# Staff summary of reading materials for JPP members in preparation for Jan. 16, 2015 Public Meeting

## A. Materials in Response to Previous Meetings

### 1. Letter to the JPP from Lieutenant Colonel Ryan Oakley (Dec. 11, 2014), Deputy Director, Legal Policy, Office of Legal Policy (OUSD (Personnel and Readiness)) (2 pages).

*Lt Col Ryan Oakley appeared at the November 14, 2014, JPP Public Meeting.*

- Provides supplemental information in response to a question Mr. Stone asked concerning the disclosure of information to Special Victims' Counsel pursuant to the Freedom of Information Act (FOIA) and Privacy Act.

### 2. Colonel (Retired) Don Christensen, President, Protect our Defenders (Jan. 5, 2015) (2 pages).

*Colonel (Retired) Christensen appeared at the December 12, 2014, JPP Public Meeting.*

- Provides language for amendments to courts-martial procedural rules regarding discovery, standing, and appeals as they relate to victims and victims' counsel in response to the JPP's request for specific recommendations.
- Proposes changes to Rules for Courts-Martial 701 (discovery), 905 (motions practice), and 908 (interlocutory appeals).

### 3. Colonel Mike Lewis, Chief of the Military Justice Division, Air Force Legal Operations Agency (Dec. 23, 2014) (4 pages).

*Colonel Lewis appeared at the September 19, 2014, JPP Public Meeting.*

- Provides supplemental statement to his testimony recommending against changes to Article 120.

## B. Caselaw Cited in February Draft Report (Not Previously Provided)

### 1. Article 120

#### *a. U.S. v. Schloff* , Misc. No. 20140708 (A. Ct. Crim. App. Dec. 16, 2014).

*On December 16, 2014, the U.S. Army Court of Criminal Appeals (ACCA) held that abusive sexual contact under the current version of Article 120 can be committed with an object, in this case, a stethoscope. The question whether abusive sexual contact with an object could be charged as a violation of Article 120 (2012) was raised at the October JPP Public meeting, prior to this decision.*

- At trial, the panel of members found the accused (medical doctor) guilty by a panel of members of abusive sexual contact by touching the breasts of the victim with a stethoscope.
- The military judge dismissed the specification post trial. The military judge determined the statutory language limited sexual contact to a touching by some part of the accused's body. Therefore, the evidence was not legally sufficient to support the conviction and sentence.
- The government filed an interlocutory appeal to ACCA under Article 62.

- ACCA Slip Opinion at P. 4-5 explained that touching with a stethoscope can constitute sexual contact because:
  1) "the statute does not require direct contact,"
  2) It is "appropriate and proper to interpret 'touching' for purposes of Article 120, UCMJ, consistently with 'touching' for purposes of Article 128,
  3) The language of the statute that "touching may be accomplished by any part of the body" is "permissive and not exclusive" as to other means of touching.
- Held: Touching should be construed consistent with the definition in Article 128 for assault offenses. Military judge's ruling vacated, conviction reinstated, and case returned to trial court for appropriate action.

***b. U.S. v. Prather*, 69 M.J. 338 (C.A.A.F. 2010).**

*This case is cited in the draft of the February JPP Report in the explanation of the evolution of Article 120. On February 8, 2010, CAAF determined that the Article 120 (2007) statutory scheme, with respect to the offense "aggravated sexual assault by engaging in sexual intercourse with a person who is substantially incapacitated," unconstitutionally shifted the burden to the accused to negate or disprove the element of substantial incapacity.*

- Accused challenged 2007 Article 120 statutory framework that (1) required an accused to raise consent and mistake of fact as to consent as affirmative defenses to certain offenses; (2) expressly required the accused to support those defenses by a preponderance of the evidence at trial; and (3) further required that if accused met this initial burden that then and only then did the burden shift to the prosecution to disprove beyond a reasonable doubt the existence of consent or mistake of fact as to consent.
- Held: The 2007 version of Article 120 that required an accused to raise consent and mistake of fact as to consent as affirmative defenses, required the accused to support to prove the victim had the capacity to consent by a preponderance of the evidence. The court found this violated the constitutionally held principle that an affirmative defense may not shift the burden of disproving any element of the offense to the defense. The statute further required that if accused met this initial burden then the burden shifted to the prosecution to disprove beyond a reasonable doubt the existence of consent or mistake of fact as to consent, which was held to be a legal impossibility.

