity probative and admissible, that kind of balancing is a meaningless, empty formality, because the scale is weighted—one might even say the deck is stacked—against a defendant's Due Process Right to a fair trial.

For the above reasons, we hold that Rule 413 is unconstitutional when used to prove a defendant's propensity to commit the crime charged. Like evidence of non-sexual prior bad acts, prior instances of sexual assault should only be admitted in limited circumstances, such as to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Fed. R. Evid. 404(b). The Government did not assert that the evidence was admissible for an alternative purpose under 404(b), and we decline to consider such question.

Finally, we decline to consider the Government's arguments that the special nature of sexual assault justifies admission of propensity evidence. We note only that such an argument is neither supported by empirical evidence, nor rationality.

B. The Federal Rape Shield Statute—Rule 412

The admissibility of evidence regarding the complainant's three past sexual encounters (the "412 evidence") presents two issues: (1) whether excluding the evidence would violate the constitutional rights of the Defendant; and (2) whether the federal rape shield statute bars the complainant's prior threat to falsely claim rape.

1. The Complainant's Past Sexual Behavior

It is uncontested that if the evidence relating to the complaining witness's past sexual behavior with third parties is admissible, it must be because it is "evidence the exclusion of which would violate the constitutional rights of the Defendant." *See* Fed. R. Evid. 412(b)(1)(C). "[W]e review evidentiary rulings de novo when they implicate constitutional rights." *Pumpkin Seed v. United States*, 572 F.3d 552, 558 (8th Cir. 2009). The District Court determined that to exclude the 412 evidence would violate the Defendant's constitutional rights under the Fifth and Sixth Amendments. We agree.

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)) (internal quotation marks omitted); *see also Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Of course, a criminal defendant's right to confrontation must accommodate other legitimate concerns, but any restrictions on that defendant's right must be in proportion to the Government interests served by the rule. *See Michigan v. Lucas*, 500 U.S. 145, 151 (1991).

Congress enacted rape shield legislation to further the reporting and prosecution of sexual offenses and to eliminate the false assumption that the "unchastity" of a victim could be equated with dishonesty. *See, e.g.*, Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 764 (1986). Nonetheless, where evidence is highly probative, those state interests cannot justify its exclusion. *State v. Jones*, 230 P.3d 576, 581 (Wash. 2010). In arriving at the proper balance, the evidence's relevance, the potential for prejudice, and the necessity for the evidence must be considered. *Johnson v. State*, 632 A.2d 152, 160 (Md. 1993).

Under the circumstances of this case, the evidence in question is highly probative and critical to the defense. First, the defense theory is that the sexual relations were consensual, that the complainant lied in denying consent and claiming to have been drugged, and that she had a strong motive to lie. This case essentially involves a credibility contest, the classic he-said/she-said. *Cf. Gagne v. Booker*, 606 F.3d 278, 287-88 (6th Cir. 2009) (the 412 evidence was "not just relevant to this case, it was in all likelihood the most relevant evidence regarding the sole contested issue at trial"), *rehearing en banc granted and opinion vacated*,_F.3d_ (July 20, 2010). Extrinsic evidence is especially important when "the only means of ascertaining . . . mental state

is by drawing inferences from conduct." *Huddleston v. United States*, 485 U.S. 681, 685 (1988). "The *nature* of the complainant's prior sexual activity, rather than its mere existence, provides the only reliable indicator of present consent." Abraham P. Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 Cornell L. Rev. 90, 93 (1977) (emphasis added).

