

## Let's Talk Specifics: Why STI Evidence Should Be Treated as a "Specific Instance" Under Rape Shield Laws\*

*The federal government and individual states have enacted rape shield laws in response to concerns that victims of sexual violence were underreporting and experiencing undue humiliation at trial. Designed to bar evidence related to the alleged victim's sexual behavior or sexual predisposition, rape shield laws prevent defendants from offering evidence regarding the victim's sexual conduct unless it falls within three exceptions. One of these exceptions to the general inadmissibility of sexual behavior evidence—the "specific instance" exception—allows a court to admit "specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence."*

*This Recent Development argues evidence of sexually transmitted infections ("STIs") constitutes a "specific instance" under rape shield laws. To minimize the retraumatization many victims experience when their sexual past is put forth at trial, the justice system has overcorrected at the expense of defendants' rights. Admitting STI evidence would both protect defendants' constitutional rights and comport with the purpose of rape shield laws.*

### INTRODUCTION

Since 2017, more than eighty women have accused film producer Harvey Weinstein of rape, sexual assault, and sexual abuse that occurred over a period of at least thirty years.<sup>1</sup> In 2018, during Supreme Court Justice Brett Kavanaugh's Senate confirmation process, Dr. Christine Blasey Ford accused him of sexually assaulting her while they were teenagers in high school.<sup>2</sup> Since then, female college classmates of Justice Kavanaugh's have come forward with similar accusations from their time at Yale.<sup>3</sup> Then, in 2019, prosecutors charged

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1. See Brooks Barnes & Jan Ransom, *Harvey Weinstein Is Said To Reach \$44 Million Deal To Settle Lawsuits*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/business/harvey-weinstein-settlement.html> [<https://perma.cc/AB7Q-8J7P> (dark archive)].

2. See Ronan Farrow & Jane Meyer, *A Sexual-Misconduct Allegation Against the Supreme Court Nominee Brett Kavanaugh Stirs Tension Among Democrats in Congress*, NEW YORKER (Sept. 14, 2018), <https://www.newyorker.com/news/news-desk/a-sexual-misconduct-allegation-against-the-supreme-court-nominee-brett-kavanaugh-stirs-tension-among-democrats-in-congress> [<https://perma.cc/7ZRUGHGT>].

3. Sandra E. Garcia, *Calls for Kavanaugh's Impeachment Come amid New Misconduct Allegations*, N.Y. TIMES (Sept. 15, 2019), <https://www.nytimes.com/2019/09/15/us/brett-kavanaugh-allegations-trump-impeach.html> [<https://perma.cc/Y8FN-X6AR> (dark archive)] (describing another recent

financier Jeffrey Epstein with sex trafficking, and multiple women accused him of rape.<sup>4</sup> These three recent and notorious examples of sexual violence follow the emergence of the #MeToo movement, a national outcry for greater protections and more recognition for victims of sexual abuse and assault.<sup>5</sup> Even earlier, in 1994, Congress recognized the need for reform in its treatment of such allegations with the passage of Title IV of the Violent Crime Control and Law Enforcement Act, the Violence Against Women Act (“VAWA”).<sup>6</sup> This legislation sought to better recognize and support victims of domestic and sexual violence while maintaining the rights of criminal defendants.<sup>7</sup>

Protecting the privacy interests of victims of sexual assault against humiliation of past sexual activity is important. In the context of the criminal process, testifying in open court—much less coming forward with an allegation—is incredibly daunting and carries the risk of embarrassment, at best, and retraumatization, at worst.<sup>8</sup> However, protecting the constitutional rights

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allegation of an instance of the Justice’s sexual misconduct against a Yale classmate during his college years).

4. See Jane Coaston, Anna North & Andrew Prokop, *Jeffrey Epstein, the Convicted Sex Offender Who Was Friends with Donald Trump and Bill Clinton, Explained*, VOX (Sept. 4, 2019), <https://www.vox.com/2018/12/3/18116351/jeffrey-epstein-case-indictment-arrested-trump-clinton> [<https://perma.cc/MV3W-7ED9>].

5. See *About*, METOO., <https://metoomvt.org/about/> [<https://perma.cc/B5WZ-3XCU>] (“The ‘me too.’ movement was founded in 2006 to help survivors of sexual violence, particularly Black women and girls, and other young women of color from low wealth communities, find pathways to healing. . . . What started as local grassroots work has expanded to reach a global community of survivors from all walks of life and helped to de-stigmatize the act of surviving by highlighting the breadth and impact of a sexual violence worldwide.”); see also Alia E. Dastagir, *It’s Been Two Years Since The #MeToo Movement Exploded. Now What?*, USA TODAY (Sept. 30, 2019), <https://www.usatoday.com/story/news/nation/2019/09/30/me-too-movement-women-sexual-assault-harvey-weinstein-brett-kavanaugh/1966463001/> [<https://perma.cc/PGC4-8E2F>] (providing an overview of the explosive growth of the “#MeToo” movement from 2017–19).

6. See generally Violence Against Women Act of 1994, Pub. L. 103–322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of the U.S. Code) (“In addressing the subject of sexual assault, domestic violence, and other criminal and unlawful acts that particularly affect women . . .”); *ACLU Letter to the Senate Judiciary Committee Regarding the Violence Against Women Act of 2005*, S. 1197, AM. C.L. UNION, <https://www.aclu.org/letter/aclu-letter-senate-judiciary-committee-regarding-violence-against-women-act-2005-s-1197> [<https://perma.cc/82R7-XR5N>] (stating VAWA has been regarded as “one of the most effective pieces of legislation enacted to end domestic violence, dating violence, sexual assault, and stalking”).

7. See *History of VAWA*, LEGAL MOMENTUM, <https://www.legalmomentum.org/history-vawa> [<https://perma.cc/66HX-7TW2>] (“In recognition of the severity of the crimes associated with domestic violence, sexual assault and stalking, Congress passed . . . [VAWA,] marking the first comprehensive federal legislative package designed to end violence against women.”).

8. See K. Alexis Johnson, *Military Rule of Evidence 412: Can Too Much Balancing Tip the Scales of Justice?*, 9 LIBERTY U. L. REV. 145, 146 (2014) (“Embarrassment and humiliation usually come in the form of cross-examination during a criminal proceeding for charges of sexual assault.”). A major distinction between Military Rule of Evidence 412 and Federal Rule of Evidence 412 is that the military version of the rule maintained a balancing test despite Congress eliminating it from the federal criminal evidentiary rule. See Shane R. Reeves, *Time To Fine-Tune Military Rule of Evidence 412*, 196 MIL. L. REV. 47, 64 n.102 (2008) (noting that the Joint Service Committee on Military Justice

of defendants “must not be overlooked in the interest of shielding the privacy interests of victims.”<sup>9</sup> In these cases, courts should not forget a defendant’s constitutional rights—the right to a fair trial, the right to confront the witnesses against him, and the right to present evidence in his defense.<sup>10</sup> Despite the upsetting nature of the alleged crime, these rights remain vital.

Prior to 1978, “[i]f a defendant in a rape case raise[d] the defense of consent, that defendant [could] then offer evidence about the victim’s prior sexual behavior.”<sup>11</sup> Courts viewed prior sexual activity as “probative of consent”<sup>12</sup> on the theory “that a woman who had consented to sex once possessed a ‘character for unchastity’ and thus was more likely to have consented to sex on the occasion in question.”<sup>13</sup> The general view was also that consent was “transferable to other parties.”<sup>14</sup> If a woman consented to sex with one man, “she was considered to have functionally consented to sex with others.”<sup>15</sup> This opened the door to a slew of probing questions for the victim, including “whether she had had intercourse before, how many times, how old she was when she had intercourse for the first time, and with how many men.”<sup>16</sup> This method applied even if the victim and the defendant did not know each other before the alleged conduct.<sup>17</sup> Because of this invasive questioning, “not only was the defendant on trial, but the victim was placed on trial, too.”<sup>18</sup> Historically, this burden fell on women because victims of sexual violence are overwhelmingly female, although men can be victims of sexual violence as well.<sup>19</sup>

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Working Group chose to keep the balancing test in the military version of the Rule since “[t]here seem[ed] to be no good reason to delete it”).

9. Johnson, *supra* note 8, at 146–47.

10. U.S. CONST. amends. VI, XIV.

11. 124 CONG. REC. 34,912 (1978) (statement of Rep. Mann).

12. I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 836 (2013).

13. *Id.* (citing 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 924–924a, at 458–60 (3d ed. 1940)); *see also* *People v. Johnson*, 39 P. 622, 623 (Cal. 1895) (“This class of evidence is admissible for the purpose of tending to show the nonprobability of resistance upon the part of the prosecutrix; for it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed.”).

14. Michelle G. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 54 (2002).

15. *Id.*

16. Capers, *supra* note 12, at 837.

17. *See id.*

18. Johnson, *supra* note 8, at 149.

19. *See* NAT’L CTR. FOR INJURY PREVENTION & CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010–2012 STATE REPORT 17–18 (2017), <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf> [<https://perma.cc/76XC-QSC6>]. Thus, I use female pronouns for simplicity throughout this piece.

