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State v. Ozuna Appellant's Brief Dckt. 40165

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. RICARDO OZUNA, JR., Defendant-Appellant.	)	NO. 40165 CANYON COUNTY NO. CR 2010-25873 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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STATEMENT OF THE CASE

Nature of the Case

Ricardo Ozuna, Jr., appeals from a judgment of conviction for lewd conduct following a jury trial. On appeal, he asserts that the district court erred in concluding that Idaho Rule of Evidence 412 applied to bar presentation of proffered evidence that he did not have sexual intercourse with the alleged victim because he had been told that she had chlamydia, and when it prevented him from eliciting evidence that the alleged victim had chlamydia at the time of the alleged assault and that he has shown no signs of chlamydia since the alleged assault. He further asserts that, even assuming the proffered evidence fell within the confines of Rule 412, the district court violated his constitutional rights to present a defense and to a fair trial under the Sixth and Fourteenth Amendments when it excluded the proffered evidence. Additionally, Mr. Ozuna asserts that the district court abused its discretion when it imposed a life sentence, with twenty years fixed, following his conviction.

Statement of the Facts and Course of Proceedings

Ricardo Ozuna, Jr., was charged with one count of lewd conduct with a minor under sixteen, for alleged genital to genital contact, and a sentencing enhancement under Idaho Code § 19-2520G. (R., pp.36-37, 67-68.) The charge stemmed from allegations that Mr. Ozuna had unprotected sex with fifteen year old E.B. (Tr., p.282, L.7 – p.303, L.9.)

Prior to the start of trial, Mr. Ozuna sought a ruling as to whether he could testify that, on the night of the alleged assault, he was told by a friend of E.B. that she had chlamydia, which caused him to have no interest in having sexual intercourse with her.

Mr. Ozuna also sought permission to elicit testimony that E.B. had chlamydia at the time of the alleged assault, and that he did not have chlamydia or show any signs of chlamydia after the alleged assault. (Tr., p.229, L.9 – p.231, L.12.) The State opposed the defense request, citing, *inter alia*, Idaho Rule of Evidence 412. Ultimately, the district court concluded that Rule 412 applied to bar the proffered evidence in both areas. (Tr., p.255, L.5 – p.256, L.2.)

Following a jury trial, Mr. Ozuna was found guilty of lewd conduct (Tr., p.695, Ls.9-25), and the sentencing enhancement. (Tr., p.722, Ls.4-22.) The State requested imposition of a unified life sentence, with twenty years fixed. (Sent.Tr., p.25, Ls.16-23.) Defense counsel requested a unified sentence of thirty or thirty-five years, with fifteen years fixed. (Sent.Tr., p.33, L.9 – p.34, L.23.) Ultimately, the district court imposed a life sentence, with twenty years fixed. (Sent.Tr., p.48, Ls.4-18.) He filed a Notice of Appeal timely from the judgment of conviction. (R., p.227.)

ISSUES

1. Did the district court err in concluding that the proffered evidence fell under Idaho Rule of Evidence 412, and violate Mr. Ozuna's constitutional rights to present a defense and to a fair trial, when it prevented him from testifying that he did not have sexual intercourse with the alleged victim because he had been told that she had chlamydia?

2. Did the district court err in concluding that the proffered evidence fell under Idaho Rule of Evidence 412, and violate Mr. Ozuna's constitutional rights to present a defense and to a fair trial, when it prevented him from eliciting testimony that the alleged victim had chlamydia at the time of the alleged assault and that he had shown no signs of chlamydia since the alleged assault?

3. Did the district court abuse its discretion when it imposed a life sentence, with twenty years fixed, following Mr. Ozuna's conviction for lewd conduct with a sentencing enhancement?

ARGUMENT

I.

The District Court Erred In Concluding That The Proffered Evidence Fell Under Idaho Rule Of Evidence 412, And Violated Mr. Ozuna's Rights To Present A Defense And To A Fair Trial, When It Prevented Him From Testifying That He Did Not Have Sexual Intercourse With The Alleged Victim Because He Had Been Told That She Had Chlamydia

A. Introduction

Mr. Ozuna asserts that the district court erred in concluding that the proffered evidence fell under Idaho Rule of Evidence 412, and violated his constitutional rights to present a defense and to a fair trial under the Sixth and Fourteenth Amendments,[1] when it prevented him from testifying that he did not have sexual intercourse with E.B. because he had been told that she had chlamydia. The district court erred because the proffered evidence did not fall within the scope of Rule 412. Furthermore, even assuming that it did, enforcing Rule 412 to bar its admission violated Mr. Ozuna's Sixth and Fourteenth Amendment rights.

B. The District Court Erred In Concluding That The Proffered Evidence Fell Under Idaho Rule Of Evidence 412, And Violated Mr. Ozuna's Constitutional Rights To Present A Defense And To A Fair Trial, And Prevented Him From Testifying That He Did Not Have Sexual Intercourse With The Alleged Victim Because He Had Been Told That She Had Chlamydia

Idaho Rule of Evidence 412, in relevant part, provides:

> (a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sex crime, reputation or opinion evidence of the past sexual behavior of an alleged victim of such sex crime is not admissible.