The Defendant's proffered evidence has a "special relevance" to his defense—one that "transcends mere evidence of . . . sexual promiscuity." *Johnson*, 632 A.2d at 152. In *Johnson*, Maryland's highest court held that when the defendant offered evidence that the complainant had traded sex for cocaine in the past, it was not to attack her general character; "rather, it was to show that she had the disposition, displayed at some earlier time, to engage in such conduct and from that conduct coupled with her not having been paid, that she falsely accused [defendant] of rape." *Id.* at 160. The evidence in this case serves that same permissible—and essential—purpose. Thus, the prior consensual intercourse of Larkin at issue here supports Defendant's version of the incident in that it shows that the complainant engaged in a pattern of sexual relationships based on "contract and consent." *See Winfield v. Commonwealth*, 301 S.E.2d 15, 20 (Va. 1983). Moreover, the evidence here strongly indicates that when the complainant did not receive the benefit of the bargain, she was likely to retaliate with a charge of rape.

The three incidents offered by the defense, together with the Defendant's own encounter with the complainant, would show a pattern of the complainant engaging in sexual activity for the purpose of advancing her career. Without this evidence, the Defendant would have no means of showing the jury that the complainant is willing to engage in sexual relations with individuals as part of a "contract" and that she is willing to claim rape when she does not get the results for which she bargained.

2. The Threat to Make a False Claim of Rape

At a minimum, Larkin's prior threat to make a false claim of rape against the teaching instructor is admissible, because it is not covered by Rule 412, and even if it should fall within 412, its exclusion would violate Defendant's constitutional rights.

Rule 412 excludes evidence offered solely to prove the victim's sexual behavior and alleged sexual predisposition. The Advisory Committee noted that this rule thus bars evidence of past physical conduct and of "activities of the mind, such as fantasies and dreams." Fed. R. Evid. 412 advisory committee's notes to 1994 amendments. A complainant's prior untruthful allegation of rape, however, constitutes neither physical conduct nor mental activities akin to fantasies and dreams. Notably, the vast majority of the courts addressing this issue agree. In such cases, a defendant is not attempting to inquire into the complaining witness's sexual history to reveal unchaste character; rather, false statements bear directly on the alleged victim's credibility. *See State v. Clark*, 219 P.3d 631, 637-38 (Utah Ct. App. 2009).

Moreover, false rape allegations are "sufficiently distinguishable from sexual activity that they should not be covered by Rule 412. Evidence of a false rape allegation does not intrude into the zone of private and personal activity that the Rule is trying to protect." S. Saltzburg, M. Martin & D. Capra 2 Fed R. Evid Man. Commentary to 412.02[4] at pp. 412-10-11 (9th Ed. 2006). In fact, the Advisory Committee Notes accompanying the 1994 amendments to Rule 412 state explicitly that "[e]vidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412." *See* Fed. R. Evid. 412 advisory committee's note to 1994 amendment.

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⁵ The majority of state courts have concluded that prior false allegations of rape are not past sexual behavior under state rape-shield statutes. *See, e.g., In re K.W.*, 666 S.E.2d 490, 494 (N.C. Ct. App. 2008) (false accusation not "sexual behavior" within state rape-shield law); *State v. Bray*, 813 A.2d 571, 577-78 (N.J. Super. App. Div. 2003) (not within meaning of New Jersey rape shield law). In addition, some states have enacted explicit statutory exceptions for false accusation evidence. *See, e.g.*, Vt. Stat. Ann. tit. 13, § 3255(a)(3)(C) (2005) ("Evidence of specific instances of the complaining witness" past false allegations of violations of this chapter."); Wis. Stat. §

Nonetheless, the Government contends that, as a practical matter, the falsity of the claim is inseparable from the underlying past sexual behavior. Put simply, this argument sweeps too broadly. Rule 412 was not designed to exclude evidence with a direct bearing on the accuser's credibility when it has only a tenuous connection to her sexual past. *See* Charles Allan Wright & Arthur K. Miller, *Federal Practice & Procedure* § 5384 (2010) ("The making of accusations is not the sort of intimate conduct that lies at the core of Rule 412 and if the accusations are false, they do not prove such conduct even though sexual behavior is the subject of the accusation."); *see also* Galvin, *supra* 70 Minn. L. Rev. at 858 ("One would be hard-pressed to dispute the high probative value of evidence that on prior occasions the complainant had made false allegations of rape."). We hold, therefore, that false accusations do not fall within the ambit of Rule 412 and are admissible if relevant.

