

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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PUBLIC MEETING

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FRIDAY
JANUARY 6, 2017

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The Panel met in the Grand Ballroom,
Holiday Inn Arlington at Ballston, 4610 North
Fairfax Drive, Arlington, Virginia, at 9:00 a.m.,
Hon. Elizabeth Holtzman, Chair, presiding.

PRESENT

Hon. Elizabeth Holtzman, Chair
Hon. Barbara Jones
Mr. Victor Stone
Mr. Tom Taylor
VADM(R) Patricia Tracey

WITNESSES

Major James Argentina, Jr., U.S. Marines Corps -
Senior Defense Counsel
Captain Brad Dixon, U.S. Army - Trial Counsel
Assistance Program Training Officer
Captain Christopher Donlin, U.S. Army - Special
Victims' Counsel
Lieutenant Colonel Wade Faulkner, U.S. Army,
Retired - Former Military Trial Judge
Captain September Foy, U.S. Air Force - Special
Victims' Counsel
Lieutenant Colonel Elizabeth Harvey, U.S. Marines
Corps, Retired - Former Military Trial
Judge

Major Benjamin Henley, U.S. Air Force - Senior
Defense Counsel

Lieutenant Commander Elizabeth Hutton, U.S.
Coast Guard, Special Victims' Counsel

Commander Cassie Kitchen, U.S. Coast Guard -
Former Military Trial Judge

Commander Mike Luken, U.S. Navy - Former
Military Trial Judge

Major Ryan Reed, U.S. Air Force - Senior Trial
Counsel, Special Victims Unit

Major Marcia Reyes-Steward, U.S. Army - Senior
Defense Counsel

Lieutenant Commander Ben Robertson, U.S. Navy -
Senior Trial Counsel

Lieutenant Colonel Wendy Sherman, U.S. Air
Force, Retired - Former Military Trial
Judge

Lieutenant Commander James Toohey, U.S. Navy -
Victims' Legal Counsel

Lieutenant Commander Rachel Trest, U.S. Navy -
Senior Defense Counsel

Lieutenant Commander Geralyn van de Krol, U.S.
Coast Guard - Branch Chief, Trial Services,
Coast Guard Legal Service Command

Major Aran Walsh, U.S. Marines Corps - Regional
Victims' Legal Counsel - West

Major Adam Workman, U.S. Marines Corps - Legal
Services Support Team

STAFF

Ms. Nalini Gupta - Attorney Advisor
Captain Tammy P. Tideswell, U.S. Navy - Staff
Director

DESIGNATED FEDERAL OFFICIAL

Ms. Maria Fried, Designated Federal Officer (DFO)
Mr. William Sprance, Alternate DFO

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Meeting Adjourned

Ms. Maria Fried. 347

1 P-R-O-C-E-E-D-I-N-G-S

2 9:10 a.m.

3 MS. FRIED: Good morning, Panel
4 Members. Thank you for being here today and
5 Happy New Year to everyone.

6 This is the 26th Public Meeting of the
7 Judicial Proceedings Panel (JPP) since the FY2012
8 Amendments Panel, also known as JPP. My name is
9 Maria Fried and I am the Designated Federal
10 Official to the JPP. Mr. Bill Sprance will also
11 be present today. He is the Alternate DFO.

12 The JPP is a congressionally-mandated
13 Federal Advisory Committee. Publicly available
14 information provided to the JPP is posted on the
15 JPP website at jpp.whs.mil.

16 Reports issued by the JPP are also
17 posted on the website, as are other materials, to
18 include transcripts of past public meetings.

19 The Department has appointed the
20 following distinguished Members to the Panel:
21 the Honorable Elizabeth Holtzman, who serves as
22 the Chair of the JPP; the Honorable Barbara S.

1 Jones; Vice Admiral Retired Patricia Tracey;
2 Professor Tom Taylor; and Mr. Victor Stone. The
3 Members' biographies are also available at the
4 JPP website.

5 At the last public meeting on December
6 9, 2016, a concern was raised by an individual
7 regarding compliance with the Federal Advisory
8 Committee Act relating to site visits. After
9 discussing the concerns with the individual and
10 upon further research, the individual agrees that
11 there was no violation.

12 And with that, I would like to turn it
13 over to the Chair. Thank you, Madam Chair.

14 CHAIR HOLTZMAN: Thank you very much,
15 Ms. Fried. Good morning to everyone and Happy
16 New Year to everyone.

17 I would like to welcome the
18 participants and everyone in attendance today to
19 the 26th meeting of the Judicial Proceedings
20 Panel. All five Panel Members are present today.
21 Today's meeting will be transcribed and the full
22 written transcript will be posted on the JPP

1 website.

2 The Judicial Proceedings Panel was
3 created by the National Defense Authorization Act
4 for FY2013, as amended by the National Defense
5 Authorization Acts for Fiscal Years 2014 and
6 2015.

7 Our mandate is to conduct an
8 independent review and assessment of judicial
9 proceedings conducted under the Uniform Code of
10 Military Justice involving adult sexual assault
11 and related offenses since the most recent
12 amendment to Article 120 of the UCMJ in 2012.

13 Today's meeting will begin with a
14 discussion of the Joint Service Committee on
15 Military Justice's proposed amendment to Rules of
16 Courts-Martial 1103A. This rule governs the
17 review of sealed materials by appellate counsel.
18 The Committee will consider whether to submit a
19 written public comment in response to this
20 proposed amendment.

21 Next, the Panel will assess the
22 application of Military Rule of Evidence 412,

1 which deals with the victim's past sexual
2 behavior and Military Rule of Evidence 513, which
3 deals with the psychotherapist patient privilege
4 at Article 32 preliminary hearings and at courts-
5 martial.

6 As tasked in the National Defense
7 Authorization Acts for FY2013 and 2015, the JPP
8 assessed these rules in its initial report issued
9 in February 2015. In light of recent significant
10 changes to Military Rules of Evidence 412 and
11 513, the Panel will continue its assessment by
12 receiving presentations today from former
13 military trial judges and current military trial
14 counsel, defense counsel, and Special Victims'
15 Counsel.

16 Each public meeting of the Judicial
17 Proceedings Panel includes time to receive input
18 from the public. The JPP received no requests
19 for public comment at today's meeting.

20 Thank you very much for joining us
21 today. We are ready to begin the meeting.

22 Ms. Gupta, can you please provide the

1 Panel with the background on the Joint Service
2 Committee's proposed amendment?

3 MS. GUPTA: Good morning, Panel
4 Members.

5 The Joint Service Committee released
6 a proposal in November 2016 to amend Rule for
7 Courts-Martial 1103A, which governs appellate
8 counsel examination of sealed materials. This
9 proposal is available at Tab 11 of your packet
10 and the language that is particularly relevant
11 for your discussion is highlighted in yellow.