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[1] The United States Supreme Court has recognized that the right to present a defense is "so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment." *Washington v. Texas*, 388 U.S. 14, 18-19 (1967) (footnote omitted).

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sex crime, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is –

(1) admitted in accordance with subdivisions (c)(1) and (c)(2)[2] and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of –

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the sex crime is alleged; or

(C) false allegations of sex crimes made at an earlier time; or

(D) sexual behavior with parties other than the accused which occurred at the time of the event giving rise to the sex crime charged.

. . .

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which the sex crime is alleged.

. . . .

I.R.E. 412.

1. The Proffered Evidence Does Not Fall Within Rule 412

Mr. Ozuna maintains that the district court erred in excluding his proffered testimony concerning his belief that E.B. had chlamydia as the reason that he did not

[2] Subsections (c)(1) and (c)(2) concern the requirements of pre-trial notice and a hearing. They are not relevant on appeal, as the district court concluded, at the requisite hearing, that the motion was timely, and the prosecuting attorney made no

have sexual intercourse with her because it is not the type of evidence that falls within the strictures of Rule 412.[3]

In his offer of proof concerning the proffered testimony, defense counsel set forth the expected testimony, its significance, and the legal theory behind its admissibility as follows,

> It would be our contention, and this would come through the testimony of my client when he's on the witness stand, that earlier in the evening, when Andree became somewhat jealous at attention he [Mr. Ozuna] was paying towards [E.B.], that Andree, the other woman present at this – at his house in Nampa, told him that, basically, you don't want to have anything to do with her, she has a sexually transmitted disease.
>
> My client is not – and I would not be offering that from that point of view for the truth of the matter asserted. Therefore, I do not think I am under 412. I would be offering that statement because my client, at least believing it true, or at least believing it could be true, that is why he, in fact – even though [E.B.] was allegedly throwing herself at my client – why he chose not to have sexual relations with her. It was a factor in his choice not to have sexual relations with [E.B.]. And I am not offering it – and this is why I shouldn't – it shouldn't be under 412. I'm not offering it to say – at that point, I'm not offering it to say she had chlamydia. At that point, I'm saying, we don't know, but my client believed it could be true and, therefore, he chose not to have sex with her. It is basically the – a reason that he chose not to have sexual relations with her.
>
> And again, I don't think it comes under 412 because that is very clear and would be very clear that this is not being offered for the truth of the matter asserted, truth of the matter asserted being she has chlamydia. It is being offered for my client's state of mind for a reason that he decided he wasn't going to roll the dice.
>
> . . .
>
> Judge, it's not reputation evidence because I'm not really offering it for that. I'm simply offering it as my client's motivation. It is – it is not being offered for reputation or anything. And Judge, I certainly have no

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argument regarding any other failure to satisfy the requirements of Rule 412. (Tr., p.242, L.22 – p.243, L.16.)

[3] At trial, Mr. Ozuna testified that E.B., whom he met through an adults-only telephone chat line (Tr., p.586, L.6 – p.588, L.25), had previously told him that she was nineteen years old. (Tr., p.599, Ls.12-16.) Her actual age, then, would not have been a factor that would have discouraged him from having sex with her.

> objection to all the cautionary instructions the Court wishes to give that it's not being offered for the truth of the matter asserted. I'm doing it because my client's state of mind, his motivation is exactly what – it's central to the issue, Judge. It's central to the issue.

(Tr., p.246, L.4 – p.248, L.9.) Defense counsel then explained, "If I was offering it for the truth, that the rumor is she has chlamydia, yes, that would be" something that fell under Rule 412. (Tr., p.252, Ls.1-4.)

In ruling that Mr. Ozuna could not testify that he had learned from Andree that E.B. had chlamydia, resulting in him having no desire to have sexual intercourse with E.B., the district court explained,

> [I]t would be stated opinion or reputation regarding the fact that the defendant [sic] had a sexually transmitted disease. And the Court has made its ruling under 412. And the Court will stand by its ruling. The evidence will not be placed before the jury. And if it's determined that I am wrong, I will graciously accept the correction by an appellate court. And again, I pointed out this is a tough decision, but I think the rule specifically addresses this issue.

(Tr., p.255, L.12 – p.256, L.2.)

In order for Rule 412 to apply, the proffered evidence must be either "reputation or opinion evidence of the past sexual behavior of an alleged victim" or "evidence of a victim's past sexual behavior." I.R.E. 412(a) and (b). The issue of whether a defendant, who believed that a person has a communicable disease, may testify as to that belief and the effect that it had in causing him not to have sexual intercourse with the person, appears to be one of first impression in Idaho.

As an initial matter, no definition of the term "sexual behavior" appears to have been developed by Idaho appellate courts. *See State v. Brown*, 131 Idaho 61, 67 (Ct. App. 1998) (declining to define the scope of the term "past sexual behavior," choosing instead to decide the case under Rule 403). However, the Oregon Court of

Appeals has interpreted the term "past sexual behavior" from a nearly-identical section of its rape shield law[4] as follows:

> We hold that "past sexual behavior" means a volitional or non-volitional physical act that the victim has performed for the purpose of the sexual stimulation or gratification of either the victim or another person or an act that is sexual intercourse, deviate sexual intercourse or sexual contact, or an attempt to engage in such an act, between the victim and another person.