A constitutional analysis also favors admissibility. Even if prior false rape accusations can be classified as "sexual behavior" or "sexual predisposition," the privacy rights of an alleged sex crime victim must sometimes yield to a criminal defendant's constitutional right to cross-examine his accuser and to put on a defense. Indeed, Rule 412 recognizes that evidence otherwise excluded by the rape-shield law must be admitted if "constitutionally required." Fed. R. Evid. 412(b). The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (citation and internal quotation marks omitted). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," *id.* at 316, and it generally includes the right to examine and prove a witness's motive to fabricate, *Olden v. Kentucky*, 488 U.S. 227, 231-32 (1988) (per curiam).

972.11(2)(b)(3) (2005) ("Evidence of prior untruthful allegations of sexual assault made by the complaining witness").

Of course, not all conceivable methods of impeaching credibility are constitutionally guaranteed. *Boggs v. Collins*, 226 F.3d 728, 736 (6th Cir. 2000). The Supreme Court has emphasized the distinction between a general attack on the credibility of a witness (i.e., that the witness is more likely to be lying because she had lied about one thing or another in the past) and a more particular attack on credibility (i.e., the witness is more likely to be lying due to bias, prejudice, or ulterior motive). *Davis*, 415 U.S. at 316. Evidence showing a particular motive to fabricate—the latter type of credibility attack—is "always relevant as discrediting the witness and affecting the weight of the testimony," and is part of an accused's constitutionally protected right of cross-examination. *Id; see also Olden*, 488 U.S. at 231-32.

Here, the Defendant's proffered evidence of complainant's prior threat to make a false claim of rape goes beyond general attack on credibility and relates to the complainant's specific motive to fabricate, that is, retaliating when she did not receive the benefit for which she had bargained.

Thus, the District Court correctly concluded that the Confrontation Clause mandated admission of evidence of the prior threat to claim falsely that a rape had occurred. To hold otherwise would be to permit Rule 412 to be "manipulated by the Government or the complainant so as to envelop the complainant's motivation or state of mind in a shroud of statutory inadmissibility, thereby depriving Defendant of 'a proper and important function of the constitutionally protected right of cross-examination." *United States v. Stamper*, 766 F. Supp. 1396, 1406 (W.D.N.C. 1991) (citing *Davis*, 415 U.S. at 316-17).

C. Vicarious Admissions

The District Court held that the out-of-court statements of intern Betty Moon were hearsay and refused to admit them as non-hearsay admissions under Rule 801(d)(2)(D). We

agree. The Rule provides that a statement is not hearsay if "[t]he statement is offered against a party and is ... (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(D). We conclude that an unpaid intern cannot, as a matter of law, be an "agent or servant" for purposes of the rule, that statements made entirely outside of the work setting are not made "during the existence of the relationship," and that those statements did not relate to a matter "within the scope of" her employment.

1. Unpaid Interns Are Not Servants or Employees

The question before us is somewhat novel. Though numerous cases have addressed the question of whether non-employees can be treated as agents or servants under the Rule, we know of none that specifically addresses unpaid interns. Some courts have distinguished independent contractors from agents under Rule 801(d)(2)(D), but this distinction tends to hinge on the degree of control over the contractor. *See*, *e.g.*, *Lippay v. Christos*, 996 F.2d 1490 (3d Cir. 1993); *Brandt v. Wand Partners*, 242 F.3d 6 (1st Cir. 2001). The agent/independent contractor distinction is thus not particularly instructive as to how to classify an intern who in some ways may act like an employee but is uncompensated.