The rule's harsh treatment of victims caused victims' rights advocates to question the propriety of a rule that allowed such expansive probing into a victim's past behavior.<sup>20</sup> Some scholars echoed this concern, arguing that the victim, not the defendant, was put on trial through the use of such inflammatory evidence.<sup>21</sup> This ultimately led Congress to enact Federal Rule of Evidence 412<sup>22</sup> in 1978.<sup>23</sup>

Rule 412, the federal rape shield law, aims to "remedy stereotypical thinking in the fact finding process."<sup>24</sup> In contrast with the historical view that prior sexual activity was probative of consent, "Rule 412's rationale is that a woman's sexual history is not a good predictor of her present behavior."<sup>25</sup> The current version of Rule 412 prohibits, in civil and criminal proceedings, "evidence offered to prove that a victim engaged in other sexual behavior . . . or . . . to prove a victim's sexual predisposition."<sup>26</sup>

Congress still sought to ensure that the interests of the rape victim, the defendant, and society were all "fairly balance[d]."<sup>27</sup> Rule 412(b) was an attempt to balance these interests by allowing evidence of specific prior sexual acts to be admitted in certain restricted circumstances in criminal cases.<sup>28</sup> There are three such circumstances in which a court can admit evidence of specific instances of a rape victim's sexual conduct. The first circumstance is when the Constitution requires the evidence be admitted, because to deny admissibility would deny the defendant a constitutional right.<sup>29</sup> The second circumstance is when the defendant raises the issue of consent, and the evidence is of sexual behavior with that specific defendant.<sup>30</sup> The third circumstance, the primary focus of this Recent Development, is when "evidence of specific instances of a victim's sexual

20. Johnson, *supra* note 8, at 149.

21. See *Privacy of Rape Victims: Hearing on H.R. 14,666 and Other Bills Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 94th Cong. 51 (1976) (statement of Rep. Harris).

22. FED. R. EVID. 412. Because federal criminal law has narrow jurisdiction, Kerry C. O'Dell, *Evidence in Sexual Assault*, 7 GEO. J. GENDER & L. 819, 822 (2006), and because the Federal Rule of Evidence 412 was "intended to serve as a model for the states," Nancy Cosgrove Cody, *Federal Rule of Evidence 412: Was the Change an Improvement?*, 49 U. CIN. L. REV. 244, 245 (1980), this Recent Development uses "Rule 412" to encompass both the federal rule and state evidentiary rules that are modeled after the federal rule.

23. See Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046.

24. Jane H. Aiken, *Leveling the Playing Field: Federal Rule of Evidence 412 & 415: Evidence Class as a Platform for Larger (More Important) Lessons*, 21 QUINNIPIAC L. REV. 927, 930 (2003).

25. *Id.*

26. FED. R. EVID. 412(a).

27. 124 CONG. REC. 34,913 (1978) (remarks of Rep. Mann).

28. See Cody, *supra* note 22, at 245. The federal rule also provides an exception for civil cases. FED. R. EVID. 412(b)(2).

29. FED. R. EVID. 412(b)(1)(C).

30. FED. R. EVID. 412(b)(1)(B) ("The court may admit the following evidence in a criminal case: . . . evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor . . .").

behavior [is] offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence.”<sup>31</sup>

Litigation under Rule 412(b) has produced a list of widely admissible evidence of specific instances of an alleged victim’s sexual behavior that is slightly more expansive than the statute’s specific exceptions. In addition to evidence of prior consensual relations with the defendant<sup>32</sup> and evidence that the semen belongs to someone other than the defendant,<sup>33</sup> examples of admissible evidence under Rule 412(b) include—in the case of a child complainant—evidence that explains why the child has “advanced sexual knowledge or a preoccupation with sex.”<sup>34</sup>

A less addressed example of evidence related to a specific prior sexual act, and one seemingly left out of the language of Rule 412 altogether, is evidence of sexually transmitted infections.<sup>35</sup> The question of whether STI evidence is admissible under Rule 412(b) has not been well addressed at the federal level,<sup>36</sup> and only a handful of states have tackled the question.<sup>37</sup> The most common example of this type of evidence is when a defendant seeks to present evidence that either the alleged victim or the defendant has tested positive for an STI while the other party has not.<sup>38</sup> For example, a defendant accused of rape wants to offer medical testimony that the defendant tested negative for chlamydia and the alleged victim tested positive, thereby establishing evidence showing that the defendant did not have sex with the alleged victim. Jurisdictions that have admitted STI evidence view it as exculpatory and categorically distinct from the types of evidence found inadmissible under Rule 412.<sup>39</sup> On the other hand, several courts have reached the opposite conclusion, finding STI evidence to be

31. FED. R. EVID. 412(b)(1)(A).

32. See *United States v. Saunders*, 943 F.2d 388, 392 (4th Cir. 1991) (“When consent is the issue, however, Rule 412(b) permits only evidence of the defendant’s past experience with the victim.”).

33. This is sometimes called the “Scottsboro rebuttal.” CHARLES A. WRIGHT & KENNETH W. GRAHAM, 23 FEDERAL PRACTICE AND PROCEDURE § 5375, Westlaw (database updated Aug. 2019).

34. O’Dell, *supra* note 22, at 828.

35. An STI is a virus or bacterial infection spread through sexual contact, whereas an STD is the symptomatic disease that develops as a result of an STI. *STDs/STIs*, AM. SEXUAL HEALTH ASS’N, <http://www.ashsexualhealth.org/stdsstis/> [<https://perma.cc/TL9J-DD9J>]. Subsequently, a person may have an infection but display no physical signs or symptoms of a disease. *Id.* For example, a human papillomavirus (“HPV”) infection can occur when there is a point of sexual contact between two people, but it does not become an STD until it is symptomatic. Although many courts still use the term STD, many public health experts prefer STI. *Id.* Accordingly, this Recent Development uses the more scientifically accurate STI throughout.

36. Cody, *supra* note 22, at 245 (“While directly affecting only a small number of rape cases where the alleged offense occurred within the areas of special maritime and territorial jurisdiction of the United States or an Indian reservation, [federal] rule 412 is intended to serve as a model for those states that have not yet enacted rape shield legislation.”).

37. See *infra* Section I.D.

38. See, e.g., *State v. Mitchell*, 568 N.W.2d 493, 496–97 (Iowa 1997) (providing an example where the defendant wanted to offer testimony that the victim had an STI that the defendant did not have).

39. See *infra* Section II.D.

inadmissible under state rape shield laws.<sup>40</sup> These courts view STI evidence as impermissible evidence of a complainant's sexual behavior.<sup>41</sup> This Recent Development addresses the inconsistencies among state and federal application of Rule 412 and the admissibility of STI evidence in sexual violence cases and argues that STI evidence should be treated as a specific instance under Rule 412(b)(1) and similar state evidentiary rules.<sup>42</sup>

Analysis proceeds in four parts. Part I introduces Rule 412, explains the purpose behind its enactment, and explores STI evidence as a specific instance. Part II examines the recent Supreme Court of North Carolina case, *State v. Jacobs*,<sup>43</sup> which found that STI evidence was a specific instance under Rule 412(b). This part argues not only that *Jacobs* was correctly decided but also that other states using similar reasoning have appropriately categorized STI evidence as a specific instance of sexual behavior that goes to proving more than propensity. Part III argues that STI evidence should be treated as a specific instance under Federal Rule of Evidence 412 and comparable state evidentiary rape shield rules due to the other procedural safeguards in place to prevent unreliable evidence from being admitted for an improper purpose. Finally, Part IV rebuts specific arguments against the admissibility of STI evidence under Rule 412.

## I. OVERVIEW OF RULE 412

This part first considers the history of rape shield laws. It then analyzes Rule 412 by looking at the plain meaning of the statutory language, the context for its adoption, and subsequent judicial interpretation.

### A. History

Reviewing the statutory history of the federal rape shield law is necessary to determine whether STI evidence is admissible as a specific instance under Rule 412(b). Prior to the enactment of rape shield laws at the federal and state level, alleged victims of sexual violence were often questioned about their sexual behavior by defense attorneys as a way to show that the alleged victims consented to the acts at issue or to hurt their credibility generally.<sup>44</sup> The

40. See *infra* text accompanying notes 93–96.

41. See *infra* text accompanying notes 93–96.

42. FED. R. EVID. 412(b)(1) (“The court may admit the following evidence in a criminal case: (A) evidence of specific instances of a victim’s sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of a victim’s sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and (C) evidence whose exclusion would violate the defendant’s constitutional rights.”).

43. 370 N.C. 661, 811 S.E.2d 579 (2018).

44. See Euphemia B. Warren, *She’s Gotta Have It Now: A Qualified Rape Crisis Counselor-Victim Privilege*, 17 CARDOZO L. REV. 141, 143–44 (1995).

enactment of Rule 412 and similar state evidentiary rules was a response to criminal justice advocates and victims' rights groups urging legislatures to confront the sexism infused in the laws surrounding rape.<sup>45</sup>

Rule 412 was "intended to serve as a model for the states."<sup>46</sup> The Advisory Committee Note to Rule 412 indicate that the rule's general prohibition is intended to exclude evidence that would "contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against *stereotypical thinking*."<sup>47</sup> In this vein, the Advisory Committee Notes expressly state that "evidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible" unless such evidence qualifies for the exception in Rule 412(b)(2).<sup>48</sup> Essentially, the rule is concerned with eliminating evidence that amounts to rumors "based on public behavior."<sup>49</sup> The purpose of the rule is twofold: protecting the alleged victim's privacy and encouraging victims to participate in the legal proceedings against alleged offenders.<sup>50</sup>

Rule 412 coincided with the growing recognition of women's equality and changes in public attitudes towards conventional sexual behaviors.<sup>51</sup> This led to an attack on the common law treatment of rape victims at trial, which culminated in the passage of Rule 412 and similar state evidentiary rules.<sup>52</sup>

#### B. *Plain Meaning of Rule 412*

The plain meaning of Rule 412 suggests STI evidence is a specific instance exception. Interpretation of a statute should begin with the plain, ordinary

45. See Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 554 (1993).

46. Cody, *supra* note 22, at 245.

47. FED. R. EVID. 412 advisory committee's note to 1994 amendment (emphasis added).

48. *Id.*

49. *Glazier v. Fox*, No. CV 2014-106, 2016 WL 827760, at \*3 (D.V.I. Mar. 2, 2016) ("Evidence that raises concerns of stereotypical thinking or relates to an alleged victim's mode of dress, speech, or lifestyle easily encompasses evidence based on public behavior.").