12 Under the current version of R.C.M.
13 1103A, appellate counsel have automatic access to
14 sealed materials, including documents reviewed in
15 camera by the military judge but not released to
16 counsel at trial.

17 The JSC's proposal --

18 CHAIR HOLTZMAN: Excuse me. Before
19 you continue, neither Judge Jones nor I have a
20 copy of this. Do you have another copy?

21 CAPT TIDESWELL: Yes, ma'am, I will
22 get another copy.

1 CHAIR HOLTZMAN: Thank you. What was
2 the tab that you mentioned?

3 MS. GUPTA: Tab 11.

4 CHAIR HOLTZMAN: Thank you. Sorry.

5 MS. GUPTA: The JSC's proposal would
6 change this practice by preventing appellate
7 counsel from examining sealed materials not
8 released to counsel at trial, unless a reviewing
9 or appellate authority defined to include judges
10 of the Service Courts of Criminal Appeals and the
11 CAAF first examines the material and determines
12 that there is good cause for appellate counsel
13 examination.

14 The JSC has published its proposed
15 amendment in the Federal Register and invited
16 public comments which are due by January 30th.
17 Based on the Panel's deliberations in November on
18 this issue, the Staff has prepared a draft public
19 comment indicating that a majority of the Panel
20 opposes this amendment and believes that
21 appellate counsel should have full access to
22 sealed materials without any prior *in camera*

1 review by the military appellate courts.

2 The draft public comment is available
3 at Tab 12.

4 CHAIR HOLTZMAN: Thank you very much,
5 Ms. Gupta. We will commence our deliberations on
6 this proposal.

7 The draft comment is at Tab 12.

8 MS. GUPTA: Tab 12.

9 CHAIR HOLTZMAN: Anybody have any
10 comment on the draft proposal?

11 PROF. TAYLOR: I would like to,
12 please, Madam Chair.

13 CHAIR HOLTZMAN: Yes, Professor.

14 PROF. TAYLOR: Even though I haven't
15 had a chance to review it in detail and of course
16 we haven't discussed it because we received it
17 late yesterday, Mr. Stone has pointed out some
18 issues that he has not only with the proposed
19 change but also with the response that we had
20 discussed in our November session.

21 One of the things that we had asked
22 for as a result of our November discussion, as I

1 recall, is some feedback from the Services about
2 how they felt about this particular issue, which
3 I understand we have not received yet,
4 particularly that best practice that we thought
5 we had identified regarding what the Air Force
6 did, which was essentially to have a judge
7 involved in that decision, as opposed to another
8 administrative official of the court, such as the
9 clerk, who I think did that job for the Army.

10 So it seems to me that there is at
11 least an argument that it would be somewhat
12 premature for us to weigh in on this issue now,
13 given that there is a lot of information still
14 out there, not the least of which is I think it
15 would be interesting for us to know prior to
16 taking a final vote on this exactly what the
17 public comments are that would be given in
18 response to this 1103A proposal.

19 I understand that the comment period
20 ends in January and, of course, we have a number
21 of meetings between now and the time we issue a
22 report. So I would just like to suggest that we

1 think about not finalizing a decision on this
2 until we have more information.

3 HON. JONES: May I speak?

4 CHAIR HOLTZMAN: Judge Jones.

5 HON. JONES: I hope that I didn't miss
6 this before but I do note that the Joint Service
7 Committee has their proposed amendments which we
8 have now received and maybe we received them
9 before but I didn't focus on it.

10 Focusing on it, I would like to also
11 give this some more time because I have the
12 utmost respect for the Joint Service Committee
13 and I would like to pause and review the
14 situation. Their proposed amendment is different
15 from the sense of our JPP Panel and I agree with
16 Mr. Taylor as well that it would be nice to get
17 more feedback.

18 VADM TRACEY: I agree.

19 CHAIR HOLTZMAN: Mr. Stone?

20 MR. STONE: Well I don't disagree. I
21 will put it that way.

22 I mean I think that we might have some

1 useful comments to make and I have drafted some
2 but I don't disagree that it would be even more
3 helpful to find out what the comments are that
4 other interested parties made.

5 CHAIR HOLTZMAN: Mr. Taylor, let me
6 see if I understand your proposal or part of the
7 rationale for the proposal. You want to have an
8 opportunity to consider the public comments to
9 the Joint Service Committee proposal before we
10 make our final decision. Is that part of your
11 concern -- part of your objective here?

12 PROF. TAYLOR: Yes it is, Madam Chair,
13 just because it seems that the better informed we
14 are about the different points of view on this
15 proposal, the better recommendation we can
16 provide.

17 CHAIR HOLTZMAN: Well my only concern
18 is -- obviously, I agree with the objective of
19 being better informed. But would the Joint
20 Service Committee, Captain, be able to consider
21 any proposals we made or comments we made after
22 the comment period is closed?

1 CAPT TIDESWELL: No, ma'am.

2 CHAIR HOLTZMAN: Does that change your
3 view, Mr. Taylor?

4 PROF. TAYLOR: No, because it seems
5 that we have an independent charter to give our
6 own recommendation to those that will end up
7 making the final decision.

8 CHAIR HOLTZMAN: And what is the
9 procedure for the -- I'm sorry. Just to clarify
10 what role our comments will have at all with
11 regard to this, the Joint Service Committee makes
12 a proposal. Does it become final? Does that
13 become the law? Does that become the rule or
14 what happens to it?

15 CAPT TIDESWELL: I think at some point
16 they are going to end -- 30 January the public
17 comment period will end.

18 CHAIR HOLTZMAN: Right.

19 CAPT TIDESWELL: They will gather
20 those up and, at some point, it might become a
21 rule or a law. That usually takes several
22 months. It doesn't happen right away.

1 I think one of the options is, as a
2 committee, you could always, like Mr. Taylor I
3 think has indicated, through charter we could put
4 things on the website. We can also make things
5 known outside of the public comment period.

6 But as far as providing official
7 public comment, that would have to happen before
8 30 January.

9 So, ma'am, the Joint Service Committee
10 makes recommendations to the General Counsel.

11 CHAIR HOLTZMAN: I see. So the
12 General Counsel could take into account the
13 comments that we made.

14 CAPT TIDESWELL: Yes.

15 CHAIR HOLTZMAN: Theoretically I mean.
16 She could ignore them but she would be entitled
17 to consider them.

18 CAPT TIDESWELL: That is correct.

19 CHAIR HOLTZMAN: Okay. I just wanted
20 to make sure that we are not engaging in
21 something that was totally futile.

22 PROF. TAYLOR: Oh, I understand.

1 Again, having heard the briefing from the JSC and
2 also observing how long it takes for them to move
3 from one step to another, it occurred to me that
4 we will probably be at least as timely as we need
5 to be in order to make sure the decision-maker
6 has all the points of view before making a
7 decision.