Compensation, however, is an essential element of an agency relationship, and courts have held as much in other contexts. *See, e.g., O'Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997) (noting the "essential condition of remuneration" under common law agency principles and finding an unpaid intern not to be an employee); *Graves v. Women's Prof'l Rodeo Ass'n*, 907 F.2d 71, 72-73 (8th Cir.1990) (unpaid rodeo dancer not an employee). The reason we find that an unpaid intern is not an agent or servant for purposes of vicarious admissions under Rule

801(d)(2(D) is that a person depending on an employer for compensation has a disincentive to lie about that employer, whereas an uncompensated intern has a far less powerful disincentive.

Consequently, as a matter of law the unpaid intern Betty Moon cannot be considered an "agent or servant" under Rule 801(d)(2)(D).

2. Statements Made During the Existence of the Relationship Under Rule 801(d)(2)(D)

Even assuming an unpaid intern could be deemed an agent or servant, we find other barriers to the admission of Betty Moon's statements under Rule 801(d)(2)(D). This Rule only encompasses statements made "during the existence of the [employment] relationship." Rule 801(d)(2)(D). The Second Circuit summarized the rationale behind 801(d)(2)(D) as follows:

The Advisory Committee Notes [to Federal Rule of Evidence 801(d)(2)(D)] observe that because admissions against a party's interest are received into evidence without many of the technical prerequisites of other evidentiary rules-such as, for example, trustworthiness and personal knowledge—admissibility under this rule should be granted freely. Liberal admissibility of this sort of proof is grounded on certain premises. One is that an employee is usually the person best informed about certain acts committed in the course of his employment, and another is that while still employed an employee is unlikely to make damaging statements about his employer, unless those statements are true. Pappas v. Middle Earth Condominium Ass'n, 963 F.2d 534, 537 (2d Cir. 1992) (emphasis added).

When a person is in a casual setting, completely removed from the work place and speaking with a person or persons with no connection to the employer, the second of these premises disappears. Put simply, if there is no risk of detriment to one's employment in making a statement, there is no special disincentive to lie. Thus, there is no longer a rationale for treating the statement as an admission against interest.

Even assuming Betty Moon could otherwise be treated as an agent or servant under the rule, her statements to her roommate took place in their apartment under circumstances too far removed from her internship to be treated as vicarious admissions of Armand LaMonde. Ms.

Moon was consuming alcoholic beverages with her roommate—a person with no connection to Mr. LaMonde or his work—in the kitchen of their apartment after Ms. Moon had returned from a fashion event. To admit her statements under Rule 801(d)(2)(D) would grossly distort the spirit—if not the letter—of the rule. While we are aware that some circuits have admitted statements made in casual, non-work-related settings as vicarious admissions, we find their reasoning unpersuasive.

3. Scope of Agency or Employment

Ms. Moon was an unpaid intern who, on her own and without direct or indirect instructions from Mr. LaMonde, decided to take his suit to the cleaner and to search the suit before doing so. Though her responsibilities as an intern were vague, it is clear to us that she was never authorized to decide which of Mr. LaMonde's clothing should be cleaned or to search his clothing whenever she wanted. Therefore, her statement concerning the contents of his suit pockets did not relate to a matter within the scope of her position as an intern and therefore is not an admission under Rule 801(d)(2)(D).

EVELYN NG, J., dissenting.

A. Defendant's Prior Sexual Offense—Rule 413

1. Propensity Under Rule 413

Nothing could be clearer than that Defendant's statutory rape of a sixteen-year-old girl fits within the plain language of Rule 413(d)(2) defining an "offense of sexual assault" as a crime involving sexual contact without consent.

The lawmakers of the State of Boerum were clear when they criminalized sexual abuse of a minor, providing that persons under 17 were deemed incapable of consenting to sexual conduct

with persons 21 years of age or older. The offense is one that, by definition, involves a lack of consent. *See* Boerum Criminal Code §120.00(b). And when Congress used the term "without consent" in Rule 413(d)(2), there is no reason to believe it meant to give that term anything but its commonly understood legal definition, which includes the incapacity of minors to consent. *See United States v. Rogers*, 587 F.3d 816, 820 (7th Cir. 2009).

