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6 Attorney for

7 IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LAKE COUNTY

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9
10 STATE OF OREGON,

11 Plaintiff,

12 -VS-

13 JOHN DOE,

14 Defendant

CASE No. 030067CR

MOTION TO ADMIT EVIDENCE
UNDER OEC 412

15
16 COMES NOW DEFENDANT, John Doe, by and through counsel, Terri Wood, and
17 hereby moves this Court for an Order admitting evidence of the alleged victim Elizabeth's past
18 sexual behavior under ORE 412. As permitted by OEC 412(4)(a), this motion is made less than
19 fifteen days prior to the date of the trial of this case is scheduled to begin, because the evidence
20 is newly-discovered and could not have been obtained earlier through the exercise of due
21 diligence. Two duplicate certified true copies have been served upon the prosecution so that
22 one may be delivered to the alleged victim, see OEC 412(4)(a).

23 The evidence of one specific instance of the alleged victim's past sexual behavior as set
24 forth in the attached written offer of proof, detailed by approximate date and description of the
25 specific instance, as required by ORE 412(3)(b), is relevant and the probative value of such
evidence outweighs any danger of unfair prejudice, pursuant to ORE 412(4)(c). This evidence of

1 past sexual behavior relates to motive or bias of the alleged victim; or is otherwise
2 constitutionally required to be admitted; and is therefore within the terms of ORE 412(2)(b) and
3 admissible. Mr. Doe relies on the following Points and Authorities, and whatever grounds for
4 admission of the evidence which become apparent during the hearing. Mr. Doe requests an
5 omnibus hearing and oral argument to be held prior to the start of trial on Tuesday, April 20th,
6 2004, or at any time during the trial prior to the testimony of Elizabeth.

7 This Motion is made in good faith and not filed for the purpose of delay, and is supported
8 by the Memorandum of Law which follows.

9 Respectfully submitted this _____ day of April, 2004.

10
11 _____
12 TERRI WOOD, OSB #88332
ATTORNEY FOR DEFENDANT

13
14 **MEMORANDUM OF LAW**

15 The principal purpose of ORE 412 is to protect alleged victims of sexual crimes from
16 degrading and embarrassing disclosure of intimate details about their private lives. ORE 412 is
17 simultaneously designed to protect a defendant's opportunity to confront witnesses testifying
18 against the defendant. The rule balances the interests involved: the interest of an alleged victim
19 of a sexual crime in protecting a private life from unwanted public exposure, and the defendant's
20 constitutional right to present an adequate defense by offering relevant and probative evidence.

21 In the case at bar, the defense learned of Ms. Elizabeth's past sexual behavior upon
22 reviewing a videotaped deposition of Ms. Elizabeth taken in connection with her pending civil
23 lawsuit for damages against Mr. Doe for the same conduct as alleged in the Indictment herein.
24 Ms. Elizabeth's civil complaint alleges her past sexual behavior increases the amount of
25 damages to which she is entitled. The defense submits that this alleged victim's interest in

1 protecting her private life from public exposure is diminished by her initiation of a civil action in
2 which she intends to offer the same evidence the defense seeks to offer in Mr. Doe's defense.

3 I. THE COURT MUST FOLLOW A THREE STEP ANALYSIS WHEN EVALUATING
4 WHETHER EVIDENCE SHOULD BE ADMITTED UNDER ORE 412.

5 In *State v. Wright*, 97 Or App 401, 405, rev denied 308 Or 593 (1989), the court held that
6 a trial judge must follow a three-step analysis when deciding whether evidence is admissible
7 under ORE 412: First, the court must determine whether the evidence concerns a victims "past
8 sexual behavior." If it does not, it is not appropriate for there to be further inquiry under ORE
9 412. Second, if the evidence does concern past sexual behavior and is offered in the form of
10 opinion or reputation, the court must deny its admission under ORE 412(1). If it is offered in
11 some other form, then the court must determine whether the purpose of the offer fits within one
12 of the exceptions in ORE 412(2)(b)(A), (B) or (C). Third, if it does fit within an exception, the
13 court must balance the probative value of the evidence against its prejudicial effect. *State v.*
14 *Wright, supra.*

15 **A. The Victim's Acts Constitute "Past Sexual Behavior" Under Oregon Statute
16 And Case Law.**

17 In *State v. Wright, supra* at 406, the court held that "past sexual behavior" means "a
18 volitional or non-volitional physical act that the victim has performed for the purpose of the
19 sexual stimulation or gratification of either the victim or another person or an act that is sexual
20 intercourse, deviate sexual intercourse, or sexual contact, or an attempt to engage in such act,
21 between victim and another person." ORS163.305(6) defines "sexual contact" to mean "any
22 touching of the sexual or other intimate parts of a person or causing such person to touch the
23 sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual
24 desire of either party." Thus, evidence relating to other molestations of the alleged victim by
25 other persons is governed by Rule 412.