8 CHAIR HOLTZMAN: Well, given what I
9 was just informed by the Captain, I have no
10 objection to that and I just hope we can get the
11 input of these materials as soon as possible.
12 But I see there is a conference going on over
13 there and I want to make sure that our
14 understanding is accurate.

15 Is there anything --

16 CAPT TIDESWELL: No, ma'am.

17 CHAIR HOLTZMAN: What you said was
18 accurate.

19 CAPT TIDESWELL: It is accurate, yes,
20 ma'am.

21 CHAIR HOLTZMAN: Excellent. So I
22 think we have a unanimous determination by the

1 Panel to postpone our deliberations on this until
2 we get comments from -- well, until we have an
3 opportunity to see the public comments. And of
4 course we would also love to get the comments of
5 the Services, the various Services on this as
6 well.

7 So, this matter will be postponed
8 until our next meeting.

9 CAPT TIDESWELL: Yes, ma'am.

10 CHAIR HOLTZMAN: Okay. So, can we
11 proceed to the next item on the agenda?

12 CAPT TIDESWELL: Yes, ma'am.

13 CHAIR HOLTZMAN: All right, let me see
14 what that is.

15 We are going to be --

16 CAPT TIDESWELL: It is the former
17 military trial judges, ma'am.

18 CHAIR HOLTZMAN: Yes, we are now
19 switching gears and focusing on M.R.E. 412 and
20 M.R.E. 513 at Article 32 hearings and courts-
21 martial. The first panel, the panel is here:
22 Lieutenant Colonel Wendy Sherman, Lieutenant

1 Colonel Wade Faulkner, Lieutenant Colonel
2 Elizabeth Harvey, Commander Cassie Kitchen, and
3 Commander Mike Luken.

4 Ladies and gentlemen, would you come
5 up, please?

6 I very much appreciate your coming to
7 the Panel. Some of you are really gluttons for
8 punishment because you were at the Subcommittee
9 yesterday as well. We definitely appreciate your
10 coming to help out the Judicial Proceedings Panel
11 twice.

12 I think we will just start on my sheet
13 with Lieutenant Colonel Wendy Sherman, U.S. Air
14 Force, Retired, former military trial judge.

15 Ms. Sherman, welcome and please
16 proceed.

17 LT COL SHERMAN: Thank you and good
18 morning. And thank you for the opportunity to
19 speak with you today.

20 First, let me summarize what I see as
21 the overall impact of the changes that were made
22 to M.R.E. 412 and 513 both in Article 32

1 proceedings and in courts-martial.

2 The elimination of the applicability
3 of the constitutional exception to M.R.E. 412 in
4 Article 32 appears, at first blush, to maybe have
5 changed some practices in Article 32. However,
6 in my opinion, when you look closer at this
7 issue, the changes to the Article 32 practices
8 appear to be more driven by changes to Article 32
9 itself, as opposed to the rules of evidence,
10 specifically allowing the victim to decide not to
11 appeal. And I think that greatly reduces the
12 offering of any M.R.E. 412 evidence at the
13 Article 32, especially by the defense.

14 The elimination of the constitutional
15 exception to M.R.E. 513 and the higher standard
16 for admission of the alleged victim's mental
17 health records has all but eliminated, in my
18 experience, the production and admission of such
19 mental health records in both Article 32s and in
20 courts-martial.

21 I would like to start out by pointing
22 out there were a number of questions about

1 training and experience. In the Air Force all,
2 almost all Article 32s in Article 120 cases are
3 conducted by military judges. So, that was a
4 large shift maybe about a year and a half or two
5 years ago. Military judges are very well trained
6 for their duties, both as preliminary hearing
7 officers and as judges in Article 120 cases -- in
8 all cases but, of course, particularly in Article
9 120 cases.

10 As a matter of fact, the Air Force
11 judiciary was recently awarded the Judicial
12 Education Award by the American Bar Association
13 when focusing on the training that we provide
14 specifically in sexual assault-type cases.

15 Our judges also attend the Joint
16 Military Judges' Annual Training that is in
17 February every year, as do most of the Service
18 judges. We also have the Air Force Circuit
19 Annual Training every August and Military Judges'
20 Course for new judges. And these are all
21 recurring things that happen every year around
22 the same time.

1 These training functions provide
2 plenty of opportunity for networking and
3 interaction between more experienced judges and
4 those that are relatively new to the bench. And
5 a large portion of all of these sessions is
6 devoted to issues faced in Article 120 cases.

7 But starting specifically with M.R.E.
8 412 and its application in Article 32
9 proceedings, again, in the Air Force they are
10 being conducted by military judges. The alleged
11 victim very rarely, in my experience, testifies
12 at the Article 32 hearing. The documentary
13 evidence alone is typically what is offered by a
14 trial counsel.

15 M.R.E. 412 evidence can be found in
16 the statements that the alleged victims give to
17 investigating agencies. So, ironically, what I
18 have seen happening is when trial counsel puts
19 that documentary evidence in at the Article 32,
20 that is the 412 evidence that gets admitted. It
21 comes in through the statements that the victim
22 made to the investigators. Generally, they are

1 not objected to by the defense. And again the
2 judge, who is acting as the PHO, will seal the
3 material and take proper care with it.

4 When the 412 evidence is admitted at
5 the Article 32 by the defense, so in a more
6 deliberate manner, it is generally evidence of
7 other physical interactions between the accused
8 and the alleged victim or used to call into
9 question the reputation of the alleged victim.
10 Although the constitutional exception has been
11 eliminated in Article 32s as to M.R.E. 412, the
12 due process concerns may still require the
13 admission of such evidence when it goes to past
14 sexual activity with the accused, just as an
15 example. So, there are times when that evidence
16 is still coming in but I think it is drastically
17 reduced from what it was in the past.

18 I would say in courts-martial practice
19 M.R.E. 412 evidence is offered 90 to 95 percent
20 of the time. Almost every single case when I was
21 a trial judge contained a motion relating to the
22 admission of M.R.E. 412 evidence. Again, the

1 evidence is generally offered to call into
2 question the alleged victim's reputation or
3 present evidence of other physical interactions
4 between the alleged victim and the accused and
5 often under the constitutionally required
6 exception.

7 It is difficult for me to say when
8 that evidence is excluded whether that exclusion
9 causes an impact on the case. It is hard to
10 tell. I can't say anecdotally. I find this
11 interesting. It seems that there are more
12 acquittals since these changes have occurred,
13 both 412, 513 and in Article 32. I cannot say
14 that there is a direct link between those things
15 because so many changes have come all at the same
16 time.