Furthermore, the majority completely disregards the "categorical approach" utilized by federal courts in situations requiring comparison of state laws to federal laws. *See Taylor v. United States*, 495 U.S. 575 (1990). That approach requires courts to look only at the statutory definition of the offense, as opposed to the underlying facts of each individual act. *Id.; accord*, *Begay v. United States*, 553 U.S. 137, 141 (2008). Here, Defendant admits to violating Boerum Criminal Code §120.05, which requires only that an adult engage in sexual intercourse with an underage person, who is presumed incapable of consenting. Thus, under that very definition, Defendant committed a state crime involving sexual contact without consent. This is precisely the conduct that Congress intended Rule 413(d)(2) to encompass.

2. Due Process Is Not Offended

The majority incorrectly holds that Rule 413 violates the Due Process rights of the defendant. The majority argues that evidence of prior sexual assault is no different than evidence of other prior bad acts and so should not be admitted unless it falls into one of the traditional exclusionary exceptions contained in the Federal Rules of Evidence. *See*, *e.g.*, *Fed*. R. Evid. 404(b). Nonetheless, in enacting Rule 413 "Congress believed it necessary to lower the obstacles to admission of propensity evidence in a defined class of [sexual assault] cases." *Enjady*, 134 F.3d at 1431. Rule 413 carves out an additional sex crime propensity exception to

the prior bad acts propensity exclusionary rule. Congress' rationale for creating such an exception is based on the difference between cases involving sexual assault and other crimes.

First, Rule 413 embodies a policy judgment by Congress that prior sexual assaults are "exceptionally probative" of propensity because sexual offenders are more likely to repeat their crimes than others who commit nonsexual crimes. *See, e.g., United States v. Withorn,* 204 F.3d. 790 (8th Cir. 2004). Second and equally important is the difficulty of proving sexual assaults. In sexual assault cases, alleged consent by the victim is often, as here, the Defendant's defense. In fact, here, Defendant has claimed that the victim engaged in consensual sexual intercourse and is falsely accusing him. "Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes – the accused mugger does not claim the victim freely handed over his wallet as a gift.... Knowledge that the Defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches." *Enjady*, 134 F.3d at 1427.

Moreover, in enacting Rule 413, Congress put in place safeguards to ensure the evidence would not be overly prejudicial and would not result in a Due Process violation. First, Congress enacted a notice requirement, which "protects against surprise and allows the defendant to investigate and prepare cross-examination." *Id.* Second, before evidence can be admitted under Rule 413, it is subjected to the Rule 403 balancing test. The majority over-simplifies the balancing of prejudicial effect versus probative value in this context. Rule 403 balancing is a complex and thorough process. Before admitting evidence of a prior sexual assault, the trial judge should consider:

1) How clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the Government can avail itself of any less prejudicial evidence. When analyzing the probative dangers, a court considers:

1) how likely it is such evidence will contribute to an improperly-based jury verdict; 2) the extent to which such evidence will distract the jury from the central issue of the trial; and 3) how time consuming it will be to prove the prior conduct. *Enjady*, 134 F.3d at 1433 (citation omitted).

These factors provide a meaningful weighing of probative value versus prejudicial effect.

Where, as here, the prior and charged sexual assaults are strikingly similar, the probative value will almost invariably outweigh the risk of prejudice.

In sum, Rule 413 reflects congressional recognition that highly probative propensity evidence should be admitted in criminal and civil trials, and that in no way offends due process.

B. The Federal Rape Shield Statute—Rule 412

1. The Victim's Sexual History – the Statutory Claim

A criminal defendant's right to cross-examine witnesses and to present a defense is a qualified right—one that must give way to other compelling governmental interests. *See Michigan v. Lucas*, 500 U.S. 145, 149 (1991); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The United States Supreme Court has recognized that the legislature's interest in affording rape victims "heightened protection against surprise, harassment, and unnecessary invasions of privacy" is one that the defendant's right to present evidence in his defense must accommodate. *See Lucas*, 500 U.S. at 150.