In the case at bar, the evidence of the victim's acts sought to be admitted constitute past
sexual behavior and fall under the purview of ORE 412.

1 **B. The Evidence Concerning The Victim’s Past Sexual Behavior Is Not Being**
2 **Offered In The Form Of Opinion or Reputation.**

3 ORE 412 prohibits the use of reputation or opinion evidence regarding the victim’s past
4 sexual behavior. This prohibition applies to both the prosecution and the defense. Specific
5 instances of prior sexual conduct will be allowed only where they (1) relate to the motive or bias
6 of the alleged victim; (2) are necessary to rebut or explain scientific evidence offered by the
7 state; or (3) are otherwise constitutionally required to be admitted. These categories are not
8 mutually exclusive. Evidence admissible under the first two provisions may also be
9 constitutionally required to be admitted.

10 1. Under ORE 412(2)(b)(A), Prior Sexual Conduct Evidence Is Admissible To Prove
11 Motive Or Bias.

12 Evidence tending to show motive or bias of the alleged victim under subparagraph
13 (2)(b)(A) includes situations where the alleged victim had a motive to make a false accusation
14 against the defendant. In *State v. Beden*, 162 Or App 178 (1999), the defendant claimed that
15 the minor victim who accused him of sexual abuse when she shared a motel room with him was
16 actually having a nightmare based upon a prior experience where she had been sexually
17 assaulted by her biological father in a similar manner several years earlier. Such evidence of the
18 earlier abuse was admissible to show motive to fabricate or imagine the charge, even though it
19 did not establish bias or ill-will against the defendant. Mr. Doe submits the evidence at issue by
20 this motion is admissible under *Beden*.

21 2. Under ORE 412 (2)(b)(C), Prior Sexual Conduct Evidence Is Admissible If It Is
22 Otherwise Constitutionally Required.

23 This general exception is intended to cover instances where following the general rule of
24 inadmissibility would deny defendant a constitutional right under the federal or state constitution.

25 The primary constitutional provisions that provide a right to offer evidence under OEC
412(2)(b)(C) are (1) the Sixth Amendment to the United States Constitution, which provides: “In
all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses
against him; [and] to have compulsory process for obtaining witnesses n his favor”; (2) the

1 due process clause of the Fourteenth Amendment, which has been interpreted to allow a
2 defendant the right to present exculpatory evidence, see *Chambers v. Mississippi*, 410 US 284,
3 93 S Ct 1038, 35 L Ed 2d 297 (1973); and (3) article I, section 11 of the Oregon Constitution,
4 which provides: “In all criminal prosecutions, the accused shall have the right . . . to meet the
5 witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.”

6 If a prosecuting witness misrepresents a fact, and evidence regarding the alleged
7 victim’s prior sexual history is necessary to correct that misrepresentation, a defendant has a
8 constitutional right to offer such evidence. See *State v. Reiter*, 65 Or App 304 (1983) (alleged
9 victim stated on direct examination that she had known defendant as a “friend;” defendant
10 entitled to offer evidence that alleged victim and defendant had consensual sexual intercourse
11 one week prior to the alleged rape; court stated that if rule 412 were interpreted to unduly
12 restrict cross-examination it would violate defendant’s right of confrontation); *State v. Hill*, 129
13 Or App 180, 188 (1994) (error to exclude defense evidence that an alleged child abuse victim
14 had “acted out” sexual behavior even before she began visiting the defendant offered to rebut
15 state’s evidence of such evidence after visiting the defendant; defendant argued that the
16 evidence of her earlier behavior was necessary to rebut or explain the state’s evidence, or, in
17 the alternative, to impeach the child’s statements).

18 In the case at bar, it is the defense theory that Ms. Elizabeth is misrepresenting the acts
19 of Mr. Doe which she describes as sexual abuse, due at least in part to having created a false
20 memory of these alleged acts; and that her prior sexual abuse by another involving acts similar
21 to those she has alleged against Mr. Doe contributed to the creation of her false memories
22 through a well-recognized operation of human memory known as “source confusion.”