***c. U.S. v. Leak*, 61 M.J. 234 (C.A.A.F. 2005).**

*This case is cited in the draft of the February JPP Report in the explanation of the evolution of Article 120. On July 21, 2005, CAAF commented on problems with the (pre-2007 version) of Article 120.*

- Accused convicted of maltreatment, rape, two specifications of adultery, indecent assault, indecent acts, and solicitation to commit adultery.
- ACCA reversed the conviction for rape on the ground of factual insufficiency.
- The government appealed, asking CAAF to reinstate a finding of guilty when the lower court reversed as factually insufficient.
- On appeal to CAAF, the Army TJAG certified question to the Court regarding the definitions of "force," both actual and constructive, and "consent," in the pre-2007

version of Article 120, UCMJ.

- Held: ACCA's opinion properly included the essential elements of rape and correctly disaggregated the concepts of actual and construct force, however remanded the case concerning the lower court's conclusion regarding consent (as opposed to force).
- In dicta, the CAAF called Article 120 "antiquated in its approach to sexual offenses" and found that it did not "reflect the more recent trend for rape statutes to recognize gradations in the offense based on context." CAAF continued, "Because Article 120 is dated, its elements may not easily fit the range of circumstances now generally recognized as 'rape,' including date rape, acquaintance rape, statutory rape, as well as stranger-on-stranger rape. As a result, the traditional military rape elements have been applied in contexts for which the elements were not initially contemplated."

## 2. Special Victim Counsel

### *a. SPC H.C. v. Bridges*, Misc. No. 20140793 (A. Ct. Crim. App. Dec. 1, 2014).

*This case is cited in the draft of the February JPP Report as an example of victims' counsel using the All Writs Act as the procedural mechanism to seek relief in court. On December 1, 2014, the U.S. Army Court of Criminal Appeals (ACCA) denied a writ petition from an Army SVC and client seeking a trial continuance based on the SVC's unavailability for the scheduled trial date.*

- The military judge found no authority or good cause for the SVC to seek a continuance (noting there was no MRE 412 or 513 issue to be litigated at trial).
- Military judges have broad discretion in making docketing decisions under the UCMJ and Rules for Courts-Martial.
- Held: The ACCA found the Army Rules for Practice do not mandate personal inclusion of SVCs in all docketing discussions, although SVC availability may be an appropriate consideration and may be raised through trial counsel.

## 3. M.R.E. 412, Evidence of Victim's Past Behavior

### *a. U.S. v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011).

*This case is cited in the draft of the February JPP Report to explain the use of the constitutionally required exception to M.R.E 412 evidence at courts-martial.*

- Accused sought to admit evidence of victim's motive to fabricate sexual assault based on victim's fear that her mother was going to have her examined to see if she was sexually active with others. On appeal appellant challenged that portion of the MRE 412 balancing test that requires a judge to determine whether the probative value of the evidence outweighs the danger of unfair prejudice to the alleged victim's privacy.
- On August 10, 2011, CAAF determined when military judges conduct the M.R.E. 412 balancing test to determine if the probative value of the evidence outweighs the unfair prejudice to the victim's privacy, the court cannot exclude evidence when it would violate the constitutional rights of the accused to present a defense.
- Held: application of the MRE 412 balancing test is unconstitutional whenever a military judge (1) excludes evidence "the exclusion of which would violate the

constitutional rights of the accused," and (2) does so for the reason that the probative value of the evidence does not outweigh the danger of unfair prejudice to the alleged victim's privacy. In other words, if after consideration of the M.R.E. 403 factors the military judge determines that the probative value of the proffered evidence outweighs the danger of unfair prejudice, the court must ask whether the accused's constitutional right to cross-examine has been violated. If so, the proffered evidence "is admissible no matter how embarrassing it might be to the alleged victim."

**4. M.R.E. 513, Psychotherapist and patient privilege**

***a. SSG C.C. v. Lippert,* Misc. No. 20140779 (A. Ct. Crim. App. Oct. 16, 2014).**

*This case is cited in the draft of the February JPP Report as a recent decision where an SVC used the All Writs Act to seek relief from the court. It also provides an example of the type of procedural issues victims are raising regarding the use of their mental health records at trial.*

- SVC submitted a petition for extraordinary relief on behalf of his client-victim alleging the military judge violated the victim's due process rights afforded under M.R.E. 513. The petition requested the trial court be required to hold an evidentiary hearing pursuant to M.R.E. 513(e ) (2) to determine whether the defense met their burden of proof and persuasion, requiring CC's mental health records to be produced under seal for *in camera* review.
- On October 16, 2014, ACCA granted a victim's petition for extraordinary relief/writ of mandamus by vacating the military judge's order for production of the victim's mental health records when the judge failed to first conduct a hearing on the motion to compel.
- Held: Appellate court ordered military judge to comply with M.R.E. 513(c)(2) by holding a hearing on the defense motion to compel records, prior to the judge deciding whether to order production of victim's mental health records for *in camera* review.