A victim of rape should be able to report the crime without fearing that her reputation and character will come under assault during trial. *See Jeffries v. Nix*, 912 F.2d 982, 986 (8th Cir. 1990). While the problem of unreported sexual assaults is certainly not unique to the fashion industry, the goals of the statute appear especially compelling in this context. *See* Hadley Freeman, *Sexual Abuse of Models is Fashion's Dirty Secret*, GUARDIAN.CO.UK (Sept. 9, 2009), *available at* http://www.guardian.co.uk/commentisfree/2009/sep/09/hadley-freeman-sexual-

abuse-models (reporting industry surprise, not at sexual abuse of models, but that any models came forward to report the abuse).

A court need not engage in any balancing of interests where, as here, the past sexual conduct that the defense seeks to admit has no bearing on the current offense. A defendant has no right to present irrelevant evidence. *See*, *e.g.*, *Wood v. Alaska*, 957 F.2d 1544, 1549 (9th Cir. 1992). "[T]he fact that a woman has voluntarily engaged in a particular sexual activity on previous occasions does not provide appreciable support for an inference that she consented to engage in this activity with the defendant on the occasion on which she claims that she was raped." *Sandoval v. Acevedo*, 996 F.2d 145, 149 (7th Cir. 1993). That unfounded inference is precisely what a rape shield law aims to avoid. *Id.* at 151.

Evidence that the complainant had sex to further her career is no different than any other evidence of sexual promiscuity. *See State v. Lambert*, 749 So. 2d 739, 761 (La. App. 4th Cir. 1999). The evidence in this case carries a high risk of jury distraction and prejudice toward the victim, while the probative value is negligible at best. The evidence simply does not constitute a sufficiently distinctive pattern that might allow the jury to draw a permissible inference as to the complainant's behavior on the night of the charged rape. *See* Clifford S. Fishman, *Consent*, *Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 788 (1995).

The proffered sexual history of Ms. Larkin may have some slight probative value but it does not outweigh the risk of unfair prejudice. Nor is this evidence critical to the defense theory. LaMonde is free to testify to his version of events. *See Stephens v. Miller*, 13 F.3d 998 (7th Cir. 1994). The defense can also introduce evidence of the complainant's behavior toward the Defendant at the party, and can vigorously cross examine the complainant as to her conduct that

evening, her intentions toward the Defendant, and her understanding of his industry connections. Moreover, this is not a case involving highly unusual or deviant sexual activity, where a jury might have a hard time believing "that someone could have consented to this sort of thing . . . absent proof that the person *had* consented to it before." *Gagne v. Booker*, 606 F.3d 278, 288 (6th Cir. 2009), *rehearing en banc granted, opinion vacated*, _F.3d_ (July 20, 2010). Accordingly, Defendant's 412 evidence can serve no permissible purpose and the District Court's ruling to admit that evidence was in derogation of the legitimate interests protected by Rule 412. *See Pumpkin Seed v. United States*, 572 F.3d 552 (8th Cir. 2009).

2. The Threat to Make a False Claim of Rape

An alleged victim's prior false accusations of sexual misconduct necessarily implicate the victim's past sexual behavior. Evidence that an accusation was false is, by extension, evidence that the victim engaged in consensual sexual conduct with another person in the past. *United States v. Cardinal*, 782 F.2d 34, 36 (6th Cir. 1986) ("I don't see how you can separate evidence of a victim's past sexual behavior from the fact that she had made an allegation of rape and then withdr[ew] it. I think they are interwoven." [quoting the trial judge approvingly]). Evidence of a prior rape claim puts the victim on trial about her sexual history—the very result that Rule 412 was designed to avoid. *See State v. Quinn*, 490 S.E.2d 34, 46 (W. Va. 1997) (Maynard, J., dissenting).