50. FED. R. EVID. 412 advisory committee's note to 1994 amendment ("The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders. Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.").

51. See generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975) (reviewing rape throughout history and common misconceptions); NANCY GAGER & CATHLEEN SCHURR, *SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA* (1976) (noting the increase in the rate of rapes caused by a society that encourages male aggression and female passivity).

52. See Carol DiBattiste, *Federal and Military Rape Shield Rules: Are They Serving Their Purpose?*, 37 NAVAL L. REV. 123, 128-29 (1988).

meaning of the language used in the rule.<sup>53</sup> Judges often turn to dictionary definitions to interpret the meaning of statutory language when the statute does not define a term itself.<sup>54</sup> “Specific” is defined as “sharing or being those properties of something that allow it to be referred to a particular category” and “free from ambiguity.”<sup>55</sup> A plain language reading of Rule 412 simply shows that evidence allowed as an exception to the general prohibition of evidence of a victim’s character includes evidence that refers to a particular category of evidence—in this case, evidence that “prove[s] that someone other than the defendant was the source of semen, injury, or other physical evidence.”<sup>56</sup>

Additionally, the plain meaning of a statute “may be tempered by the purpose of the rule.”<sup>57</sup> Rule 412 governs the admissibility of evidence related to “past sexual behavior” of a victim in cases where the defendant is charged with a sex crime.<sup>58</sup> The rationale underlying the prohibition is explained as protecting rape victims against “unwarranted invasions of privacy and harassment regarding their sexual conduct.”<sup>59</sup> Although Rule 412(a) provides that evidence of a victim’s past sexual behavior, other than reputation or opinion evidence, is inadmissible, Rule 412(b) states that the court may admit “evidence of specific instances of a victim’s sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence.”<sup>60</sup> The exceptions enumerated in Rule 412 “reflect a determination that, despite the general prohibition against evidence of past sexual behavior, certain evidence may be appropriate for the fact-finder to consider in ascertaining the truth and securing a just verdict in a case involving alleged sex crime.”<sup>61</sup>

53. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKLEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 819 (3d ed. 2001).

54. *See, e.g.*, *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225–26 (1994) (“Virtually every dictionary we are aware of says that ‘to modify’ means to change moderately or in minor fashion.”).

55. *Specific*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/specific?src=search-dict-hed> [<https://perma.cc/7V8X-8PLJ>].

56. FED. R. EVID. 412(b)(1)(A).

57. *State v. Chambers*, No. 45608, 2019 WL 1891005, at \*2 (Idaho Ct. App. Apr. 29, 2019).

58. FED. R. EVID. 412 advisory committee’s note to 1994 amendment.

59. *See State v. Ozuna*, 315 P.3d 109, 114 (Idaho Ct. App. 2013); *see also* 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann) (noting that Federal Rule 412 was enacted “to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives”).

60. FED. R. EVID. 412(b)(1)(A). Categorizing a piece of evidence as a specific instance of sexual behavior is a necessary, but not sufficient, part of qualifying for the exception to Rule 412(a). The rule is designed to get rid of evidence in the form of propensity or character evidence. To be an exception, the evidence must be specific *and* go towards proving something more than propensity indirectly.

61. *Chambers*, 2019 WL 1891005, at \*2.



C. *Contextual Analysis of Rule 412*

Furthermore, evidence of STIs should also be admissible as a prior specific instance of sexual conduct under Rule 412 because STI evidence is relevant to the identity of the alleged perpetrator, unlike the inadmissible evidence that Rule 412 explicitly forbids. For example, a victim's prior work in the sex industry is inadmissible as a prior specific instance under Rule 412.<sup>62</sup> An alleged victim's "mode of dress" during an encounter is similarly excluded to prove the alleged victim's sexual predisposition<sup>63</sup> as is the victim's viewing of pornographic material.<sup>64</sup> Additionally, social media page contents have been found inadmissible.<sup>65</sup> Some states have excluded evidence of age-inappropriate sexual knowledge.<sup>66</sup> None of these examples are relevant to the identity of the perpetrator of the alleged crime; rather they are simply facts that imply some kind of general sexual behavior, which Rule 412 has made clear is inadmissible. In contrast, STI evidence points to a specific sexual encounter(s) when the infection was transmitted from one person to another.

STI evidence is more analogous to semen evidence than to any of the above-mentioned examples. Offering evidence to show that the semen found on the victim is the semen of someone other than the defendant creates doubt that the defendant committed the acts alleged.<sup>67</sup> In the same way, if the defendant does not have an STI but the victim does, depending on the type of STI, that fact could reduce the possibility that it was the defendant who committed sexual violence against the victim. Both have a similar probative—and exculpatory—effect, and semen has been routinely held admissible under Rule 412.<sup>68</sup> Especially where more reliable DNA evidence is not available, STI evidence is particularly important to the defendant.

62. *United States v. Rivera*, 799 F.3d 180, 185 (2d Cir. 2015).

63. Michael H. Graham, "Rape Shield" Statutes: Overview; *Fed. R. Evid. 412; Mode of Dress, Statements of Sexual Nature or Intention*, 48 CRIM. L. BULL. 1378, 1389 (2012).

64. *Wolak v. Spucci*, 217 F.3d 157, 160–61 (2d Cir. 2000). *But see State v. Rorie*, 242 N.C. App. 655, 662–63, 776 S.E.2d 338, 343–44 (2015) (holding that evidence that the defendant was "watching a pornographic video, without anything more, is not evidence of sexual activity barred by the Rape Shield Statute").

65. *See, e.g., In re K.W.*, 192 N.C. App. 646, 651, 666 S.E.2d 490, 494 (2018) (holding the contents of a Myspace page, including statements that the alleged victim was not a virgin and had answered a question affirmatively about whether she previously had sex, were not specific instances of sexual behavior offered for the purpose of showing that the acts were not committed by the respondent).

66. *See, e.g., White v. State*, 242 S.W.3d 240, 246–47 (Ark. 2006).

67. It does not eliminate the possibility altogether. For example, because semen can live in a person for up to a few days, if the person had consenting sex with someone else then the defendant could still have committed the crime later while wearing a condom. *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, 729–31 (1995).

68. *See, e.g., State v. Timothy C.*, 787 S.E.2d 888, 897, 899 (W. Va. 2016) (holding it was reversible error to exclude results from DNA tests, which showed that the semen found on clothing

D. *Judicial Interpretation of Rule 412*<sup>69</sup>

The states that have deemed STI evidence admissible under Rule 412 have emphasized that such evidence is valuable for the defendant, despite Rule 412's concerns in protecting the victim's sexual history from being unnecessarily exposed.<sup>70</sup> These courts, however, have emphasized that STI evidence must be offered through expert testimony that explains how the STI is contracted between people.<sup>71</sup> For example, in *Reece v. State*,<sup>72</sup> the defendant wanted to present evidence that he did not have the same STI, trichomoniasis, that the complainant did have.<sup>73</sup> The defendant planned to present this evidence through medical records.<sup>74</sup> The trial court did not admit the evidence, but the Georgia Court of Appeals held that the defendant should have been able to introduce testimony about the complainant's sexually transmitted infection and the defendant's lack of infection.<sup>75</sup> The court was clear that the STI evidence was "vital" to the defendant and "not an improper attempt to explore the victim's past or other sexual experience."<sup>76</sup> Further, the court stated that even if the STI evidence

under some remote consideration . . . suggests that . . . the victim had some sexual activity with someone else, so be it. . . . Any possible harm caused to the victim by such speculation is far outweighed by the harm done to the defendant in denying him the opportunity to prove he did not have the disease.<sup>77</sup>

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worn by the alleged victim at the time of alleged sexual assault was not the defendant's under rape shield law).

69. Perhaps because of the limited federal criminal jurisdiction over sexual violence crimes, there is a lack of federal case law interpreting whether STI evidence is a specific instance of sexual behavior under Rule 412. Thus far, only the Eighth Circuit has interpreted this issue, and the Supreme Court of the Virgin Islands has relied on the Ninth Circuit to interpret the issue. *See* *United States v. Tail*, 459 F.3d 854, 859 (8th Cir. 2006); *Alexander v. Virgin Islands*, 60 V.I. 486, 504 (2014) ("The testimony that the defense sought to elicit from Detective Thomas could arguably fall within the exceptions found in subsections (b)(1)(A) and (C). For instance, the source of an injury, namely an STD, can be a permissible purpose for admission of evidence under Rule 412, if the evidence tends to exclude the defendant as the source of the injury." (citing *United States v. Torres*, 937 F.2d 1469, 1473 (9th Cir. 1991))).