***b. U.S. v. Hudgins*, No. ACM 38305 (A.F. Ct. Crim. App. Apr. 3, 2014).**

*This case is cited in the draft of the February JPP Report as a recent decision demonstrating a standard of relevancy pertaining to M.R.E. 513 evidentiary rulings, similar to M.R.E. 412(c) (3) in which a military judge determines that it is relevant for a specified purpose and then conducts a balancing test.*

- The defense requested production of the victim's mental health records asserting that information was relevant and necessary to show an alleged motive for the victim to fabricate. The military judge reviewed the mental health records in camera and determined none of the mental health records were relevant, at least to findings.
- The trial court convicted the accused of abusive sexual contact, rape, forcible sodomy and assault consummated by battery, and sentenced him to 11 years' confinement and dishonorable discharge. On appeal, he alleged the trial court erred when it denied his pretrial request to order the production of victim's mental health records.
- On April 3, 2014, the Air Force Court of Criminal Appeals, found the military judge

made the proper determination regarding the victim's mental health records approved the accused's sentence.

- Held: Trial court did not err. The records sought did not contain relevant information for the purpose sought. The records sought were not so probative that they were constitutionally required to be produced.

### *c. U.S. v. Harding*, 63 M.J. 65 (C.A.A.F. 2006).

*Case is noteworthy in that it discusses the production procedures under MRE 513 and what the government must do to secure records from a civilian mental health provider. On April 13, 2006, CAAF affirmed the military judge's ruling to abate the proceedings until he received the victim's civilian mental health records to conduct an in camera review pursuant to M.R.E. 513.*

- A social worker in the private sector who counseled the victim after the charged incident declined to provide the victim's medical records. The U.S. Marshals Service did not enforce the military judge's warrant of attachment asking for a civilian provider to produce mental health records.
- The military judge concluded that he would have to review the documents in camera, without disclosing the contents to the parties, before ruling on the motion in accordance with M.R.E. 513 (e)(2). The military judge concluded there was no substitute for in camera consideration of the records and abated the proceedings as to the rape charge.
- Held: The Court of Appeals for the Armed Forces upheld the trial court's ruling, finding that the trial court had properly followed the process required by MRE 513 for ordering production of records, and that the government had failed to enforce the warrant of attachment for the records. The Court determined the military judge demonstrated that he is ready to move forward with the trial if and when the warrant is executed.

### *d. U.S. v. Klemick*, 65 M.J. 576 (N-M. Ct. Crim. App. 2006).

*This case is cited in the draft of the February JPP Report as a recent decision as an example where a relevancy standard for disclosure and admissibility would clarify the military judge's determination and make reviews of M.R.E. 524 evidence more uniform in adult sexual assault cases. On August 7, 2006, the U.S. Navy-Marine Corps Court of Criminal Appeals established a three part test when a patient objects the production of privileged psychotherapist records, which the moving party must satisfy prior to the military judge conducting an in camera review of those mental health records.*

- The government filed a motion to compel the wife's psychotherapist treatment records relying on the child-abuse exception.
- A military judge sitting alone convicted the accused of involuntary manslaughter and assault consummated by battery on a child under 16, and sentenced to 9 years confinement and a dismissal.
- On appeal, he alleged the trial court erred by granting a government motion under MRE 513 to compel production of his wife's mental health records.
- Held: A party seeking an in camera review of victim mental health records must satisfy a three part test: (1) the moving party must provide a "specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield" evidence admissible under an M.R.E. 513 exception; (2) the information

sought must not merely prove the same point as other available information; and (3) the movant must have made "reasonable efforts to obtain the same or substantially similar information through non-privileged sources." In this case, the government satisfied this three part test.

***e. Jaffee v. Redmond*, 518 U.S. 1 (1996).**

*This case is cited in the draft of the February JPP Report to explain the roots of M.R.E. 513 as being based on the social benefit of confidential counseling recognized by the U.S. Supreme Court in the Jaffee case. On June 13, 1996, the United States Supreme Court issued a decision in a civil case recognizing the privilege protecting confidential communications between a psychotherapist and patient under Federal Rule of Evidence 501.*

- A police officer shot and killed a suspect. The police officer received counseling after the shooting.
- Survivors of the suspect filed suit, claiming civil rights violations by police officer.
- Trial court ordered defendant police officer's mental health provider to produce her mental health counseling records, and the defendant and provider refused.
- At trial, court instructed jury they could infer that defendant's refusal to turn over records was evidence the records contained "unfavorable" information. Jury ruled for plaintiffs and awarded damages. Defendant police officer appealed, arguing he had a psychotherapist-patient privilege to refuse to release her mental health records.
- Held: The Supreme Court interpreted F.R.E. 501 to create a federal psychotherapist-patient privilege in civil proceedings and refers federal courts to state laws to determine the extent of that privilege.