The majority places undue weight on the Advisory Committee's one-sentence statement that prior false accusations fall outside of Rule 412. To be sure, Advisory Committee Notes may serve as a useful guide, but they are not dispositive. As Justice Scalia has noted with respect to the Federal Rules of Civil Procedure, "[t]he Advisory Committee's insights into the proper interpretation of a Rule's text are useful to the same extent as any scholarly commentary. But the

Committee's intentions have no effect on the Rule's meaning. [And] . . . it is the text of the Rule that controls." *Krupski v. Costa Crociere S.p.A.*, 130 S. Ct. 2485, 2498-99 (2010) (Scalia, J., concurring in part and concurring in judgment). Similarly, the text of 412 controls its interpretation and compels the conclusion that prior false accusations are protected by the shield of the Rule.

3. The Constitutional Claim

Nor does the exclusion of these prior rape claims infringe on Defendant's constitutional rights. No matter how central an accuser's credibility is to a criminal case, the Constitution does not require that the accused be given an opportunity to wage a general attack on the credibility of that witness by pointing to individual instances of past conduct. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974). In *Davis*, the Supreme Court distinguished between credibility attacks based on specific motive-based theory, which is a protected constitutional right of the accused, and general credibility, which is not. *Id*.

Here, the Defendant attempts to circumvent the *Davis* admonition by labeling his otherwise general credibility theory as one of motive—namely, that the complainant's past threat to retaliate with a rape charge after being misled demonstrates her motive to do the same in this case. However, "[s]imply labeling this general credibility argument to be one of 'motive' without articulating a theory of motive or partiality does not implicate the rights carefully outlined in *Davis*." *Boggs v. Collins*, 226 F.3d 728, 741 (6th Cir. 2000). The threat to make a false accusation of rape in similar circumstances adds nothing to the Defendant's purported motive theory other than the pure propensity reasoning rejected by Rule 412. *Cf. United States v. Saunders*, 736 F. Supp. 698, 701 (E.D. Va. 1990) ("Rule 412 . . . recognizes that whether a woman has consented once or myriad times, and whether she has done so for love or money, she

is, in any event, entitled by law to be free from nonconsensual sexual contact."). Put simply, Defendant's theory of the case hinges on the complainant's general credibility, not any specific bias, interest, prejudice, or motive.

Finally, despite Defendant's argument and the majority's view, the victim's prior consensual conduct and her exchange of sex for career advancement have no bearing here. This is so because the crime charged and the prosecution's theory had nothing to do with consent. Rather, the crime is aggravated sexual abuse by use of an intoxicant without the knowledge or permission of the victim. Neither in Defendant's brief, nor in the majority opinion is there a single word addressing the victim's consent and permission to be drugged by Nok-Out or another substance. Put another way, the defense of consent to the sexual act and the evidence of consent have nothing to do with the crime charged.

C. Vicarious Admission

The majority overreaches in both of its holdings regarding Rule 801(d)(2)(D). First, in holding that an unpaid intern can never be treated as an agent or servant, the majority creates a bright-line rule that is unwarranted, unnecessary, and likely to exclude otherwise relevant and reliable evidence without proper basis. The majority cites to *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997), and *Graves v. Women's Prof'l Rodeo Ass'n*, 907 F.2d 71 (8th Cir. 1990), for the proposition that compensation is an "essential condition" of the employer-employee relationship. But both of those cases concern employment discrimination and sexual harassment claims; it is unclear why the same reasoning should necessarily apply in the context of the Federal Rules of Evidence.