Wright, 776 P.2d at 1297-98. The Supreme Court of Iowa has adopted the Oregon Court of Appeals' definition when interpreting its own rape shield law. *State v. Baker*, 679 N.W.2d 7, 10 (Iowa 2004) (quoting *Wright*).

While no Idaho appellate court has tackled the issue, appellate courts in several states have held that evidence that an alleged victim *actually has* a sexually transmitted disease is not prohibited under those states' rape shield laws because presenting such testimony does not amount to disclosing specific instances of prior sexual behavior. *See, e.g., State v. Steele*, 510 N.W.2d 661, 667 (S.D. 1994) (holding that, in seeking to offer the fact that the alleged victim had chlamydia at the time of the alleged assault, which defendant did not subsequently contract, "Steele sought not to offer evidence of any specific instance of [the victim's] prior sexual contacts, as prohibited by the rape shield statute"); *Evans v. Com.*, 415 S.E.2d 851, 855 (Va. Ct. App. 1992) ("Evidence that the complaining witness learned that she had contracted a venereal disease is not evidence of general reputation or of specific prior sexual 'conduct' which [the rape shield statute] shields."); *Reece v. State*, 383 S.E.2d 572, 574 (Ga. Ct. App. 1989); *but see Fells v. State*, 207 S.W.3d 498, 502 (Ark. 2005) (holding, in an issue of first impression,

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[4] The relevant portion of the law read, "For purposes of this section, the term 'past sexual behavior' means sexual behavior with respect to which rape, sodomy or sexual abuse or attempted rape, sodomy or sexual abuse is alleged." *State v. Wright*, 776 P.2d 1294, 1297 (Or. Ct. App. 1989).

"that the HIV status of a rape victim is protected under Arkansas' rape-shield statute" but cautioned that "[o]ne should not conclude, as the dissent suggests, that a defendant can never present evidence of a rape victim's HIV status when that evidence is relevant to a defense at trial"); *State v. Cunningham*, 995 P.2d 561, 568-69 (Or. Ct. App. 2000) ("Evidence that a victim has a sexually transmitted disease is as much evidence of past sexual behavior as evidence of intercourse or other sexual contact.").

In *Reece*, the Georgia Court of Appeals reasoned that evidence that the alleged victim had tested positive for a sexually transmitted disease immediately after the alleged sexual assault and that the defendant and his wife did not have such a disease did not fall under the state's rape shield statute, explaining,

> Perhaps it might suggest by deduction that if defendant did not have the disease, and did not transmit it to the victim, then someone else might have done so. *This is not an improper attempt to explore the victim's past or other sexual experience; and if under some remote consideration it suggests that (in addition to perhaps bathing in water which another infected person had enjoyed) the victim had some sexual activity with someone else, so be it. That is speculation only.* 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. Such speculation should not stand in the way of allowing defendant to present this vital defense to the prejudicial testimony elicited by the State.

Reece, 383 S.E.2d at 574 (emphasis added). In *Evans*, the Virginia Court of Appeals reasoned, "Although a venereal disease is usually sexually transmitted, evidence that a person has learned that he or she has contracted a venereal disease is not proof of specific sexual conduct." *Evans*, 415 S.E.2d at 855.

Mr. Ozuna urges this Court to accept the reasoning of the courts in *Reece*, *Evans*, and *Steele* that evidence concerning whether an alleged victim has a sexually transmitted disease does not fall under the prohibitions of rape shield laws. As both the *Reece* and *Evans* Courts explained, the fact that a person has a sexually transmitted

disease does not amount to a statement that the person has had sex, let alone constitute evidence of a specific prior instance of sexual conduct. There is no reason to conclude that Idaho's rape shield rule should be read any differently, especially with respect to a claim, not offered for the truth of the matter asserted, that a defendant's reason for not having sexual intercourse with an alleged victim was fear of contracting a sexually transmitted disease he believed she had.

Furthermore, the fact that Mr. Ozuna was not offering the testimony to prove that E.B. actually had chlamydia further undermines the district court's conclusion that this evidence fell under Rule 412. This is reinforced by the Idaho Court of Appeals' recent explanation of the reasons for the adoption of rape shield laws, namely, "Rape shield laws are rules of exclusion of evidence of a victim's sexual behavior, adopted in large part to protect victims and prevent use of evidence of a victim's past sexual behavior *for improper and irrelevant purposes*." *State v. Molen*, 148 Idaho 950, 954 n.3 (Ct. App. 2010) (emphasis added).

Because the proffered evidence does not fall within the scope of Rule 412, the district court erred when it excluded the evidence on that basis. As such, this Court should vacate Mr. Ozuna's conviction, and remand this matter for a new trial. *See State v. Meister*, 148 Idaho 236, 240 (2009) (where district court applies wrong standard in excluding defense evidence the remedy is to vacate the conviction and remand for a new trial).