17 For example, the Air Force Chief Trial
18 Judge recently excluded 412 evidence in four
19 cases with Members and the four cases resulted in
20 acquittals. Again, I don't know the specific
21 facts but I just find it interesting that as I
22 review case reports I do see more and more

1 acquittals since these changes have occurred.
2 But finding a link for me between any specific
3 change and that increase of acquittals, I cannot
4 say that that exists.

5 Again, this could be from changes to
6 the Article 32 process itself, where we have gone
7 to a probable cause determination as opposed to a
8 review of the truth of the matter set forth in
9 the charges. But again, it is hard to pinpoint
10 what is causing this.

11 I would hesitate, personally, to make
12 any further changes to Article 32 or M.R.E. 412.
13 The same will be true for my comments for 513.

14 Because of these changes, as I said
15 just a minute ago, occurred simultaneously, it is
16 difficult to determine which changes, if any have
17 had an impact and what that impact might be and
18 what the impact might be attributable to.

19 Also, with the changes coming as
20 quickly as they are coming, there is not as great
21 an opportunity to develop the case law and the
22 guidance for the military judges.

1 Transitioning to issues concerning
2 M.R.E. 513, given that the alleged victims'
3 written statements often remain unrebutted in the
4 Article 32, again, it is generally a paper case
5 and the statements are put in before the
6 preliminary hearing officer. These statements
7 are also the primary evidence of a sexual
8 assault. And the standard to recommend referral
9 for trial is probable cause. There is little to
10 no impact, in my opinion, upon the probable cause
11 or the disposition of determination with the
12 absence of this mental health information.

13 Article 120 hearings, again, our
14 preliminary hearings are conducted by military
15 judges and they have a significant amount of
16 training and experience when it comes to 120
17 cases. So, it is not a reason -- I don't think
18 there is much impact with the 513 evidence not
19 being allowed in Article 32s or at trials but I
20 will get to that as well.

21 Looking at M.R.E. 513 in courts-
22 martial, quite often the defense seeks production

1 of mental health evidence. In very few cases,
2 since the standard was raised, have I -- I have
3 never, since the standard was raised, looked at
4 mental health records *in camera*. I did
5 previously and I would often release a few pages.
6 But interestingly, what I would release when I
7 looked at mental health records, again before the
8 standard was raised, were, I want to say, never
9 offered for admission. I believe the one or two
10 times that that production was offered for
11 admission, it was a little while ago but if I am
12 remembering correctly, there was no objection
13 from the government because it was clearly so
14 relevant. So very, very rarely under the old
15 standard when I would review mental health
16 records *in camera* would any ever, even though
17 produced, be offered into evidence at the trial.

18 If the defense is able to satisfy the
19 higher standard for production, fundamental
20 notions of fairness and due process still remain,
21 of course, and can lead to this disclosure, I
22 would think, of some relevant mental health

1 information, depending upon what is in there,
2 even in the absence of the constitutionally
3 required exception.

4 When the *in camera* reviews are being
5 conducted we know, at least in the Air Force,
6 they are being done very similarly. And we know
7 this because of the significant amount of
8 training that we have three or four times a year
9 with the judges and the mentoring that occurs
10 throughout the years for all the judges.

11 Again, with the higher standard for
12 even the *in camera* review, this is very rarely
13 being done, in my opinion. I haven't had -- I am
14 now the Clerk of the Air Force Trial Courts and I
15 am there to talk the judges through whatever
16 complications they may have as they are trying
17 120 cases and I am not getting a lot of phone
18 calls about what do I do. Do I have enough to do
19 an *in camera* review; do I even look at these? We
20 talk about a lot of other things with 120 cases
21 but nothing about mental health records. So, it
22 says a lot to me as well.

1 As far as writs filed, I know I have
2 my esteemed colleagues here, the only two I know
3 of are the two I am sure you are aware of: the
4 Marine Corps writ that was filed -- I believe it
5 was the Martinez case and a Coast Guard case,
6 Randolph. I don't want to take time away from my
7 colleagues' presentations about those two writs.

8 I don't know of any other writs that
9 were filed by any victim now that they have the
10 right to do so.

11 And the same as M.R.E. 412, I would be
12 hesitant to make further changes to M.R.E. 513.
13 I think we need some time for everything to
14 settle out so that we get good guidance from our
15 appellate courts. We have some time to work with
16 the application of these rules in the new 32s.
17 And then I think that we need to be able to
18 determine, when we make changes, what impact
19 those changes are having. But we may be getting
20 to a point that if things keep changing, I'm
21 afraid that ability will continue to get sort of
22 shoved down to the bottom.

1 Thank you for your time.

2 CHAIR HOLTZMAN: Thank you very much,
3 Ms. Sherman.

4 We will next hear from Lieutenant
5 Colonel Wade Faulkner, U.S. Army, Retired, former
6 military trial judge.

7 LTC FAULKNER: Thank you, Madam Chair
8 and Members of the Panel. Thank you for the
9 opportunity to address you today.

10 I would like to preface my comments by
11 saying that the opinions that I express today are
12 my own personal opinions. As a military judge,
13 my decisions and rulings were always guided by
14 the facts as I found them and the law as I
15 understood it at the time. Nothing I say today
16 should be taken as an indication of how I may
17 have ruled in a particular case.

18 As it relates to your interest in the
19 application of M.R.E. 412 and 513 in Article 32
20 hearings, I can only say that as an Army military
21 judge, where military judges do not conduct
22 Article 32 hearings, I had little knowledge of

1 what went on at the Article 32. I don't have
2 specifics on cases but it seemed to me that the
3 changes to the Article 32 procedure, where the
4 victim could elect not to testify, I believe
5 after that change I saw a lot more waivers of the
6 Article 32 investigation in cases of sexual
7 assault.

8 Prior to those changes, it was rare
9 that I would see an Article 32 waiver in a case
10 involving sexual assault. However, again, after
11 the changes it was routine to see the waivers in
12 the Article 32. And I have been a civilian
13 defense counsel and I have practiced some still
14 in military courts and I still see a lot of
15 prospective clients in sexual assault cases where
16 the detailed defense counsel has waived the 32
17 investigation.

18 With respect to my assessment of
19 M.R.E. 412 and 513 at courts-martial, I would
20 just like to give you a couple -- a few numbers.
21 I went back and reviewed all of my cases from
22 calendar year 2015. In that year, I was detailed

1 to 41 courts-martial. Of those 41, eight were
2 disposed of without trial either by discharge in
3 lieu of courts-martial or the charges were
4 withdrawn by the convening authority. And I
5 didn't look specifically at the numbers but it
6 has been rare in my experience to see a discharge
7 in lieu of courts-martial in sexual assault
8 cases.