70. *See, e.g.,* *Reece v. State*, 383 S.E.2d 572, 574 (Ga. Ct. App. 1989).

71. *See* *State v. Marsh*, No. E1998-00057-CCA-R3-CD, 2000 WL 555231, at \*7 (Tenn. Crim. App. May 8, 2000) (affirming the trial court's exclusion of STI evidence because "[i]n *Fears*, there was medical evidence introduced at trial establishing, among other things, how one might contract gonorrhoea, [but n]othing here made the claims of the defense material to the central issue").

72. 383 S.E.2d 572 (Ga. Ct. App. 1989).

73. *Id.* at 573.

74. *Id.*

75. *Id.* at 574.

76. *Id.*

77. *Id.*

In sum, courts that admit STI evidence recognize the fine balance of avoiding retraumatizing a victim-witness while allowing a defendant to offer credible evidence that goes towards proving the defendant's innocence. Even though the evidence has the potential to be embarrassing to the victim, its exculpatory value to explain that someone other than the defendant is responsible for the victim's injuries is not negated.<sup>78</sup> As discussed further in this Recent Development,<sup>79</sup> STI evidence, when tempered by evidentiary rules regarding expert testimony, can point to a specific sexual interaction and thus falls within Rule 412(b)'s exception to the general inadmissibility of evidence of sexual behavior.

## II. *STATE V. JACOBS* AND THE CONFLICT ABOUT WHETHER STI EVIDENCE IS A "SPECIFIC INSTANCE"

In 2018, North Carolina decided that STI evidence is admissible as a specific instance under North Carolina Rule of Evidence 412(b)(2).<sup>80</sup> In *Jacobs*, The defendant was accused of committing sexual acts with a child.<sup>81</sup> After the child reported that the defendant had been having sexual intercourse with her, she was taken to the hospital and examined.<sup>82</sup> She recounted that the defendant had sexual intercourse with her on a number of occasions over a three-year period, beginning when she was eight years old and continuing until she reported his conduct when she was eleven.<sup>83</sup> The examination showed that the alleged victim had *Trichomonas vaginalis* and the herpes simplex virus, while the defendant did not.<sup>84</sup> At trial, the defense submitted an offer of proof that contained the "Medical Expert Report" prepared by an infectious disease specialist describing the testimony the doctor would give regarding the STI evidence.<sup>85</sup> The doctor's proffered testimony follows: "Based upon the results of these tests, it [was his] expert opinion that it [was] not likely that the [alleged victim] and defendant engaged in unprotected sexual activity over a long period of time without transmitting either the *Trichomonas*, the *Herpes simplex*

78. See, e.g., *State v. Ollis*, 318 N.C. 370, 377, 348 S.E.2d 777, 782 (1986) (holding the exclusion of testimonial evidence that other sexual activity could explain the victim's injuries was reversible error).

79. See *infra* Part III.

80. N.C. R. EVID. 412; *State v. Jacobs*, 370 N.C. 661, 662, 811 S.E.2d 579, 580 (2018). The North Carolina Rule of Evidence 412 "is clearly intended" to allow the same relevant evidence as set out in federal Rule 412(b)(2). *State v. Fortney*, 301 N.C. 31, 41, 269 S.E.2d 110, 115 (1980).

81. *Jacobs*, 370 N.C. at 662, 811 S.E.2d at 580.

82. *Id.*

83. *Id.* at 663, 811 S.E.2d at 580–81.

84. *Id.* at 662, 811 S.E.2d at 580.

85. *Id.* at 663–64, 811 S.E.2d at 581.

infection, or both, to the defendant.<sup>86</sup> However, the district court did not allow this testimony, and the defendant was found guilty.<sup>87</sup>

Following the view held by other states that STI evidence is inadmissible, the North Carolina Court of Appeals affirmed the trial court's decision because it viewed that the reason for the doctor's testimony was "to raise speculation and insinuate that [the complainant] must have been sexually active with someone else."<sup>88</sup> The Supreme Court of North Carolina disagreed, stating that "[t]he purpose of this evidence appears to be precisely what defendant stated it to be: to support his claim that he did not commit the criminal acts for which he was charged. That purpose aligns completely with the exception carved out in Rule 412(b)(2)."<sup>89</sup> The court noted that offering medical evidence "that directly supports an inference 'that the act or acts charged were not committed by the defendant'" is permissible.<sup>90</sup> Additionally, the court noted that the defendant had offered evidence other than the STI evidence to go towards proving his innocence—including his own testimony.<sup>91</sup> Therefore, the court held the evidence admissible and remanded for a new trial.<sup>92</sup> Although it is true such evidence would suggest the alleged victim had sexual history with another person, the purpose of the evidence as a whole would be to exculpate the defendant.

While North Carolina ultimately admitted the STI evidence, other states have decided differently, finding that STI evidence is inadmissible under Rule 412 on the theory that STI evidence relates to the victim's sexual behavior or alleged sexual predisposition.<sup>93</sup> For example, the Supreme Court of Arkansas

86. *Id.* at 666, 811 S.E.2d at 582.

87. *Id.* at 664, 811 S.E.2d at 581.

88. *State v. Jacobs*, 252 N.C. App. 402, 408, 798 S.E.2d 532, 536 (2017).

89. *Jacobs*, 370 N.C. at 666, 811 S.E.2d at 582–83.

90. *Id.* at 667, 811 S.E.2d at 583 (quoting N.C. R. EVID. 412(b)(2)).

91. *Id.* at 663, 811 S.E.2d at 581.

92. *Id.* at 667, 811 S.E.2d at 583.

93. *See State v. Ozuna*, 316 P.3d 109, 114 (Idaho Ct. App. 2013) ("We believe that the better approach is to recognize that evidence related to whether a victim had an STD or whether the defendant thought the victim had an STD at the time of an alleged sex crime is evidence of a victim's past sexual behavior. Evidence that the defendant subsequently did not contract that disease would not be relevant without first establishing that the victim had an STD. Admissibility of such evidence is governed by I.R.E. 412. Therefore, the district court did not abuse its discretion by treating the STD evidence as evidence of past sexual behavior under I.R.E. 412."); *State v. Mitchell*, 568 N.W.2d 493, 496–97 (Iowa 1997) (holding evidence that victim tested positive for gonorrhea shortly after a sexual assault as evidence of the victim's past sexual behavior under Iowa Rule of Evidence 412); *State v. Cunningham*, 995 P.2d 561, 568 (Or. Ct. App. 2000) (holding evidence of an STI is tantamount to evidence of past sexual behavior under Oregon Rule of Evidence 412 because STIs generally occur as the result of sexual intercourse or sexual contact); *Smith v. State*, 737 S.W.2d 910, 915 (Tx. Ct. App. 1987) (analyzing proffered evidence that the victim had gonorrhea on date of rape examination as evidence of the victim's previous sexual conduct under Texas rape shield law); *State v. Jarry*, 641 A.2d 364, 366 (Vt. 1994) (allowing evidence that the victim had chlamydia on the date of the rape examination as the victim's prior sexual conduct under Vermont's rape shield law).

excluded the evidence because of the public's prejudicial perception of STIs.<sup>94</sup> In contrast to courts that have admitted STI evidence, other courts seem concerned that evidence of a victim's STI is either not probative enough to show the defendant's innocence or is too inflammatory, resulting in the jury overvaluing the evidence.<sup>95</sup> This is somewhat unsurprising, as a majority of modern rape shield laws "tend to the opposite extreme of the old rule of automatic admissibility: presumptive inadmissibility."<sup>96</sup>

Public perception of STIs is one of willful blindness. Though perhaps avoided in casual conversation, studies indicate the public thinks STI education should be discussed more.<sup>97</sup> Perhaps, too, courts are fearful of returning to the days before the enactment of rape shield laws when victims were interrogated about every facet of their sexual history.<sup>98</sup> Because of this, judges may also believe that STI evidence will cause juries to form negative opinions about the party who has the STI rather than regarding the evidence's probative value.<sup>99</sup>

Courts that have found STI evidence inadmissible are overly concerned with the fear that STI evidence is only offered to show that the victim is promiscuous.<sup>100</sup> First, the evidence the defendant offers is not always that the victim has an STI; it could also be the case that the defendant has an STI that the victim does not. Offering evidence that the alleged victim *lacks* an STI cannot reasonably be said to be "evidence offered to prove that a victim engaged in other sexual behavior"<sup>101</sup> or "evidence offered to prove a victim's sexual predisposition."<sup>102</sup> Second, judges have the discretion to determine—and defense lawyers have the obligation to show—that the STI evidence is being

94. See *Fells v. State*, 207 S.W.3d 498, 502 (Ark. 2005) (holding that evidence of victim's HIV-positive status fell under the state's rape shield law as evidence of prior sexual conduct because of the public's general perception of it as an STI).

95. See, e.g., *Mitchell*, 568 N.W.2d at 497 (holding that the STI evidence had "low probative value because it can't be established with reasonable clarity that the victim had the STD at the time of the alleged contact").

96. J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 551 (1980).

97. Rosalind Thomas et al., *Community Attitudes About Discussing Sexual Health: Assessing Public Opinion of Local STD Prevention Campaigns*, 128 PUB. HEALTH REP. (SUPPLEMENT I) 73, 79 (2013).