2. Exclusion Of The Proffered Testimony Violated Mr. Ozuna's Constitutional Rights To Present A Defense And To A Fair Trial Under The Sixth And Fourteenth Amendments

Rule 412 does not apply to bar evidence of a victim's past sexual behavior when it "is constitutionally required to be admitted . . . ." I.R.E. 412(b)(1). In considering

whether exclusion under Rule 412 violates a defendant's Sixth Amendment right to present a defense, Idaho appellate courts must apply a two-part test. First, because a defendant has no constitutional right to present irrelevant evidence, the court must determine whether the proffered evidence is relevant. Second, the court must "ask whether other legitimate interests outweighed" the defendant's interest in presenting the proffered evidence. In considering the issue, an Idaho appellate court "will find a Sixth Amendment violation only if [it] conclude[s] that the trial court abused its discretion." *State v. Peite*, 122 Idaho 809, 814-15 (Ct. App. 1992) (citing *Wood v. Alaska*, 957 F.2d 1544 (9th Cir. 1992)). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401.

Mr. Ozuna maintains that the first part of the test, whether the proffered evidence was relevant, is clearly satisfied. Whether Mr. Ozuna had a plausible reason for not wanting to engage in sexual intercourse with E.B. goes to the heart of his defense. Central to his defense was his testimony that he did not have sexual intercourse with E.B., whom he believed to be of age,[5] because he had no desire to do so. What was absent from his testimony in support of his defense was the reason that he rejected her aggressive pursuit of sex with him was that he believed her to be afflicted with chlamydia.

In order to understand how critical the excluded information was to Mr. Ozuna's defense, it is necessary to examine his actual trial testimony. At trial, Mr. Ozuna testified that, while E.B. used the bathroom, Andree told him, "[E.B.]'s checking you out and stuff. She's giggling, she's coming on to you. And don't be messing with her." At

[5] *See* note 3, *supra*.

that point, defense counsel said, "Okay. I want to stop you right there. Okay." This was an attempt to avoid violating the district court's order concerning what Andree told him about E.B. having chlamydia. (Tr., p.601, Ls.9-22.) Andree then left the room briefly, and E.B. flirted with Mr. Ozuna before throwing him on the bed and getting on top of him, at which point Andree, wearing lingerie, walked back in and started yelling at them. (Tr., p.602, Ls.3-25.)

Andree became enraged, and "ran down the alley like a lunatic for a couple of minutes," before returning and asking to use the phone. Mr. Ozuna offered to call a cab for E.B. and Andree because he wanted them to "get the hell out of [t]here." Andree then used the phone to arrange a ride with "some guy in a truck that she met on Live Links." Mr. Ozuna asked her to take E.B. with her, but she refused to do so. (Tr., p.603, L.25 – p.606, L.20.) At that point, Mr. Ozuna went to his futon and "crashed out" wearing just his boxer shorts and a tank top. (Tr., p.607, L.4 – p.608, L.2.)

Some time later, he awoke to find E.B. "straddling" him. He said, "I was wet, and I – and there was – and there was, like, discharge. And I told her, what the fuck. And I said, I have to work tomorrow. *And I told her some stuff that I'd heard about her that wasn't cool.*" (Tr., p.608, Ls.8-14 (emphasis added).) At that point, the prosecutor interjected, clearly attempting to ensure compliance with the pre-trial ruling preventing Mr. Ozuna from testifying as to why he didn't want to have sex with E.B. (Tr., p.608, L.15.) Mr. Ozuna then testified, "Anyway, I just – *in a rage, I just yelled some stuff*, and went to my room to go lay in my bed. And it was wet from piss or beer. I have no clue. So I laid on the floor." (Tr., p.608, Ls.19-22 (emphasis added).) The district court's ruling prevented Mr. Ozuna from providing a plausible explanation as to why he was enraged by E.B.'s attempt to sexually assault him, as well as why he would refuse to

have sex with a more-than-willing female whom he believed to be of legal age. Depriving him of that opportunity gutted his defense, and deprived the jurors of hearing relevant evidence necessary to exercising their truth-seeking function.

In *Commonwealth v. Thevenin*, 603 N.E.2d 222 (Mass. App. Ct. 1992), the appellate court considered the state's rape shield law in a rape prosecution in which the defendant wished to explain that he did not have sexual intercourse with the alleged victim because of his fear of contracting a sexually transmitted disease from her. Specifically, the defendant sought to introduce evidence that a coworker of the alleged victim had told him, prior to the alleged rape, that he had contracted "crabs" after having sex with her. *Thevenin*, 603 N.E.2d at 589. He also sought to testify that "because of his fear of developing the condition, he was disinclined to have natural sexual intercourse[6] with the complainant." Defense counsel noted that the evidence was necessary to present a defense. *Id.* at 589-90. In refusing to allow the evidence, the trial court reasoned that "in his view, 'crabs' is more easily cured than certain other venereal diseases, and because he doubted that the defendant thought that the complainant still had the disease, the judge concluded that fear of it would not 'deter a sexually aroused young man who had his mind on satisfaction." *Id.* at 590.