9 So then of the 33 cases that went to
10 trial, 11 of them involved at least one
11 allegation of adult sexual assault and I did have
12 two cases of child sexual assault. My remaining
13 20 cases did not involve any sexual assault
14 allegations. And although I don't have all the
15 specifics on my calendar year 2014 cases, my
16 guess is that those percentages were about the
17 same.

18 Of the 13 cases that involved sexual
19 assault, I conducted an M.R.E. 412 hearing in 11
20 of those cases. The reasons proffered by the
21 defense varied widely but the most common
22 exception sought was the constitutionally

1 required exception. In several cases, the
2 defense often wants to offer evidence of the
3 alleged victim and the accused prior romantic
4 relationship, typically just in order to put any
5 relationship that they had into context. Often
6 when this was the reason, I would allow the
7 defense to offer the evidence that the accused
8 and the alleged victim had a prior romantic
9 relationship in the days, weeks, or months
10 leading up to the allegations but the specifics
11 of that relationship, to include the frequency
12 and nature of any sexual activity were not
13 allowed.

14 Other reasons proffered by the
15 defense, where I did allow at least some of the
16 412 evidence included evidence where the alleged
17 victim was romantically involved with someone
18 else at the time of the allegations. The defense
19 often sought that type of evidence to show that
20 any infidelity between the alleged victim and the
21 accused was a motive to fabricate the
22 allegations. Again, while I would often allow

1 the defense to elicit evidence that the alleged
2 victim was romantically linked to someone else,
3 the specifics of that relationship, including
4 sexual details were not allowed.

5 Like Ms. Sherman, it is difficult for
6 me to estimate what impact allowing or excluding
7 412 evidence has on a case but just my personal
8 opinion is that it doesn't have a measurable
9 impact, particularly in a case where a judge
10 alone, where the military judge alone is deciding
11 the facts of the case. I think that allowing it
12 might impact a little bit more in cases where
13 there is a jury but I continue to believe that it
14 doesn't have a measurable impact on the case.

15 In the cases where I excluded the 412
16 evidence in calendar year 2015, the reasons
17 proffered by the defense included there was a
18 case where the alleged victim was a college
19 student and had outside employment, where she
20 worked as an escort and I did not allow that
21 information. There was another case where the
22 defense sought evidence of the alleged victim's

1 prior sexual involvement with other Members of
2 the accused's unit. And again, as both of those
3 cases were tried at juries, it is difficult it
4 estimate the impact of the exclusion. However, I
5 would estimate that it had just a little impact
6 on the case.

7 Like Ms. Sherman, I do believe that
8 military judges have the training and experience
9 to properly conduct 412 hearings, as well as 513
10 hearings, and issue appropriate rulings. As an
11 Army Judge, I attended the Military Judges'
12 Course and then I attended the Joint Military
13 Judges' Annual Training. And the Army Judges do
14 an annual sexual assault training each August. I
15 found both of those training events each year to
16 be extremely helpful, especially when I was a
17 newer judge. Just the ability to talk with and
18 to build networks with other judges, more
19 experienced judges I think is invaluable and I
20 found it to be extremely helpful in helping me to
21 understand how to try sexual assault cases.

22 I think that most judges out there do

1 their best to follow the law and to issue
2 appropriate rulings. I don't think there is a
3 lot of rogue judges out there looking to change
4 the law from the bench in any way.

5 Also like Ms. Sherman, I personally
6 have never had an alleged victim file a writ
7 based on my ruling to admit 412 evidence. I am
8 aware that writs have been filed, just from
9 reading some case law but I have never seen it in
10 any of my cases or any other cases that were
11 tried at Fort Hood, where I did the majority of
12 my trial work.

13 With respect to my assessment of
14 M.R.E. 513, in cases involving sexual assault, of
15 those 13 cases that I tried in 2015, only one had
16 a 513 issue. And in that case, I did not conduct
17 an *in camera* review.

18 I had 513 hearings or motions in a
19 couple of the cases not involving sexual assault
20 but, again, I never found that the defense met
21 that burden to even get an *in camera* review. And
22 I think that is, just from my observation of

1 other cases, not my own, in talking with other
2 judges, I think that that is a relatively common
3 experience across the judicial spectrum that
4 after the changes, it is almost impossible for a
5 party to meet the requirements under 513.

6 My opinion is that many of the judges
7 have taken the newly written 513 and they are
8 applying it in the same way as other well-
9 established privileges like attorney-client and
10 priest-penitent, which is what at least I believe
11 was intended by the changes.

12 I know that there are some judges that
13 are reluctant to treat the 513 privilege the same
14 way. I think that is for a couple of reasons.
15 One, because 513 is a relatively new privilege
16 and in the not so distant past, judges routinely
17 pierced that privilege. And the second reason is
18 I think that where you are seeking 513-type
19 evidence, an alleged victim who seeks mental
20 health treatment, sometimes that seeking of
21 treatment goes to that victim's ability to
22 accurately remember and perceive the events in

1 question, whereas, attorney-client privilege and
2 priest-penitent privilege often don't address
3 those same issues or certainly don't have the
4 symptomology or things like that. So, I think
5 that may be why some judges are hesitant to give
6 it the same status as other privileges.

7 I think there a couple of issues out
8 there on 513 that still need to be addressed.
9 One, at least within the military health records
10 at Fort Hood that I typically might see, often
11 the disclosure of medical records contains
12 information about treatment for mental health
13 issues. And so I am aware of several cases where
14 the defense sought and received medical records
15 that contained an inadvertent disclosure of what
16 would be otherwise privileged mental health
17 treatment. And then, based on that inadvertent
18 disclosure, the defense often asks for the 513
19 hearing and seeks the remainder of those records.
20 Most of the judges that I know that have
21 encountered the situation typically treat it as
22 an inadvertent disclosure and, essentially, put

1 the cat back in the bag and don't let the
2 defense, they don't even do an *in camera* review.

3 Secondly, I have seen a few recent
4 cases where the alleged victim undergoes a
5 medical board for PTSD that was related to the
6 sexual assault. And many of the victim's MEB
7 records then get disclosed to the defense and
8 they often contain what might otherwise be
9 privileged information. And then the defense
10 seeks a 513 hearing and they want the remainder
11 of the mental health records under the theory
12 that an MEB that leads to some type of disability
13 compensation could be a motive to fabricate. And
14 I haven't seen any decisions in those types of
15 cases. I have just talked with judges who have
16 started to see those types of issues pop up. I
17 don't know what the solution is to that problem.
18 I just think it is something that may need to be
19 looked at.

20 And then finally, there is just a
21 clarification change that needs to be made to
22 513. Currently in M.R.E. 513 under the general

1 rule, it is Section A, the privilege is conferred
2 on confidential communications between a patient
3 and a psychotherapist and that is the extent of
4 the general rule.