23 The right to confrontation is intended to enable a criminal defendant to challenge the
24 credibility of prosecution witnesses and to expose their bias or possible motives to fabricate
25 testimony. Therefore, evidence relating to the motive or bias of the alleged victim offered under
412(2)(b)(A) is also likely to be constitutionally required and hence admissible under Rule

1 412(2)(b)(C). See *Olden v. Kentucky*, 448 US 227 (1988) (error not to allow defendant in
2 kidnapping, rape and sodomy prosecution to cross-examine complainant regarding her
3 cohabitation with boyfriend, who was the defendant's half-brother; evidence relevant to issue of
4 consent and to victim's motive to lie to protect her relationship with her boyfriend

5 In *State v. Lantz*, 44 Or App 695 (1980), the court found evidence of an alleged victim's
6 prior sexual behavior admissible to rebut her explanation of why she delayed reporting the
7 offense. Because her explanation of the delay was that she was degraded and humiliated by
8 the nature of the assault, the court held that the defendant was entitled to offer evidence of
9 admissions by the alleged victim that she was a prostitute in order to rebut the alleged victim's
10 explanation.

11 C. The Probative Value Of The Evidence Being Offered By The Defendant Exceeds
12 Its Prejudicial Effect.

13 If evidence of a victim's past sexual behavior fits under one of the exceptions set forth in
14 ORE 412(2)(b)(A), (B), or (C), the court must balance the probative value of the evidence
15 against its prejudicial effect. If the probative value of the evidence exceeds its prejudicial effect,
16 the evidence must be admitted. *State v. Wright*, 97 Or App 401,405 (1989). In the case at bar,
17 there is surely little if any prejudice to the State for the factfinder to hear that Ms. Elizabeth was
18 a victim of a prior sexual assault.

19 **II. FIFTEEN DAY NOTICE BEFORE TRIAL IS REQUIRED FOR THE EVIDENCE TO BE**
20 **ADMISSIBLE, UNLESS THE EVIDENCE IS NEWLY-DISCOVERED.**

21 If a defendant intends to offer evidence of a victim's past sexual behavior, notice must
22 normally be given at least 15 days prior to trial by a motion accompanied by a written offer of
23 proof. The rule provides that the trial judge may allow the motion to be made at a later date,
24 including during trial, "if the court determines either that the evidence is newly discovered and
25 could not have been obtained earlier through the exercise of due diligence or that the issue to
which such evidence relates has newly arisen in the case."

1 For the reasons more fully set forth in the accompanying affidavit of counsel, the
2 evidence at issue by this motion is newly-discovered and could not have been obtained earlier
3 through the exercise of due diligence.

4 If defendant could not reasonably anticipate the need to inquire into past sexual conduct
5 on cross examination and does so only to correct a misperception created by the complainant's
6 direct testimony, barring such examination because of his failure to give pretrial notice raises
7 serious constitutional issues. *State v. Reiter*, 65 Or App 304, 307-8 n2 (1983) (when alleged
8 rape victim described her relationship with the defendant was "friend" it was error to bar
9 defendant from introducing evidence that the alleged victim had voluntarily engaged in sexual
10 intercourse with the defendant one week prior to the incident for which he was being prosecuted
11 on grounds of failure to give pretrial notice).

12 **III IF EVIDENCE IS FOUND FALLING UNDER ORE 412, THE COURT MUST CONDUCT**
13 **AN IN CAMERA HEARING TO DETERMINE THE ADMISSIBILITY OF THE**
14 **EVIDENCE.**

15 If the court finds the defense offer of proof to contain evidence meeting the requirements
16 of OEC 412(2), the court must order a hearing in camera to determine the admissibility of the
17 evidence. After a hearing, the court must determine whether the evidence is relevant and
18 whether it's probative value outweighs the danger of unfair prejudice. After making this
19 determination, the court is required to enter an order specifying what evidence if any may be
20 introduced, and in what areas the alleged victim may be examined or cross-examined. If the
21 court determines that the evidence is constitutionally required to be admitted, the balancing test
22 is inapplicable because the court would lack the authority to exclude the evidence.

23 **CONCLUSION**

24 Mr. Doe urges the court at the conclusion of the hearing to admit evidence of all prior
25 sexual conduct of the alleged victim relevant to provide Mr. Doe a fair trial in this case.

1 Respectfully submitted this _____ day of April, 2004.

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ATTORNEY FOR DEFENDANT