In cross-examining the defendant, the prosecutor "reviewed with the defendant in detail each of the complainant's sexually provocative actions and comments to which the defendant had referred in his direct testimony and questioned him in reference to each such action and comment about his disinterest in engaging in natural sexual intercourse." *Id.* Defense counsel objected to the line of questioning in light of the pre-

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[6] The reference to "natural sexual intercourse" was because the defendant did admit to having digitally penetrated her with her consent.

trial ruling. *Id.* While the trial court terminated the line of questioning, noting, "I'm having a real problem with my ruling now. You've got him looking like a jackass," it did not revisit its earlier ruling. *Id.*

The appellate court declined to create a general rule allowing for questions concerning sexually transmitted diseases in every case because "given the prevalence of sexually-transmitted diseases" it "would undoubtedly encourage a significant number of inquiries into the sexual history of rape complainants, causing them humiliation and discouraging them from reporting the crime to law enforcement authorities." *Id.* at 593. The court did, however, find error in excluding the evidence in light of the prosecutor's cross-examination of the defendant, because it made "the defendant's testimony concerning his actions appear altogether incredible even though the defendant had sought to offer a plausible explanation, the credibility of which should have been for the jury." *Id.*

While there is some difference between the facts in *Thevenin* and Mr. Ozuna's case, namely, the fact that the prosecuting attorney was responsible for making his defense look incredible, he maintains that the case supports his argument. Specifically, by preventing Mr. Ozuna from offering a reasonable explanation for turning down sex with a person he believed to be of age, both his ability and his right to present a defense were fatally weakened. Absent a legitimate reason for turning down sex, it is unlikely that a jury would believe that a man seeking companionship through an adults-only telephone chat line would have done so under the circumstances. The excluded evidence, therefore, was crucial to establishing Mr. Ozuna's state of mind at the time of the alleged assault, and providing a reasonable explanation for why he turned down sex.

With respect to the second prong of the test, whether other legitimate interests outweighed Mr. Ozuna's right to present a defense, the district court appears to have abused its discretion by failing to conduct such a balancing test. Nowhere in its statement explaining its ruling did the district court mention the requirement that it consider whether "other legitimate interests outweighed" Mr. Ozuna's interest in exercising his right to present a defense, it merely concluded, "I do not find that this evidence is constitutionally required to be admitted." (Tr., p.245, Ls.2-4.) This failure occurred despite defense counsel arguing, "I understand we have victims [sic] rights here, Judge, but we also have a man facing very serious charges. And any error made should be made – *anything that's on the line, Mr. Ozuna should get the benefit of the doubt here.*" (Tr., p.240, Ls.1-5 (emphasis added).)

Even assuming that the district court's one sentence conclusion that the evidence was not constitutionally required to be admitted constituted the required weighing of interests, Mr. Ozuna maintains that it was an abuse of discretion to so conclude in light of its crucial importance to his defense, when considered alongside any unidentified "other legitimate interests." In support of this argument, Mr. Ozuna cites to the Georgia Court of Appeals' reasoning in *Reece* that "[a]ny possible harm caused to the victim by such speculation [that she had contracted a sexually transmitted disease through sexual activity] is far outweighed by the harm done to the defendant in denying him the opportunity to" present the evidence. *Reece*, 383 S.E.2d at 574.

Because the district court abused its discretion and violated Mr. Ozuna's constitutional rights to present a defense and to a fair trial, his conviction must be vacated, with this matter remanded for a new trial. *See Meister*, 148 Idaho at 240

(where district court applies wrong standard in excluding defense evidence the remedy is to vacate the conviction and remand for a new trial).

II.

The District Court Erred In Concluding That The Proffered Evidence Fell Under Idaho Rule Of Evidence 412, And Violated Mr. Ozuna's Constitutional Rights To Present A Defense And To A Fair Trial, When It Prevented Him From Presenting Evidence That E.B. Had Chlamydia At The Time Of The Alleged Assault, And That He Did Not Contract Chlamydia Following The Alleged Assault

A. Introduction

Mr. Ozuna asserts that the district court erred in concluding that the proffered evidence fell under Idaho Rule of Evidence 412, and violated his constitutional rights to present a defense and to a fair trial under the Sixth and Fourteenth Amendments, when it prevented him from presenting evidence that E.B. had chlamydia at the time of the alleged assault, and that he did not contract chlamydia following the alleged assault. The district court erred because the proffered evidence did not fall within the scope of Rule 412. Furthermore, even assuming that it did, enforcing Rule 412 to bar its admission violated Mr. Ozuna's Sixth and Fourteenth Amendment rights.

B. The District Court Erred In Concluding That The Proffered Evidence Fell Under Idaho Rule Of Evidence 412, And Violated Mr. Ozuna's Constitutional Rights To Present A Defense And To A Fair Trial, When It Prevented Him From Presenting Evidence That E.B. Had Chlamydia At The Time Of The Alleged Assault, And That He Did Not Contract Chlamydia Following The Alleged Assault

1. The Proffered Evidence Does Not Fall Within Rule 412

In his offer of proof, defense counsel explained that, at trial, he wished to ask E.B. whether she had chlamydia at the time of the alleged assault.[7] (Tr., p.229, Ls.17-

[7] Evidence provided by the State to defense counsel on the eve of trial confirmed that E.B. suffered from chlamydia at the time of the alleged assault. (Tr., p.242, Ls.22-24.)