5 But when you get to the definitions
6 section, there is a definition for evidence of a
7 patient's records. And then in the procedural
8 section of 513, the rule requires a party who
9 seeks production or admission of records or
10 communications.

11 And so I think most judges treat the
12 privilege as both the records and the
13 communications but the records are not included
14 as part of the general rule. And I just think it
15 would be helpful to clarify that in the general
16 rule.

17 Thank you again for the opportunity to
18 address you today and, subject to your questions,
19 that concludes my statement.

20 CHAIR HOLTZMAN: Thank you very much,
21 Mr. Faulkner.

22 Lieutenant Colonel Elizabeth Harvey,

1 U.S. Marine Corps, Retired, former military trial
2 judge. Thank you very much, Colonel, for
3 appearing before us and we look forward to your
4 testimony.

5 LTCOL HARVEY: Good morning, Madam
6 Chair and Panel Members and thank you for having
7 me here this morning.

8 During my time as a military judge, I
9 did frequently deal with issues concerning M.R.E.
10 412 and 513 at courts-martial, but like
11 Lieutenant Colonel Faulkner with the Army, the
12 Marine Corps, for the most part, does not provide
13 military judges for Article 32 hearings. So, I
14 have little visibility over what happened there.

15 M.R.E. 412 issues were raised in
16 approximately 75 percent of the Article 120 cases
17 I presided over or was aware of within our
18 circuit. However, I believe that more than half
19 of that time it was actually raised proactively
20 by the government, as opposed to a defense motion
21 being made. It was an attempt by the government
22 to either preclude or limit evidence that the

1 prosecutors believed fell under the rule.
2 Frequently, once you got to the hearing, the
3 parties either both agreed it was not admissible,
4 both agreed it was admissible but wanted to know
5 what the parameters were, or in some cases
6 disagreed over whether it fell under the
7 protections of M.R.E. 412 at all. There are some
8 gray areas when you get into the sexual
9 predisposition portion of that rule.

10 Primarily, the defense counsel sought
11 the evidence to show consent under M.R.E.
12 412(b)(1)(B) and those were the -- that was how I
13 analyzed the evidence related to previous
14 relationships with the accused or flirtatious or
15 other type of conduct either around the time of
16 the offense or sometimes you have text messaging
17 and things like that after the offense. I
18 evaluated those under the consent prong.

19 The constitutionally required analysis
20 usually became about either prior false
21 allegations or relationships with other people,
22 raising a motive to fabricate this allegation

1 against the accused. Prior false allegations
2 usually didn't take too much effort to dispense
3 with because once case law came out demonstrating
4 that the allegation needed to be clearly false,
5 that became a little easier. Usually, the motion
6 was raised and the only evidence was strong
7 denial of the person previously accused without
8 any other evidence of falsity. So, there was
9 only one occasion I can think of where I ever let
10 anything in as it related to a prior false
11 allegation and that one was demonstrably false.
12 I believe there was a recantation.

13 As far as the previous or the
14 relationships with others, that was the one that
15 was probably the most difficult, the most nuanced
16 under the constitutionally required exception.

17 Because, as the Panel noted in their
18 initial report, the military community leads to
19 frequently the accused having a lot of
20 information about the alleged victim either
21 through social media, through things they know
22 within the unit, rumors, who they have seen in

1 relationships, they have witnessed, that is a
2 fertile ground for litigation under the
3 constitutionally required exception.

4 Also, I saw more frequently towards
5 the end an increase in the number of issues we
6 had to deal with concerning the sexuality of the
7 alleged victim. In cases where the accused and
8 the alleged victim were the same gender, the
9 defense would try to introduce evidence that the
10 alleged victim was homosexual or had engaged in
11 homosexual behavior. That was usually easy to
12 shut down, as, obviously, sexual orientation
13 doesn't bring with it consent. But where it
14 became more difficult was when the alleged victim
15 would sort of be introduced -- the door would be
16 opened by the government where the alleged victim
17 would say well I would never have had consensual
18 intercourse with this individual because of my
19 sexual orientation, which then led the defense to
20 wish to explore occasions where that was not the
21 case and things like that. You started to get
22 again into really trying to shut the door or

1 limit and restrict how far into the rumor mill
2 and things like that that you would get.

3 So, those were usually the more -- not
4 difficult decisions -- a little more nuanced and
5 a little more careful. You really had to, I
6 found, though, as long as it was litigated
7 thoroughly and early, you could lay out the
8 parameters clearly. And defense counsel expected
9 that they expected to be limited in any of these
10 areas which they were able to get into and
11 usually proceeded professionally accordingly.

12 I felt, as the others have said, I did
13 have the adequate training and experience as the
14 other Services did. We had the annual joint
15 military training. We had Navy and Marine Corps
16 training annually as well that pertained
17 specifically to sexual assault training.

18 We had a SharePoint site where we
19 would all ask questions and be able to answer
20 each other's questions. So through that
21 interaction and the continued focus on training
22 in these areas, I felt M.R.E. 412, as a rule of

1 relevance, was not so dissimilar from other
2 decisions that you had to make concerning
3 relevance, that it was beyond our abilities or
4 experience.

5 And as far as the impact of excluded
6 or admitted material, as a rule of relevance, I
7 felt that if it was excluded, it was because it
8 wasn't relevant, given the policy intentions and
9 the idea behind the rule of M.R.E. 412 as to what
10 is relevant in this type of a trial and,
11 therefore, if it was excluded, it wasn't relevant
12 so, it shouldn't have an impact on the result.

13 If it was admitted, it was because it
14 was relevant and I believe it usually did have an
15 impact on the result of the case.

16 Turning to 513, the use and
17 understanding of the M.R.E. 513 litigation grew
18 and developed exponentially during the four years
19 that I was a military judge. When I first
20 started, it was sort of advent of a lot of the
21 victims' services. So, there were a lot more
22 victims going to mental health treatment and

1 everybody was aware that that was happening. So,
2 there were a lot of requests at one point, I
3 would say about 90 percent of the 120 cases that
4 I saw involved litigation under M.R.E. 513, as
5 the idea was sort of well we know that she went
6 to the therapist after she made this allegation.
7 She must have talked about the allegation and
8 possibly those statements contradicted statements
9 she has given elsewhere. So, we would like to
10 see them.

11 And that was generally the basis of it
12 at the time. And because of other previous case
13 law, including *U.S. v. Briggs* in 1998 that talked
14 about hey, let's all look at the records in
15 camera -- that is the safer practice -- and
16 attach them to the record. That was the mindset
17 that a lot of judges had. They treated M.R.E.
18 513 a lot like M.R.E. 412, more as a rule of
19 relevance than a rule of privilege.