## C. Articles Cited in the February Draft Report (Not Previously Provided)

### 1. Article 120

**a. Major Timothy Grammel, *Justice and Discipline: Recent Developments in Substantive Criminal* Law, The Army Lawyer, April 2001 (23 Pages).**

*Provides a review of multiple opinions from the Court of Criminal Appeals for the Armed Forces (CAAF) during the 2000 term, focusing on trends in three areas of the law including unprofessional relationships between superiors and subordinates.*

- CAAF reversed four cases involving improper relationships between male noncommissioned officers (NCOs) and female subordinates.
- Court ruled that a victim's lack of consent must be manifest; rank alone is not enough unless the accused used their position to create a situation of dominance.

**b. Major Jennifer Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target*, The Army Lawyer, August 2007 (45 pages).**

*Provides an overview of sexual assault in the military, origins of contemporary rape law, a history of Article 120, Uniform Code of Military Justice (UCMJ), a critique of the 2007 changes to Article 120.*

- Proposes amending Article 120 to require verbal affirmative consent before a sexual penetration act.
- Argues that such a standard will provide a clear standard, prevent miscommunication, and assist in maintaining good order and discipline within the armed forces.

**c. Major Mark Sameit, *When a Convicted Rape is Not Really a Rape: The Past, Present, and Future Ability of Article 120 Convictions to Withstand Legal and Factual Sufficiency Reviews*, 216 Military Law Review 77 (2013) (45 pages).**

- Reviews the evolution of sexual assault law from its inception to its present form.
- Analyzes all military sexual assault cases from 2000 through March 2012, which were overturned for a lack of factual sufficiency.
- Explains why the 2007 and 2012 revisions of Article 120 create legal uncertainty while overall increasing the likelihood of cases withstanding factual sufficiency challenges .

**2. Victim Privacy Issues: Privileges and Protections**

**a. Major Paul Schimpf, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military*, 185 Military Law Review 149 (2005) (41 pages).**

- Provides a background and history of victim advocates in the military, including the relationship between the military, sexual assault victims, and victim advocates.
- Examines the various privileges codified within the Military Rules of Evidence, including attorney-client, clergy, husband-wife, classified information, informants, and psychotherapist-patient.
- Advocates for creating an absolute privilege for confidential communications between a victim and victim advocate.

**b. Jeffrey Toobin, *The Consent Defense: Rape Laws May Have Changed, But Questions About the Accuser are Often the Same*, The New Yorker, September 1, 2003 (6 pages).**

*Centered around the Kobe Bryant sexual assault case in 2004, the article examines difficulties in prosecuting rape and provides a history of victim-related changes in the law, particularly changes in the consent defense, corroboration, resistance, and rape-shield laws.*

**3. Rights and Needs of Sexual Assault Victims**

**a. Charles Doyle, Congressional Research Service, *Crime Victims' Rights Act: A Summary and Legal Analysis of 18 U.S.C. 3771* (2012) (53 pages).**

- Provides a brief history of victims' rights legal reform within state and federal law.

- Analyzes complete Crime Victims' Rights Act, including the definition of victim, discussions on protection rights, restitution, and responsibilities of the courts and other authorities, as well as notice, attendance, and participation rights.

**b. Special Victims' Counsel Request for Air Force Records Under the Privacy Act and Freedom of Information Act, Opinion of The Judge Advocate General of the Air Force, No. 2014/3 (July 1, 2014) (2 pages).**

*Provides the Air Force Judge Advocate General's Corps' opinion as to the scope of records and information a Special Victims' Counsel can receive under the Privacy Act and Freedom of Information Act (FOIA).*

- Requests from SVCs for Air Force records associated with an accused's conduct toward the victim, absent specific guidance on the type of information that is releasable to an SVC or victim, are properly addressed under the Privacy Act and FOIA.
- SVC requests for records made in the course of their official SVC duties are processed as a functional use/official use request within the Air Force to another Air Force employee.
- Records requests associated with a Privacy Act System of Records Notices may be released and properly protected by a Privacy Act exception, depending on what an SVC seeks and why; in the absence of a Privacy Act exception, release of Privacy Act records is governed under FOIA exemption policies.