98. See *Capers*, *supra* note 12, at 835 ("[T]he common law allowed defendants to cross-examine a complainant about her sexual history, to introduce testimony regarding the complainant's reputation for chastity, and in some cases, even to call a complainant's prior sexual partners as witnesses.").

99. See, e.g., *Fells*, 207 S.W.3d at 502 (holding that evidence of the victim's HIV-positive status fell under the state's rape shield law as evidence of prior sexual conduct because of the public's general perception of it as an STI).

100. See *State v. Ozuna*, 316 P.3d 109, 116 (Idaho Ct. App. 2013) ("The district court also noted the presence of other legitimate interests—namely, the danger of embarrassing the victim and giving the jury the impression that she was promiscuous."); *Mitchell*, 568 N.W.2d at 496–97, 499 ("There was just too much danger that the omitted STD evidence would brand [the victim] as promiscuous in the eyes of the jury and for that reason not worthy of belief.").

101. FED. R. EVID. 412(a)(1).

102. FED. R. EVID. 412(a)(2).

offered to prove something other than propensity for sexual behavior. If the judge determines the STI evidence is going to disprove an element of the charged crime, the evidence is probative and should be admitted.

### III. WHY STI EVIDENCE SHOULD BE ADMISSIBLE UNDER THE SPECIFIC INSTANCE EXCEPTION TO RULE 412

This Recent Development argues that STI evidence should be admissible under Federal Rule of Evidence 412 and comparable state rape shield laws as a specific instance of sexual behavior. This part examines two reasons why it is critical STI evidence be deemed admissible under Rule 412. First, defendants accused of sexual violence face uniquely burdensome hurdles in the course of trial as compared to defendants charged with other crimes. Second, *even if* the critiques of admitting STI evidence are true, evidentiary rules governing expert testimony and prejudicial testimony ensure that only STI evidence that is relevant and probative would be admissible.

#### A. *Hurdles*

Criminal defendants accused of sexual assault or abuse face incredible obstacles in the criminal justice system due to widespread bias.<sup>103</sup> Excluding STI evidence is problematic because it makes it more difficult for defendants in these cases to construct and present a defense to the specific charge. Although, historically, alleged victims were met with disbelief, some are concerned that the pendulum is swinging too far in the opposite direction: “[o]ur social and judicial reactions have shifted from widespread disbelief of any victim to an immediate reflexive belief of every victim.”<sup>104</sup> Bias against a defendant solely because he is accused of sexual assault, particularly sexual assault of a child, increases the importance of the right to introduce objective, exculpatory evidence.<sup>105</sup> The public often reacts to cases involving sexual assault—particularly those with a child victim—with horror, nausea, and outrage.<sup>106</sup> And

103. See Neil Vidmar, *Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials*, 21 *LAW & HUM. BEHAV.* 5, 5–8 (1997).

104. Laurie Shanks, *Child Sexual Abuse: Moving Toward a Balanced and Rational Approach to the Cases Everyone Abhors*, 34 *AM. J. TRIAL ADVOC.* 517, 520 (2011). Although Professor Shanks is likely overstating the response to those reporting to be victims of sexual violence, it should be noted that public response is not as victim-centric as she posits. See, e.g., Laura E. Gómez, *Use Your Personal Lie Detector to Judge Kavanaugh*, 26 *UCLA WOMEN'S L.J.* 29, 33 (2019) (discussing the many people, including women, who defended Justice Kavanaugh when Dr. Christine Blasey Ford came forward with sexual assault accusations); see also Rachel Donadio, *Vatican Preparing New Guidelines To Deal with Sexual Abuse*, *N.Y. TIMES*, Nov. 20, 2010, at A5 (discussing the ways the Catholic Church has handled abuse internally, which favors the accused instead of the victim, rather than outsourcing).

105. Brief of North Carolina Advocates for Justice as Amicus Curiae Supporting Defendant at 8–9, *State v. Jacobs*, 370 N.C. 661, 811 S.E.2d 579 (2018) (No. 126PA17) [hereinafter Brief of Amicus Curiae] (citing Vidmar, *supra* note 103, at 5–8).

106. Shanks, *supra* note 104, at 519.

although Rule 412 was enacted in part to ensure that the alleged victim's and defendant's rights were "fairly balance[d]," criminal defendants in these cases face a steep uphill battle to be treated as innocent until proven guilty.<sup>107</sup>

Research demonstrates the difficulty of providing fair trials for those accused of sexual assaults and child sex crimes.<sup>108</sup> First, jurors are influenced by a wide variety of factors in sexual violence trials, including a defendant's socioeconomic status, physical appearance, and relationship status.<sup>109</sup> Studies conducted on juror bias towards defendants accused of sexual violence indicate a general empathy towards rape victims and a general attitude of prejudgment of the accused as guilty.<sup>110</sup> Victims or people who know victims of sexual violence are unsurprisingly more likely to have these views.<sup>111</sup> The research also indicates that the lack of impartiality in jurors comes not as much from detestation of sexual violence, but rather "attitudes and beliefs that bear on the presumption of innocence."<sup>112</sup> One juror from a sexual abuse trial, when questioned on voir dire about his duty to impartiality, remarked, "I guess in certain situations I consider people are guilty until proven innocent; I know it's not the way it is suppose [sic] to be, but that's the way it is sometimes."<sup>113</sup> This juror's comment exemplifies the attitudes generally formed by jurors upon hearing the nature of the charges against a defendant accused of sexual violence. The public's negative perception of those accused of sexual assault creates a barrier to ensuring that a defendant's constitutional rights are protected "and that only the truly guilty are convicted."<sup>114</sup>

Disdain for sexual abuse offenders is not limited to the community at large—even attorneys react with repugnance to these cases. When lawyers were surveyed as to whether or not "people accused of child sexual abuse should be entitled to the same legal protections as defendants accused of other crimes," twenty-five percent of lawyers believed that such individuals did not deserve the same rights as other criminal defendants.<sup>115</sup> Even judges—officials charged to be impartial—face public pressure and struggle to find the appropriate course of action to handle sex crimes.<sup>116</sup> A judge presiding over a sexual assault trial can

107. 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann).

108. Vidmar, *supra* note 103, at 5–8.

109. See Claire Gravelin, Monica Biernat & Caroline E. Bucher, *Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors*, 9 FRONTIERS PSYCHOL. 1, 10–12 (2019).

110. Vidmar, *supra* note 103, at 7 (citing five studies); see David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1275 (1997).

111. Vidmar, *supra* note 103 at 7.

112. *Id.* at 18.

113. *Id.* at 7.

114. Shanks, *supra* note 104, at 519.

115. Stephen L. Carter, *What Is the Source of the Obligation of Public Service for the Professions?*, 25 WM. MITCHELL L. REV. 103, 115 (1999).

116. See Phylis Skloot Bamberger & Richard N. Allman, *Some Special Concerns in the Trial of Child Sexual Abuse Cases*, 64 N.Y. ST. B.J. 18, 18 (1992); Ronnie Hall, *In the Shadowlands: Fisher and the*

be thrust into the limelight, exposing himself or herself to vicious backlash if the outcome is viewed unfavorably by the public.<sup>117</sup> This is particularly concerning for judges who are elected rather than appointed.<sup>118</sup> Empirical evidence suggests that judicial campaign donations affect judicial decisionmaking.<sup>119</sup> For instance, campaign contributions from the public in partisan judicial elections are positively correlated with donor-friendly judicial outcomes.<sup>120</sup> It is not unreasonable, then, to infer that other public pressures similarly affect judges presiding over sexual assault cases.

A recent example of the public pressure judges face when presiding over sexual assault trials comes from New Jersey.<sup>121</sup> During the sentencing phase, the judge commented that he would recommend leniency for the defendant because the boy was from a “good family,” which prompted outcry from victims’ rights advocates.<sup>122</sup> Shortly after the comments were published by the media, many members of the public called for the judge’s resignation and even disbarment.<sup>123</sup> The judge eventually resigned, and the New Jersey Supreme Court responded to the nationwide backlash by announcing mandatory training for New Jersey state judges on sexual assault cases.<sup>124</sup> This example highlights the public pressure elected judges face.<sup>125</sup> In light of this pressure, it is not difficult to imagine the public’s perception of those accused of sexual violence influencing a judge’s decisions during trial.<sup>126</sup>

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*Outpatient Civil Commitment of “Sexually Violent Predators” in Texas*, 13 TEX. WESLEYAN L. REV. 175, 180 (2006).

117. See *Recent Election*, 132 HARV. L. REV. 1369, 1369, 1371 (2019) (discussing a recall election initiated in 2018 for Judge Aaron Persky after his sentencing decision in the 2016 case *People v. Turner*, No. B1577162 (Cal. Super. Ct. 2016)).

118. See Thomas E. McClure, *Do Judicial Elections Impact the Perception of Impartiality? A Comparison of Bar Poll Ratings of Elected and Appointed Illinois Downstate and Collar County Trial Judges*, 37 JUST. SYS. J. 157, 158 (2016) (demonstrating that judges had lower impartiality ratings when elected rather than appointed based on an eighteen-year study in Illinois).

119. Aviva Abramovsky, *Justice for Sale: Contemplations on the “Impartial” Judge in a Citizens United World*, 2012 MICH. ST. L. REV. 713, 716.

120. *Id.* at 727–28.