21.) He then represented that Mr. Ozuna would testify "that he has since been to a doctor, had, basically, a full physical, and he does not suffer from a sexually transmitted disease. He does not suffer from chlamydia, and never came down with any signs." (Tr., p.230, Ls.7-12.) The State opposed, arguing that the proffered evidence fell "squarely under 412 and it's [a] prior sexual act," and made its own offer of proof that a doctor had told the State, *inter alia*, that "the transmission rate of STD via intercourse is not a hundred percent." (Tr., p.234, L.15 – p.235, L.4.)

Defense counsel argued that the proffered evidence did not fall under Rule 412 because he had "no intent on asking her how she had a sexually transmitted disease, how she contracted it. I am simply going to ask whether she had it." (Tr., p.238, Ls.9-15.) With respect to the State's argument that the evidence wasn't relevant because the transmission rate for sexually transmitted diseases is not one hundred percent, defense counsel responded, "I do think it is a relevant piece of information, because, for relevance, it doesn't require the hundred percent certainty standard that [the prosecutor] seems to be holding me to. It is simply evidence that tends to show something is probable, Judge." (Tr., p.239, Ls.19-24.)

Ultimately, the district court concluded, pursuant to Rule 412, that the proffered evidence "is evidence of a victim's past behavior, suggesting she had past sexual activities. And I will not allow the evidence to be addressed during the trial." (Tr., p.243, Ls.17-21.)

Appellate courts in at least three states – South Dakota, Georgia, and Virginia – have held that the type of evidence proffered by Mr. Ozuna does not fall within the strictures of rape shield laws. *See Steele*, *Reece*, and *Evans*; *but see Fells*, 207 S.W.3d at 502 (holding, in an issue of first impression, "that the HIV status of a rape

victim is protected under Arkansas' rape-shield statute" but cautioned that "[o]ne should not conclude, as the dissent suggests, that a defendant can never present evidence of a rape victim's HIV status when that evidence is relevant to a defense at trial"); *Cunningham*, 995 P.2d at 568-69 ("Evidence that a victim has a sexually transmitted disease is as much evidence of past sexual behavior as evidence of intercourse or other sexual contact.").

In *Steele*, the South Dakota Supreme Court considered whether evidence that an alleged victim of rape had tested positive for chlamydia while the defendant had tested negative ran afoul of the state's rape shield law in determining whether the trial court erred in denying a motion for new trial. The motion for new trial concerned the prosecutor's suppression of evidence that the alleged victim had chlamydia at the time of the alleged rape by the defendant. *Steele*, 510 N.W. 2d at 664. In concluding that the suppressed evidence didn't require a new trial, the trial court concluded that such evidence would have been inadmissible under the state's rape shield law because "[i]f evidence was offered that the victim had chlamydia, and that she did not contract it from the Defendant, the jury would become aware that the victim had been engaged in some prior sexual contact with a third person." *Id.* at 667. In rejecting the trial court's reasoning, the South Dakota Supreme Court explained that such a concern was misplaced because "this is not '*specific instances* of a victim's prior sexual conduct." *Id.* (quoting rape shield statute) (emphasis in original). The court went on to explain that, "[m]ost importantly, Steele sought not to offer evidence of any specific instance of [the victim's] prior sexual contacts, as prohibited by the rape shield statute. Rather, the Defense sought to offer evidence that had direct bearing on the believability of the two versions of the events . . . ." *Id.*

In *Reece*, the Georgia Court of Appeals considered the applicability of the state's rape shield law with respect to evidence of sexually transmitted diseases. In the prosecution's case in chief, it presented testimony from a doctor who examined the alleged victim following the alleged assault. That doctor testified that he had observed a vaginal infection, and that the alleged victim told him that the infection only emerged after the alleged assault. The court noted, "There was other evidence that the victim said she had not had sexual intercourse with anyone else, and evidence that sexual intercourse transmits the disease." *Reece*, 383 S.E.2d at 573. After his objection to this testimony was overruled, the defendant sought to introduce evidence that neither he nor his wife had tested positive for the disease, but was prohibited from doing so. *Id.* at 573-74.

In concluding that it was error for the trial court to exclude the proffered evidence, the court explained,

> We do not see how allowing this vital defense to be put forward offends the rape shield law . . . *Perhaps it might suggest by deduction that if defendant did not have the disease, and did not transmit it to the victim, then someone else might have done so. This is not an improper attempt to explore the victim's past or other sexual experience; and if under some remote consideration it suggests that (in addition to perhaps bathing in water which another infected person had enjoyed) the victim had some sexual activity with someone else, so be it. That is speculation only.* 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. Such speculation should not stand in the way of allowing defendant to present this vital defense to the prejudicial testimony elicited by the State.

Id. at 574 (emphasis added). *See also Warner*, 626 S.E.2d at 622-23 ("We have held that a defendant may introduce evidence that the victim has a sexually transmitted disease, 'not to prove that the victim had engaged in sexual intercourse with other men,

but to exclude the possibility that *he* had had intercourse with her.'") (quoting *Chambers v. State*, 421 S.E.2d 326 (Ga. Ct. App. 1992)) (emphasis in original).