20 And so it was really, I would say,
21 probably about 2014 when there were a lot of
22 high-visibility cases. The Victims' Legal

1 Counsel was becoming more involved. A colleague
2 that I worked with at Camp Pendleton wrote an
3 article concerning M.R.E. 513 for the Military
4 Law Review and then he started providing a lot of
5 training at the Joint Service training and the
6 Navy and Marine Corps training that led to a lot
7 more discussion and a lot more analysis and
8 focus. Between that and the rule changes, the
9 aperture has completely narrowed. And I think
10 all military judges were thankful for a more
11 clarified and elevated standard for even doing
12 the *in camera* review because, frankly, I didn't
13 feel well-equipped to look at mental health
14 records and understand everything I was seeing
15 and determine what was important and what wasn't.
16 I could make my call on it but I am not a mental
17 health professional. And so I found that
18 difficult.

19 And so by narrowing the ability to
20 seek records and really the focus has shifted
21 from there must be contradictory statements
22 really to more of is there a diagnosis that would

1 affect the alleged victim's ability to perceive,
2 remember, recall. We could go to the provider
3 and say just provide me the diagnoses or just
4 provide me the medications, maybe even in the
5 form of a letter, as opposed to poring through
6 the records. We have used the VLC frequently to
7 help target the appropriate information or to
8 work with the provider to get us what we are
9 looking for.

10 We started using the VLC, the Victims'
11 Legal Counsel, to, if there was information that
12 was intended to be turned over, provide that to
13 the VLC first and get an ex parte brief from the
14 VLC as to any objections or their, I guess,
15 opinion or position on that information being
16 released before it was released.

17 So, I have also never had any of the
18 alleged victims file a writ in any of the cases I
19 have had or in our circuit. I think probably
20 partly because we have tried to use the VLC more
21 up front, as opposed to making the decision in a
22 vacuum.

1 As far as a recommendation, I guess
2 the only recommendation I would have I agree with
3 Lieutenant Colonel Faulkner. Frequently, even
4 from civilian -- this wasn't just military health
5 providers but civilian medical facilities, you
6 would subpoena the -- your trial counsel would
7 subpoena medical records from something and it
8 would come back with a lot of mental health
9 records and things and everybody had to sort of
10 all stop and throw things in the sealed envelopes
11 and sort of start from there. And it makes it
12 more difficult to protect the privacy when it
13 comes that way.

14 But I would recommend that if there is
15 -- that perhaps the military judge have the
16 ability to appoint a mental health expert as an
17 assistant to the court, if they are going to be
18 looking at records, only so that they can
19 understand what is important or what is there
20 because I found that to be, as I said, the most
21 difficult part of evaluating mental health
22 records was knowing what was in them.

1 Thank you. That is all that I have
2 and I appreciate you hearing from me today.

3 CHAIR HOLTZMAN: Thank you very much
4 for your presentation.

5 We will next hear from Commander
6 Cassie Kitchen, U.S. Coast Guard, former military
7 trial judge. Commander, welcome again and thank
8 you very much for being here today. We look
9 forward to your testimony.

10 CDR KITCHEN: Thank you, Madam Chair,
11 Members of the Panel, and thank you for the
12 opportunity to participate in today's meeting.

13 As we all know, military justice
14 proceedings involving charges of alleged sexual
15 offenses often bring to light the tensions
16 between the constitutional rights of the accused
17 and the privacy interests of alleged victims. I
18 believe the changes to the Article 32 proceeding,
19 while no longer requiring or allowing the victim
20 not to appear at the Article 32 -- and I suppose
21 I should preface it by saying it is only
22 occasionally that Coast Guard military judges are

1 the preliminary hearing officers in Article 120
2 cases. Our practice has always been to have
3 Judge Advocates serving as the preliminary
4 hearing officer but recently there are occasions
5 where military judges do serve in that function.

6 And the limiting of focus, in my
7 experience, has led to some decrease in the
8 defense seeking to offer 412 evidence of the
9 sexual behavior of the victim but what there has
10 been is an increase of *sua sponte* offering of the
11 defense of that information during the course of
12 the hearing itself, without providing any notice
13 to the victim or the Special Victims' Counsel in
14 advance of the proceedings. Now understanding
15 that the procedural aspects of 412 also apply in
16 the Article 32 context, oftentimes the notice
17 requirements of M.R.E. 412 are not being abided
18 by by defense counsel prior to raising those
19 issues. And as a military judge, I frequently
20 did not serve in that function. So, that is just
21 anecdotal stories that have been recounted to me
22 from other judges who have served in that

1 function.

2 I do believe that the Special Victims'
3 Counsel program, the Coast Guard has improved the
4 ability of the individual who is making
5 recommendations to the convening authority at the
6 Article 32 level and of the trial judge to be
7 fully aware of the concerns or interests of an
8 alleged victim in a case.

9 In the courts-martial realm, I believe
10 that the presence or involvement of Special
11 Victims' Counsel has improved or increased the
12 sophistication of the motions practice with
13 respect to M.R.E. 412 evidence and 513 evidence,
14 although that has occurred on a much less
15 frequent occasion with respect to 513.

16 To say that it is definitely -- it is
17 not uncommon, I would say it is rather common. I
18 don't have particular case numbers or percentages
19 for you of times when defense or government
20 sought to introduce 412 evidence at courts-
21 martial but it is a common practice. Though,
22 oftentimes, it is on the basis of trying to

1 establish consent on the part of the alleged
2 victim or from a constitutionally required
3 perspective seeking to establish confrontation if
4 there is a motive to fabricate. In my particular
5 cases, understanding that all of the rulings are
6 very fact- and case-specific, it was the rare
7 occurrence when specific instances and acts were
8 allowed as evidence, as opposed to the mere
9 existence of some other type of relationship that
10 may have, especially in the realm of giving
11 motive to fabricate the existence of some
12 extramarital relationship, for example, would
13 have been relevant in that situation.

14 With respect to the 513, the changes
15 to M.R.E. 513, there is very little motions
16 practice on 513 as compared to M.R.E. 412 in
17 Coast Guard courts-marital in my experience. I
18 have had a writ filed and our Coast Guard Court
19 of Appeals ruled on that issue in favor of the
20 victim. The interesting thing, as far as impacts
21 of that, so the ruling in a particular case, was
22 that case was February of last year and that case

1 has yet to go to trial because they are still
2 waiting on the opinion of CAAF in that particular
3 case. So, the impact there: the significant
4 delay in the trial of the accused for a case that
5 was docketed to go to trial nearly a year ago.

6 So with respect to the changes in the
7 language itself, the higher burden now on the
8 moving party in terms of disclosure of that
9 evidence, there were no circumstances under which
10 I then conducted an *in camera* review. The same
11 was true of my predecessor, once the rule had
12 changed.