121. See Luis Ferré-Sadurní & Nick Corasaniti, *Rape Case Judge Resigns Over ‘Good Family’ Remark; State Orders Training*, N.Y. TIMES (July 17, 2019), <https://www.nytimes.com/2019/07/17/nyregion/judge-james-troiano-resigning.html> [<https://perma.cc/U8A9-GGXC> (dark archive)].

122. *Id.*

123. *Id.*

124. *Id.*

125. Judicial elections at the state level are common. See *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (May 8, 2015), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> [<https://perma.cc/HTS2-2TXB>] (noting thirty-nine states use “some form of election” for judges). Thus, it is reasonable to assume that many judges in sexual violence crime trials are subject to some level of public pressure in the face of elections.

126. See Shanks, *supra* note 104, at 519–20 n.4 (noting this phenomenon in the child sexual abuse context).



Despite a prosecutor's personal feelings towards a defendant charged with sexual abuse, he or she has an ethical obligation "to ensure that justice is done in each case" not just to secure a conviction.<sup>127</sup> But with child sexual assault cases in particular, prosecutors may prioritize a conviction instead of the defendant's rights or convicting the correct person for the sake of the victim and the prosecutor's constituents.<sup>128</sup> Furthermore, for these types of cases, defense attorneys face significant restrictions in the discovery process, such as the right of the victim to decline an interview by defense counsel.<sup>129</sup> Perhaps most concerning in light of the discretion police officers have over the investigative process, they have been found to "disregard their training and make arrests based exclusively on the words of the [alleged victim]" without corroboration.<sup>130</sup> Therefore, any other relevant exculpatory evidence the defendant can present—such as STI evidence—is crucial.

Moreover, much is at stake for defendants accused of sexually violent crimes by way of the many potential punishments to be levied in the event of a guilty verdict. These potential lifelong punishments include prison time, a stripping of rights, sexual offender registration, and probation.<sup>131</sup> For example, in North Carolina, defendants in sexual assault cases "will face some of the longest punishments and most extensive post-release restrictions" if found guilty as compared to other crimes.<sup>132</sup> The way the American criminal justice system punishes sexual violence crimes evinces how negatively we view those accused of these crimes. The lengthy prison sentences add to the injustices because of the number of wrongfully convicted defendants,<sup>133</sup> including those originally accused of sex offenses. Between 1989 and February 2017, 1994 defendants—including individuals originally convicted of child sex abuse—were exonerated in the United States after being wrongfully convicted.<sup>134</sup> Though there are relatively few deliberately false accusations of sexual abuse,

127. *Id.* at 521 (citing MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2010)).

128. *Id.* at 522–23.

129. *Id.* at 524.

130. *Id.* at 527.

131. See Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412, 413 (2010).

132. Brief of Amicus Curiae, *supra* note 105, at 9 (first citing N.C. GEN. STAT. §§ 14-208.5 to .45 (2017) (detailing sex offender registration and satellite-based monitoring programs); and then N.C. GEN. STAT. § 15A-1340.17 (2017) (providing sentencing chart)).

133. See, e.g., *The National Registry of Exonerations: Patrick McAllister*, U. MICH. (May 17, 2018), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5326> [<https://perma.cc/FQ2P-3MB6>] (illustrating how the use of STI evidence on appeal demonstrated the victim had lesions from an STI and "not from being raped," exonerating the defendant after six years in prison).

134. NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016, at 3, 5–6 (2017). Furthermore, from 1989 through 2013, at least 154 of the individuals exonerated were originally convicted of child sex abuse. NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2013, at 11 (2013).

they do occur.<sup>135</sup> Thus, although “[e]very effort must be made to improve the legal system’s ability to protect [victims] and punish offenders[,] . . . great care must be taken to safeguard the innocent against false accusation.”<sup>136</sup>

As evidenced by widespread movements against sexual assault and sexual harassment like the #MeToo movement,<sup>137</sup> our society cares about protecting people who have been sexually abused or harassed. Rule 412 aims to limit, to the extent possible, the revictimization of a person who has already suffered from such a personal and traumatic event. However, those charged with sexual assault are also vulnerable: they face lengthy prison sentences and a long-lasting stigma that will follow them for the rest of their lives.<sup>138</sup> But research has shown that these laws actually *encourage* recidivism.<sup>139</sup> The resulting stigmatization under sex offender registration and notification laws “is likely to result in . . . loss of or difficulties finding jobs, difficulties finding housing, and decreased psychological well-being, all factors that could increase [offenders’] risk of recidivism.”<sup>140</sup> Because of the permanent consequences following a sexual violence crime conviction, it is crucial to due process that defendants should be allowed to present certain types of relevant, exculpatory evidence, such as evidence that the alleged victim possesses an STI that the defendant does not. As an extension of a defendant’s constitutional right to present a defense, courts should admit STI evidence when it is offered through proper expert testimony.

#### B. *Evidentiary Safeguards*

Opponents of admitting STI evidence under Rule 412 are right to be concerned about the potential harm to alleged victims. However, critics forget that Rule 412 is not the only gatekeeper of this type of evidence—both *Daubert* and Federal Rule of Evidence 403 act as barriers to scientifically unreliable or too prejudicial evidence. These serve as evidentiary barriers to keep out

135. For a review of the small body of research on false accusations, see JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES § 6.05 (3d ed. 2005). False reporting of sexual assaults remains very rare, between two and ten percent. David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1330 (2010).

136. John E.B. Myers, *Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion*, 14 U.C. DAVIS J. JUV. L. & POL’Y 1, 4 (2010).

137. See *About*, *supra* note 5.

138. For example, in response to the “community-wide hysteria” following the realization that a sex offender reside[d] in their neighborhood, parents in New York “reacted by posting signs warning that ‘Monsters Live Here.’” Bonnar-Kidd, *supra* note 131, at 415. This hysteria “led to a proliferation of registered sex offender laws above and beyond community notification. . . . [I]n 2008, Governor Bobby Jindal signed SB 144, a bill making chemical castration . . . mandatory for certain offenders. In other states, registered sex offenders are subject to civil commitment.” *Id.*

139. *Id.* at 412.

140. Hollida Wakefield, *The Vilification of Sex Offenders: Do Laws Targeting Sex Offenders Increase Recidivism and Sexual Violence?*, 1 J. SEXUAL OFFENDER CIV. COMMITMENT 141, 141 (2006).

unreliable scientific evidence concerning STIs as well as extremely inflammatory evidence.

First, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>141</sup> and Federal Rule of Evidence 702 together act as a block to unreliable scientific evidence.<sup>142</sup> *Daubert* established that scientific evidence must satisfy a reliability test that “entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”<sup>143</sup> In most states, the corresponding rule of evidence to Rule 702 “impose[s] a requirement that judges admit expert testimony only if it is based on a scientifically sound foundation.”<sup>144</sup> *Daubert* and other related evidentiary principles designed to ensure the reliability of expert evidence are already regularly applied in sexual abuse cases.<sup>145</sup> In the context of medical testimony concerning the significance of a victim having STIs while the defendant does not, medical expert testimony is valuable as it aids the jury in understanding rates of infection and transmission. Additionally, research shows that certain sexually transmitted infections indicate sexual abuse while others do not.<sup>146</sup> This is particularly true “in prepubertal children.”<sup>147</sup> *Daubert* was created to prohibit the “junk science” that was traditionally admissible in courts;<sup>148</sup> it would function similarly to

141. 509 U.S. 579 (1993).

142. FED. R. EVID. 702; *Daubert*, 509 at 592–93. Rule 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

143. *Daubert*, 509 U.S. at 592–93.

144. David W. Barnes, *General Acceptance Versus Scientific Soundness: Mad Scientists in the Courtroom*, 31 FLA. ST. U. L. REV. 303, 303 (2004).

145. See *United States v. Eagle*, 515 F.3d 794, 800 (8th Cir. 2008) (“In child sexual abuse cases, ‘a qualified expert can inform the jury of characteristics in sexually abused children and describe the characteristics the alleged victim exhibits.’ An expert can also summarize the medical evidence and express an opinion that the evidence is consistent or inconsistent with the victim’s allegations of sexual abuse.” (citation omitted) (quoting *United States v. Kirkie*, 261 F.3d 761, 765–66 (8th Cir. 2001))).

146. See Myers, *supra* note 136, at 10–11, 13 (listing different STIs that either “raise suspicion” or “are persuasive” of unwanted sexual contact in child sexual abuse cases).

147. *Id.* at 10.

148. See Kenneth R. Berman, *Daubert Turning 20: Junk Science Replaced by Junk Rulings?*, A.B.A. SEC. LITIG. (2012), [https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac\\_2012/18-2\\_daubert\\_turning.pdf](https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/18-2_daubert_turning.pdf) [https://perma.cc/YY8Y-JMEF].

exclude faulty evidence concerning the significance of STI evidence in sexual abuse or assault cases.