In *Evans*, the Virginia Court of Appeals, interpreting the state's rape shield law, held,

> Evidence that the complaining witness learned that she had contracted a venereal disease is not evidence of general reputation or of specific prior sexual 'conduct,' which Code § 18.2-67.7 shields . . . Although a venereal disease is usually sexually transmitted, evidence that a person has learned that he or she has contracted a venereal disease is not proof of specific sexual conduct.

Evans, 415 S.E.2d at 855.

Mr. Ozuna asserts that, for the reasons given by the courts in *Steele*, *Reece*, and *Evans*, the proffered evidence that E.B. suffered from chlamydia at the time of the alleged assault should not have been excluded because it did not fall under Rule 412. As such, this Court should vacate the judgment of conviction, and remand this matter for a new trial. *See Meister*, 148 Idaho at 240 (where district court applies wrong standard in excluding defense evidence the remedy is to vacate the conviction and remand for a new trial).

2. Exclusion Of The Proffered Evidence Violated Mr. Ozuna's Constitutional Rights To Present A Defense And To A Fair Trial Under The Sixth And Fourteenth Amendments

Rule 412 does not apply to bar evidence of a victim's past sexual behavior when it "is constitutionally required to be admitted . . . ." I.R.E. 412(b)(1). In considering whether exclusion under Rule 412 violates a defendant's Sixth Amendment right to present a defense, Idaho appellate courts apply a two-part test. First, the court must determine whether the proffered evidence is relevant because a defendant has no constitutional right to present irrelevant evidence. Second, the court must "ask whether

other legitimate interests outweighed" the defendant's interests in presenting the proffered evidence. In considering the issue, an Idaho appellate court "will find a Sixth Amendment violation only if [it] conclude[s] that the trial court abused its discretion." *Peite*, 122 Idaho at 814-15 (citing *Wood*). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401.

The proffered evidence satisfies the first prong of the test, as it had a tendency to make the existence of a fact of consequence less probable, namely whether Mr. Ozuna had genital to genital contact with E.B. Given the fact that sexually transmitted diseases are, unsurprisingly, transmitted via sexual intercourse, the fact that E.B. had chlamydia at the time of the alleged assault, and that Mr. Ozuna did not contract chlamydia following the alleged assault makes it less probable that he had unprotected sexual intercourse with her. Although no Idaho appellate court has yet decided whether an alleged victim of sexual assault having a sexually transmitted disease at the time of the incident is relevant when a defendant does not subsequently contract the disease, several other states have considered the issue.

In *State v. Knox*, 536 N.W.2d 735 (Iowa 1995), the Iowa Supreme Court considered the trial court's exclusion, under the rape shield law, of evidence that the alleged victim had chlamydia at the time of the alleged assault and that the defendant tested negative for chlamydia three months after the alleged assault. The court declined to consider whether the proffered evidence fell under the rape shield law, instead considering it on general grounds of relevancy. *Knox*, 536 N.W.2d at 738.

The court noted that the trial court had concluded, on the basis of "other evidence," that the probative value of the evidence was "very weak," a decision with which it agreed. That other evidence included the fact that "[c]hlamydia is usually transmitted by sexual intercourse" and that "[a] male has a thirty percent chance of contracting the disease from an infected female in a single act of intercourse," but that the use of a condom "substantially reduces this risk." *Id.* Other evidence significant to the finding included the following:

> [T]he complainant testified that she was penetrated but she was not sure whether she had been penetrated with a penis, a finger, or some other object. She also testified that Knox did not move his body as if he were having sexual intercourse. Nor could she tell whether he reached any kind of climax. Investigators found no seminal fluid or foreign pubic hairs in the complainant's underpants. Had such evidence been found, one could reasonably infer unprotected sexual intercourse. Shortly after the alleged incident, the police arrested Knox and found condoms in his pocket. All of this evidence suggests that Knox may have used a condom or may have digitally penetrated the complainant. In either of these events, the chances of Knox contracting chlamydia was nil.
>
> Finally, there was evidence that chlamydia is easily treatable with widely available antibiotics. This suggests that Knox could have been infected at the time of the alleged incident but was cured when tested three months later.

Id. at 738-39. *See also Fells*, 207 S.W.3d at 502 (holding, in an issue of first impression, "that the HIV status of a rape victim is protected under Arkansas' rape-shield statute" but cautioned that "[o]ne should not conclude, as the dissent suggests, that a defendant can never present evidence of a rape victim's HIV status *when that evidence is relevant to a defense at trial*") (emphasis added); *Warner*, 626 S.E.2d at 622-23 ("We have held that a defendant may introduce evidence that the victim has a sexually transmitted disease, 'not to prove that the victim had engaged in sexual intercourse with other men, but to exclude the possibility that *he* had had intercourse with her.'") (quoting *Chambers v. State*, 421 S.E.2d 326 (1992)) (emphasis in original).

The facts of Mr. Ozuna's case are distinguishable from those of *Knox* in two important respects. First, the testimony of E.B. established that she believed that unprotected vaginal sex occurred. (Tr., p.282, L.7 – p.303, L.9.) Second, Mr. Ozuna's offer of proof was that "he has since been to a doctor, had basically, a full physical, and he does not suffer from a sexually transmitted disease. He does not suffer from chlamydia, and *never* came down with any signs." (Tr., p.230, Ls.7-12 (emphasis added).) This differs from the proffered evidence in *Knox*, which consisted of nothing more than evidence that, *three months after the fact*, the defendant tested negative for chlamydia.