The Restatement (Third) of Agency defines agency as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the

agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Rest. 3d Agen. § 1.01. The definition contains no references to compensation. Further, in her capacity as an intern, Betty Moon appears to have fit this definition. She essentially performed the duties of a full-time assistant to Defendant, having consented to perform all kinds of professional and personal tasks at his command and functioning in almost all ways exactly like an employee. See Affidavit of Jacqueline Katz-Eliot (another of Defendant's former interns). Under all the circumstances here there is no reason that a title of "intern" or her lack of compensation should be dispositive under 801(d)(2)(D). This conclusion is also bolstered by the fact that today unpaid interns are slowly but surely becoming the mainstays of both big and small businesses. Interns are a fertile source of "cheap," good, dedicated, and skilled labor without whom many businesses cannot efficiently function and compete. The interns of today are compensated by the experience, knowledge, and training received, not to mention the contacts made, all of which often places them on the path to a successful career. Finally, importantly and completely ignored by the majority, intern Betty Moon was under the "control and direction" of Defendant. See United States v. Bonds, 608 F.3d 495, 504-07 (9th Cir. 2010). As such, she was as much a valued employee as those who earn a minimum wage or those who are paid an exorbitant amount of money for doing not that much, not that well.

Second, in holding that the conversation of an employer or servant with her roommate should be treated as not taking place "during the existence of the relationship" under 801(d)(2)(D), the majority ignores the plain meaning of the rule. An employee or intern does not cease being an employee or intern merely because she leaves the workplace and goes home; it would be absurd to claim the relationship ceases to exist at these times, only to reconstitute itself

upon a person's return to work the following day (or two weeks later after a vacation). Rule 801(d)(2)(D) requires only that a statement concern a "matter within the scope of the employment," not that the conversation itself take place within that scope. *See, e.g., Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 230–231 (6th Cir. 1990). Significantly, the majority cites not a single authority supporting its departure from the Rule's text.

The majority holds that Ms. Moon's statement was inadmissible because it did not concern a matter within the employment relationship. This conclusion ignores the virtually open-ended nature of her responsibilities. The record clearly establishes that her duties included every imaginable task as well as running personal errands. Taking a suit to the cleaners is reasonably part of this broad portfolio. Therefore, her decision to take the suit to the cleaners and to first remove items from the pockets are matters well within the employment relationship and therefore a party admission under Rule 801(d)(2(D).

* * *

The out-of-court statements of Betty Moon are a crucial element of the Government's case, providing a direct link between the Defendant and the drug that was allegedly used to render Abigail Larkin unconscious. They are exactly the type of statement envisioned as vicarious non-hearsay party admissions under Rule 801(d)(2)(D), and there is no reason why they should be treated as excludable hearsay.

IN THE SUPREME COURT OF THE UNITED STATES October Term, 2010

UNITED STATES OF AMERICA,

Petitioner,

-against-

ARMAND LAMONDE,

Respondent.

December 13, 2010

The petition for a writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is granted, limited to the following certified questions.

Ι

- A) Is a criminal defendant's admitted but unprosecuted prior sexual intercourse with a sixteen-year-old girl, which constituted statutory rape under state law, a sexual assault under Federal Rule of Evidence 413(d)(2) and thus admissible under that Rule to prove defendant's propensity to commit a subsequently charged sexual assault of a different victim?
- B) Does introduction of a prior act of statutory rape under Federal Rule of Evidence 413(a) solely to establish defendant's propensity to commit a subsequent sexual assault of another person violate a criminal defendant's constitutional right to Due Process?

Π

- A) In a sexual-abuse prosecution of defendant for engaging in sexual intercourse with a woman after drugging her without her consent or permission, does the Constitution require the admission of evidence that the woman on three prior occasions had consensual intercourse with three other men who she believed could advance her career?
- B) Does Federal Rule of Evidence 412(a)(1) & (2) barring introduction of a sex-crime victim's prior sexual behavior or evidence of her sexual predisposition encompass a threat made by the victim to claim falsely that she had been raped by a man with whom she had consensual sex?

- A) Is an unpaid intern/assistant an agent or servant within the meaning of the Federal Rule of Evidence 801(d)(2)(D) definition of a party admission, and if so
- B) Does the statement of an intern to her roommate about a dropper bottle found in her employer's suit jacket concern "a matter within the scope of [her] ... employment [and] made during the existence of the [employment] relationship," thereby rendering it a party admission of the employer under Federal Rule of Evidence 801(d)(2)(D)?