Additionally, the origin of an STI can have similar probative value as that of the origin of sperm.<sup>149</sup> And like the origin of sperm, the origin of a sexually transmitted infection requires expert testimony.<sup>150</sup> For STIs, an expert is needed to testify about

the incubation period of a disease; the potential mode of transmission, including whether the acts alleged were potential or exclusive means of transmission; the rate of transmission from male to female, female to male, or between people of the same gender; the availability of treatment, or if there is no cure; the effectiveness of any treatment; the time after treatment when a person might test as negative; how testing is done; how testing is interpreted; and whether the presence or absence of the disease in the complaining witness and defendant is consistent with the State's theory of the case.<sup>151</sup>

Rates of infection of STIs vary depending on the type of sex and whether the sex was unprotected.<sup>152</sup> Gonorrhea, chlamydia, human papillomavirus (“HPV”), human immunodeficiency virus (“HIV”), herpes, and syphilis are all easily passed through vaginal or anal sex without a condom.<sup>153</sup> When a condom is used during sex, HPV, herpes, and syphilis can still be passed to a sexual partner; however, gonorrhea, chlamydia, and HIV are not commonly passed.<sup>154</sup> These STIs are not passed—or not commonly passed—through oral sex with a condom or barrier, and HIV in particular is difficult to transfer through oral sex.<sup>155</sup> When there is a low likelihood that an STI was passed between the defendant and the alleged victim, evidence of the STI has little probative value. *Daubert* and Rule 702 would prevent expert testimony of STI evidence for an STI that is not as likely to be contracted through a singular sexual encounter or an STI that is rarely contracted even over multiple encounters.

For example, in *Jacobs*, the medical expert's proffered testimony stated the reason that both the defendant and alleged victim would have the STI if they

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149. See Myers, *supra* note 136, at 7–9 (noting that experts could testify in child abuse trials that the “presence of spermatozoa” is “powerful evidence of sexual contact” and also could testify as to the duration and detectability of sperm).

150. *Id.*

151. Brief of Amicus Curiae, *supra* note 105, at 5–6.

152. *STD Risk and Oral Sex – CDC Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/std/healthcomm/stdfact-stdriskandoralsex.htm> [<https://perma.cc/Z4G9-9GRB>]. Most sexual assaults occur without the use of a condom. See Eryn Nicole O’Neal et al., *Condom Use During Sexual Assault*, 20 J. FORENSIC & LEGAL MED. 605, 606 (2013).

153. *STD Risk and Oral Sex – CDC Fact Sheet*, *supra* note 152.

154. *Id.*

155. *HIV Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/basics/transmission.html> [<https://perma.cc/A3LD-S9TL>].

had sexual contact with the victim was due to the alleged victim's statements that the sexual abuse occurred over a period of years.<sup>156</sup> If a defendant wants to put forth evidence that an alleged victim had an STI that is less likely to be contracted during a single sexual encounter—for example, HIV—and the facts alleged were of one sexual encounter, then *Daubert* and Rule 702 would prevent this evidence from being admissible. Thus, critics of admitting STI evidence should not be concerned that STI evidence not backed by scientific reliability will be admitted under Rule 412. *Daubert* and Rule 702 will act as gatekeepers to unreliable evidence concerning the origin and transmission of an STI. The presentation of STI evidence by experts or through medical records limits the possibility a defendant may simply humiliate an alleged victim, reflecting courts' ongoing concern to protect potential victims. States that do not currently allow this evidence ignore that there is more than one rule of evidence to evaluate the admissibility of STI evidence.

In addition to *Daubert*, Federal Rule of Evidence 403<sup>157</sup> serves as a barrier to prejudicial evidence of a victim's sexual history or proclivities. It is conceivable that, in certain circumstances, evidence of a victim's sexual behavior may be so inflammatory that it outweighs any probative value.<sup>158</sup> For instance, in *United States v. Pumpkin Seed*,<sup>159</sup> the district court prevented the defendant charged with aggravated sexual abuse from presenting evidence that the alleged victim engaged in consensual sexual activity with other men within days of the alleged abuse.<sup>160</sup> On appeal, the defendant claimed that this was erroneous because it would have helped prove that the victim's injuries could have come from those acts.<sup>161</sup> The Eighth Circuit disagreed, concluding that the type and extent of injuries suffered by the victim were generally inconsistent with consensual activity, so the evidence would have a high risk of unfair prejudice and confusion.<sup>162</sup> Indeed, Rule 403 is one of the most important discretionary tools a trial judge possesses.<sup>163</sup> Even if evidence of the alleged victim's STIs

156. See *State v. Jacobs*, 370 N.C. 661, 666, 811 S.E.2d 579, 582 (2018).

157. Rule 403 states that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” FED. R. EVID. 403.

158. JENNIFER A. BROBST, *ADMISSIBILITY OF EVIDENCE IN NORTH CAROLINA* § 8:10 (2018) (“Regardless of whether the history of a victim witness’s sexual behavior should be excluded under Rule 412, the trial court may exclude the same evidence under Rule 403. The rape shield rule ‘was not meant to be the sole gauge for determining whether evidence is admissible in rape cases.’” (quoting *State v. West*, 255 N.C. App. 162, 166, 804 S.E.2d 225, 227 (2017))).

159. 572 F.3d 552 (8th Cir. 2009).

160. *Id.* at 557.

161. *Id.*

162. See *id.* at 558.

163. See JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S FEDERAL EVIDENCE* § 403.02-1 to -2, Lexis (database updated Mar. 2020).

would be admissible under Rule 412(b), the trial judge may think the jurors might overvalue the evidence and thus exclude it.<sup>164</sup>

State courts may be following suit. At least one state has found that, while STI evidence technically might be admissible in a particular case, the evidence there was too inflammatory to be admissible.<sup>165</sup> Rule 403 responds to the concerns of commentators that *any* evidence of prior sexual activity creates a substantial prejudicial effect.<sup>166</sup> Because Rule 403 would keep out any substantially prejudicial evidence related to the victim's sexual history, allowing STI evidence in a specific instance will not unduly harm a victim's privacy or reputational interests.

Further, judges should take care not to discount the probative value of STI evidence. Like the facts of *Jacobs*, in cases where the alleged victim reports repeated sexual assaults over a period of time, the likelihood that an STI would transfer between the parties increases as compared to an isolated incident of sexual assault. Thus, the period of time of the alleged sexual assault(s) can increase STI evidence's probative value.

Additionally, STI evidence is particularly probative in cases where the complainant is a child. Because prepubescent children are far less likely to be sexually active, STI evidence would not influence a jury to view a child complainant as morally suspect for being sexually active like a jury may be more likely to do with an adult complainant or even a teenager.<sup>167</sup> With child complainants, it may be more apparent that the child has been victimized because of the child's low likelihood of engagement in other sexual activity. Thus, STI evidence can shed light on who victimized the child without affecting the jury's perception of the complainant.<sup>168</sup>

Rule 412 is not the only barrier to admissibility of STI evidence in sexual abuse and assault cases. The requirements that the evidence be scientifically reliable and not substantially more prejudicial than probative ensure that only probative evidence concerning the presence or absence of an STI is admissible

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164. Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 227 (1976).

165. See *State v. Ervin*, 723 S.W.2d 412, 415 (Mo. Ct. App. 1987) (upholding exclusion of testimony that the victim had gonorrhea under the state's rape shield law because of its inflammatory and prejudicial impact).

166. See Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 30–31 (1977).

167. *Adolescent Sexual and Reproductive Health in the United States*, GUTTMACHER INST. (Sept. 2019), <https://www.guttmacher.org/fact-sheet/american-teens-sexual-and-reproductive-health> [<https://perma.cc/9476-HVC2>] (depicting that nearly zero percent of ten-year-old children are sexually active while twenty percent of fifteen-year-olds and sixty-five percent of eighteen-year-olds are sexually active).

168. In cases where a child was victimized by multiple people, a medical expert may likely conclude that she cannot ascertain the likelihood of STI transmission as accurately as she could if there was only one defendant; in these cases, Rule 702 could prevent STI evidence from being admitted because of the lack of exculpatory value of the evidence.

at trial. Especially in light of the perception of criminal defendants in these types of cases and the many procedural obstacles they face in court, these defendants should be able to present evidence to prove they were not the source of the alleged victim's injuries. Thus, admitting STI evidence under Rule 412 is proper because the evidence is not offered to show the victim's propensity for sexual activity, but rather as part of a defendant's defense as to why he was not the perpetrator of the alleged crime. Further, the format of the presentation of that evidence by experts or through medical records limits the possibility a defendant may humiliate a complainant, which promotes courts' attempts to protect potential victims.

#### IV. RESPONDING TO CRITICISMS OF ADMITTING STI EVIDENCE

States have not treated STI evidence uniformly in sexual violence cases.<sup>169</sup> Courts that have decided STI evidence is inadmissible label it as evidence of the victim's previous sexual behavior,<sup>170</sup> meaning STI evidence is not specific enough to qualify for the exception under Rule 412. Relatedly, critics are also concerned about the embarrassment that admission of STI evidence would create for the alleged victim. This part first responds to criticism that STI evidence is not a specific instance. Next, it shows why STI evidence does not cause the embarrassment for victims that Rule 412 intended to eliminate from sexual violence trials.

##### A. *Why STI Evidence Is More than Propensity Evidence*

Rule 412 is intended to prevent the admission of general propensity evidence—evidence that the alleged victim has the propensity for certain sexual behaviors. Rule 412 has resulted in the exclusion of the following evidence at trial: (1) an alleged victim's "general reputation in and around the Army post"; (2) a victim's "habit of calling out to the barracks to speak to various and sundry soldiers"; (3) a victim's "habit of coming to the post to meet people and of her habit for being at the barracks at the snack bar"; (4) evidence from an alleged victim's former landlord regarding his experience with her promiscuity; and (5) a social worker's opinion of an alleged victim.<sup>171</sup> Thus, the rule aims to exclude "sexual stereotyping," for example, that the alleged victim is promiscuous.<sup>172</sup>

169. Compare *State v. Jacobs*, 370 N.C. 661, 667, 811 S.E.2d 579, 583 (2018) (determining that STI evidence falls within the exception of Rule 412(b)(1) in first-degree sex offense case), with *State v. Mitchell*, 568 N.W.2d 493, 497, 499 (Iowa 1997) (concluding that district court did not violate the defendant's "Sixth Amendment rights [by] excluding STD evidence" because of its low probative value and risk to be highly inflammatory).