With respect to the second prong of the test, whether other legitimate interests outweighed Mr. Ozuna's right to present a defense, the district court appears to have abused its discretion by failing to conduct such a balancing test. Nowhere in its statement explaining its ruling did the district court mention the requirement that it consider whether "other legitimate interests outweighed" Mr. Ozuna's interest in exercising his right to present a defense, it merely concluded, "I do not find that this evidence is constitutionally required to be admitted." (Tr., p.245, Ls.2-4.) This failure occurred despite defense counsel arguing, "I understand we have victims [sic] rights here, Judge, but we also have a man facing very serious charges. And any error made should be made – *anything that's on the line, Mr. Ozuna should get the benefit of the doubt here.*" (Tr., p.240, Ls.1-5 (emphasis added).)

Because the district court abused its discretion and violated Mr. Ozuna's constitutional rights to present a defense and to a fair trial, his conviction must be vacated, with this matter remanded for a new trial. *See Meister*, 148 Idaho at 240

(where district court applies wrong standard in excluding defense evidence the remedy is to vacate the conviction and remand for a new trial).

III.

The District Court Abused Its Discretion When It Imposed A Life Sentence, With Twenty Years Fixed, Following Mr. Ozuna's Conviction For Lewd Conduct With A Sentencing Enhancement

Mr. Ozuna asserts that, given any view of the facts, his life sentence, with twenty years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Ozuna does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Ozuna must show that in light of the governing criteria, the sentences were excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

The Idaho Supreme Court has recognized that an important factor in fashioning a sentence is whether an offender enjoys the support of family and friends in his rehabilitation efforts. *See State v. Shideler*, 103 Idaho 593, 594-595 (1982) (reducing

sentence of defendant who, *inter alia*, had the support of his family in his rehabilitation efforts). Mr. Ozuna enjoys the support of his family and friends. At the time of his arrest, Mr. Ozuna was residing with his father. (Presentence Investigation Report (*hereinafter,* PSI), p.10.) His family and friends, including his mother, four aunts, a niece, and his sister, provided letters of support to the district court. (Sentencing Exhibit No. 2 (eight letters in support of Mr. Ozuna).) One aunt, Patricia Salas, described the incredible amount of family support enjoyed by Mr. Ozuna, writing, "I also believe that with the help of such a large family that he has we can help and support him in anyway [sic] that we can . . . Rich has always had the love and respect of his entire family. His mother and sister have always been there for him as well as his family." (Sentencing Exhibit No. 2 (Letter of Patricia Ann Salas).) His sister, Melissa Ozuna, echoed these remarks, writing, "We are all here and supportive of him . . . I believe with his family being here and supporting him out here he can be given opportunity . . . myself and my family will be his support through this trying time." (Sentencing Exhibit No. 2 (Letter of Melissa Ozuna).) The other letters reiterated the strong family support that Mr. Ozuna enjoys. (Sentencing Exhibit No. 2.)

The Idaho Supreme Court has held that substance abuse should be considered as a mitigating factor. *State v. Nice*, 103 Idaho 89 (1982). In *Nice*, the Idaho Supreme Court reduced a sentence based on Nice's lack of prior record and the fact that "the trial court did not give proper consideration of the defendant's alcoholic problem, the part it played in causing defendant to commit the crime and the suggested alternatives for treating the problem." *Id.* at 91. Additionally, the Idaho Supreme Court has held that ingestion of drugs and alcohol, resulting in impaired capacity to appreciate criminality of conduct, can be a mitigating circumstance. *State v. Osborn*, 102 Idaho 405, 414

(1981). The charge for which Mr. Ozuna was found guilty involved alcohol. According to his mother, Mr. Ozuna's alcohol problem began when his parents divorced while he was in the eighth grade. The divorce was "devastating" to him, causing everything in his life to "spiral[] downhill," and as a result, "alcohol took over his life." (Sentencing Exhibit No. 2 (Letter of Helen Salas).) The PSI writer described Mr. Ozuna's "history of substance and alcohol abuse" and noted that "[h]is prior record consists of seven drug and/or alcohol-related charges." (PSI, p.11.)

Mr. Ozuna asserts that, in light of the mitigating factors known to the district court at the time of sentencing, the district court abused its discretion when it imposed a unified life sentence, with twenty years fixed.

CONCLUSION

For the reasons set forth herein, Mr. Ozuna respectfully requests that this Court vacate the judgment of conviction, and remand this matter for a new trial. In the alternative, he respectfully requests that this Court reduce his sentence to a unified sentence of thirty years, with fifteen years fixed, or otherwise reduce it as this Court deems appropriate.

DATED this 20th day of February, 2013.

SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of February, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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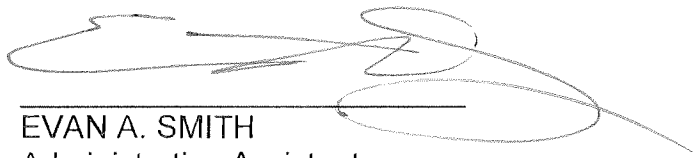

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SJH/eas