170. See *State v. Cunningham*, 995 P.2d 561, 568 (Or. Ct. App. 2000).

171. *Doe v. United States*, 666 F.2d 43, 47 (4th Cir. 1981).

172. See FED. R. EVID. 412 advisory committee's note to 1994 amendment; *supra* Section I.A.

Critics of admitting STI evidence under Rule 412 maintain that this evidence is not specific enough to be admissible under the “specific instance” exception to Rule 412. For example, in *State v. Jacobs*, Justice Morgan advocated in his dissent that the rule’s requirement of “specific instances of sexual behavior” meant that any evidence under this exception should provide “a time, place, or circumstance in which a complainant was involved in ‘specific instances of sexual behavior’” rather than submitting a medical expert’s report referencing the complainant’s diagnosis.<sup>173</sup> However, by requiring a “time, place, or circumstance,” Justice Morgan’s textual analysis inserts more language into the definition of “specific” than what is required under the rule.<sup>174</sup>

The proponents of Rule 412 did not contemplate requiring the specificity that Justice Morgan would have promoted.<sup>175</sup> During discussion surrounding the passage of Rule 412, one representative noted that evidence of the victim’s past sexual relations with others could be used when the defendant offers the evidence to rebut he caused certain physical injuries to the victim.<sup>176</sup> Nowhere in the records of debate during the enactment of Rule 412 was there any discussion of requiring a time, place, or circumstance with regard to the evidence proffered.<sup>177</sup>

Rule 412(b) requires two things: (1) the evidence must be a “specific instance”; and (2) the evidence must go towards proving “that someone other than the defendant was the source of semen, injury, or other physical evidence.”<sup>178</sup> STI evidence is “specific” because an STI is transmitted at a specific time (or several times) during sexual intercourse.<sup>179</sup> Further, when either the defendant or the victim has the STI and the other does not, STI evidence goes towards proving that someone other than the defendant committed the acts alleged.

Additionally, critics of admitting STI evidence argue that STI evidence is different than semen—which is enumerated as a “specific instance”<sup>180</sup>—because sperm contains genetic identification.<sup>181</sup> But genetic proof is not required by Rule 412. The purpose of offering semen evidence is exculpatory: to show that the semen belongs to someone other than the defendant, which usually is accomplished through DNA testing. The same exculpatory purpose exists for STI evidence. STI evidence can be exculpatory not because of DNA, but because the presence of certain STIs in only the complainant or the defendant

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173. *Jacobs*, 370 N.C. at 669, 811 S.E.2d at 585 (Morgan, J., dissenting).

174. See *supra* Section I.B.

175. See 124 CONG. REC. 34,912 (1978) (statement of Rep. Mann).

176. *Id.* at 34,913 (statement of Rep. Holtzman).

177. See *id.* at 34,912.

178. FED. R. EVID. 412(b)(1)(A).

179. See *supra* Section I.B.

180. FED. R. EVID. 412(b)(1)(A).

181. Myers, *supra* note 136, at 9.



may indicate that the two have not had sex. Granted, it is likely that semen evidence would be admissible more often than STI evidence because of the genetic markers in sperm. However, *Jacobs* carved a path where STI evidence can create a sufficient nexus to the identity of a person, especially when the complainant alleges the sexual violence was not limited to one isolated encounter and occurred multiple times over an extended period.<sup>182</sup>

#### B. *STI Evidence Will Not Revictimize the Alleged Victim*

When Congress passed Rule 412, discussion centered on the idea that “victims of rape are humiliated and harassed when they report . . . the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself.”<sup>183</sup> Victims have described the experience of testifying at trial as being “raped all over again.”<sup>184</sup> Victims’ rights advocates are concerned—and rightfully so—about the jury blaming the victim and believing rape myths if confronted with evidence linked to the victim’s sexual conduct.<sup>185</sup>

Critics of admitting STI evidence are concerned that admitting STI evidence will continue to revictimize the victim when she is cross-examined at trial.<sup>186</sup> And states that have found STI evidence inadmissible emphasize the revictimization of the alleged victim when her sexual history is exposed.

Although the introduction of evidence that the alleged victim has an STI that the defendant does not could conceivably cause embarrassment for the victim, it is not the same type of embarrassment the rule was enacted to remove from the courtroom.<sup>187</sup> With STI evidence, “[t]he issue is not whether evidence is prejudicial in the sense that it is detrimental to someone involved in the trial. Rather, the question is whether the evidence will arouse the jury’s emotions of prejudice, hostility, or sympathy.”<sup>188</sup> Rule 412 is concerned about evidence such as “mode of dress, speech, or lifestyle” that prosecutors bring out on cross-examination as a way to humiliate and harass complainants of sexual assault.<sup>189</sup>

182. *State v. Jacobs*, 370 N.C. 661, 667, 811 S.E.2d 579, 583 (2018).

183. 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman).

184. Amelia Gentleman, *Prosecuting Sexual Assault: ‘Raped All Over Again’*, *GUARDIAN* (Apr. 13, 2013), <https://www.theguardian.com/society/2013/apr/13/rape-sexual-assault-frances-andrade-court> [<https://perma.cc/VP35-9PDB>].

185. Peter M. Hazelton, Note, *Rape Shield Laws: Limits on Zealous Advocacy*, 19 *AM. J. CRIM. L.* 35, 43 (1991).

186. Jane E. Brody, *The Twice-Victimimized of Sexual Assault*, *N.Y. TIMES* (Dec. 12, 2013), <https://www.nytimes.com/2011/12/13/health/the-twice-victimimized-of-sexual-assault.html> [<https://perma.cc/KW6A-QB6S> (dark archive)].

187. See H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning Up the “Greatest Legal Engine Ever Invented”*, 27 *CORNELL J.L. & PUB. POL’Y* 145, 177 (2017).

188. Tanford & Bocchino, *supra* note 96, at 569–70.

189. 124 CONG. REC. 34,912–13 (1978) (statement of Rep. Mann).

But STI evidence is a narrow type of evidence that accomplishes more than establishing propensity—STI evidence, when properly admitted through qualified expert testimony, goes towards establishing that someone other than the defendant committed the acts alleged.

The overwhelming problem with categorically excluding STI evidence is that rape shield laws have already severely limited a defendant's ability to put forth a defense. Besides conflicting with the historical purpose of Rule 412, the primary consequence is that the exclusion of STI evidence infringes upon the constitutional right to present a defense and confront an accuser<sup>190</sup> through relevant exculpatory medical evidence. As mentioned, evidence that a victim has an STI is likely to create some embarrassment for the alleged victim and may affect the jury's opinion of her. But "the risk of a jury decision based on distrust or dislike of a complaining witness operates in every case where a victim's testimony is important in the State's case."<sup>191</sup> Rape and sexual assault cases are not unique in this regard.<sup>192</sup> Research suggests jurors often "inadequately evaluate the testimony" of witnesses.<sup>193</sup> When a judge is determining whether evidence should be admissible, the type of crime charged should not influence the decision.<sup>194</sup> Thus, the constitutional question is who should be "prejudiced": the defendant, "who should have paramount Sixth-Amendment rights over a mere witness,"<sup>195</sup> or the victim, who serves as a witness in a criminal trial. The "[a]dverse psychological effects" experienced by alleged victims in these cases are not to be diminished; however, they "are not grounds for excluding probative evidence."<sup>196</sup>

#### CONCLUSION

One of the core purposes of Rule 412 is to protect victims of sexual assault and abuse from further humiliation. However, this protection cannot come at the expense of criminal defendants' constitutional rights—namely due process and the right to present a defense. STI evidence should be admissible as a specific instance under Rule 412 and analogous state rape shield laws, especially because defendants in this area of the law are already subject to more hurdles in the criminal justice system than other criminal defendants. Other evidentiary barriers that prevent unreliable or overly prejudicial evidence from being admitted, paired with policy considerations, heavily favor admission. Thus, the

190. See, e.g., *Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (per curiam).

191. Martha Rix, *Rape Shield Statute — Shield or Sword?*, 69 WOMEN LAW. J. 13, 15 (1983).

192. Steven L. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 179 (1989)

193. *Id.* at 167 (noting the inaccuracy of juries in evaluating eyewitness testimony).

194. Tanford & Bocchino, *supra* note 96, at 550–51.

195. Rix, *supra* note 191, at 15.

196. Tanford & Bocchino, *supra* note 96, at 570.

2020]

*STI EVIDENCE AND RAPE SHIELD LAWS*

715

admission of STI evidence as a specific instance of prior sexual behavior aligns with the purpose of Rule 412 and helps maintain the constitutionally guaranteed standard of “innocent until proven guilty,”<sup>197</sup> even for our most unforgivable criminal defendants.

ERIN WILSON\*\*

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197. U.S. CONST. amends. V, VI, XIV; *Coffin v. United States*, 156 U.S. 432, 452 (1895).

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