13 With respect to the change in
14 constitutionally-required language, I don't
15 believe that practically that has had an impact,
16 as I believe it is the military judge's
17 responsibility to consider whether or not
18 something is constitutionally required,
19 regardless of whether or not it is specifically
20 articulated in the rule itself.

21 Barring any questions from the Panel,
22 that concludes my comments.

1 CHAIR HOLTZMAN: Thank you very much,
2 Commander, for your presentation.

3 We will next hear from Commander Mike
4 Luken, U.S. Navy, former military trial judge.
5 Commander, thank you very much for appearing here
6 and we look forward to your testimony.

7 CDR LUKEN: Thank you, Madam Chair,
8 distinguished Panel Members. Thank you for the
9 invitation for me to hold discussion with you.

10 Again, I am Commander Luken, currently
11 serving as Navy's Trial Counsel Assistance
12 Program Director. On this billet, I serve as
13 military judge at the Navy Central Circuit in
14 Norfolk, one of our busiest dockets.

15 I must note that my comments here are
16 my own and not necessarily that of the Department
17 of Defense, United States Navy, or the Judge
18 Advocate General Corps.

19 Respecting the time that we have, I
20 ask your indulgence for me to limit my initial
21 comments as to what I viewed at the trial level.
22 I will leave the Article 32 level to the Senior

1 Trial Counsel, which I believe you may be hearing
2 from later, specifically, Lieutenant Commander
3 Ben Robertson, one of our outstanding
4 prosecutors. He will probably have more
5 deliberate comments as to that area.

6 I will further focus my comments on
7 M.R.E. 513, since I have sort of a personal
8 history with that particular rule and seeing its
9 development throughout the military justice
10 process.

11 M.R.E. 513 was a new rule when I first
12 started practicing as a junior counsel. It was
13 new ground for the military to have a
14 psychotherapist-patient privilege. Showing my
15 age a bit here, we are talking about late
16 December 2001. In that case, I was prosecuting
17 Lieutenant Commander Klemick, which later became
18 the *United States vs. Klemick* case that we rely
19 on for the 513 privilege.

20 At the time, as a junior counsel, I
21 had to dig into the history of the rule and I was
22 seeking access to a mother's psychotherapy

1 records in a child homicide case as a prosecutor.
2 Little did I know that the case would later serve
3 as the Navy's adopted process and, ultimately,
4 adopted in Congress in today's 513 process and
5 for accessing the psychotherapist patient
6 records.

7 Forwarding to 2006, when the Klemick
8 precedent was issued by the Navy and Marine
9 Corps, giving us some direction of what are the
10 standards for allowing parties to pierce the
11 privilege, the case was not very well understood.

12 In 2013 and later in 2015, we had the
13 changes to M.R.E. 513 and I was now on the trial
14 bench having counsel argue Klemick and explaining
15 what Klemick was about to me. Further, I was
16 privy to judges' interpretations of applying the
17 rule. As with new rules, there was initially a
18 range of applications, some very narrow and some
19 very, very broad.

20 I believed the application of M.R.E.
21 513 was challenging, initially, because the
22 Klemick case is arguably distinguishable on the

1 facts on how we actually use it today. However,
2 the case largely served as a vehicle for the
3 process of how judges should go through to review
4 records. Reading Klemick and now Rule 513, as
5 modified, it gives a clear process. I hold that
6 to best understand the burden of proof for an in
7 camera review, the practitioner needs to look at
8 Wisconsin vs. Green, which Klemick adopted in its
9 ruling.

10 I know training service judges spoke
11 at length about the standards for ordering an in
12 camera review. The practice did develop. The
13 moving party must set forth a specific factual
14 basis before an *in camera* review can be ordered.
15 Practitioners must present some evidence.
16 Although a relatively low burden, some evidence
17 of what they are seeking and for what is its
18 purpose. As Green stated, attending treatment
19 alone is insufficient. Just because a victim
20 sought psychological assistance after an
21 incident, that is not sufficient to go ahead and
22 pierce the privilege, in my opinion.

1 Judges later made better specific
2 findings of fact prior to issuing their orders
3 for production. Victims' Legal Counsel stood
4 ready to challenge a judge who got outside the
5 box or is abusing their discretion.

6 In cases where victim records were
7 known to exist, defense sought them. The
8 argument they often posed was that they cannot
9 articulate the need without knowing what is in
10 the documents and at least an *in camera* review
11 will help them better articulate if the judge at
12 least looks at it. I found a defense met its
13 burden usually with an affidavit from a witness
14 where a patient disclosed a communication to a
15 third party. That would, therefore, pierce the
16 privilege.

17 In long-term relationship cases, a
18 partner often knew evidence to support an
19 affidavit for the court to provide some evidence.
20 So, if you have a spousal sexual assault case,
21 that would be a case where the spouse, the
22 accused, would have information and an affidavit

1 would be provided to the court, and that would
2 give us the basis for us to go ahead and order an
3 *in camera* review.

4 Also, if the government wanted to show
5 harm or injury and aggravation at sentencing, the
6 treatment became relevant for the defense to
7 access. So, if the government, upon sustaining a
8 conviction, was going to be presenting injury or
9 evidence of aggravation, that opened the door, if
10 you will, for the defense to have potential
11 access to the records; however, first, an *in*
12 camera review was conducted.

13 It is challenging for judges in our
14 system dealing with issues related to sentencing,
15 when we are dealing with sentencing, to handle
16 that pre-trial. We do not have a bifurcated
17 merit case and then a sentencing case. Upon
18 conviction, we go straight into sentencing. If a
19 government presents aggravating evidence related
20 to the victim's mental health condition or
21 injury, that may open the door for a justified
22 review of the records, which may not be

1 immediately available. So, this tends for judges
2 to want to resolve the M.R.E. 513 issue pre-
3 trial. That, in turn, requires the government to
4 commit to either presenting or not presenting
5 evidence in aggravation of sentencing.

6 Victims' Counsel understood and they
7 weighed, with their clients, what the options
8 were. I had one case in particular where the
9 Victims' Legal Counsel said my victim, if there
10 is a conviction, will not testify as to
11 aggravation related to her mental health.

12 *In camera* reviews are now conducted
13 with that consideration of the standard and any
14 released material must be necessary for
15 preparation, relevance, necessary and not
16 cumulative. Protective orders are issued.

17 I did find and do find that protective
18 orders and sealing orders were an area needing
19 more attention. Our system has a convening
20 authority, Staff Judge Advocate review, appellate
21 review by the defense, government attorneys, as
22 well as appellate jurists, should a party have

1 access to psych records sealed at the trial level
2 without having to make a similar showing. That,
3 obviously, changed with the new rule. Now, for
4 it to be unsealed, a party has to go to the
5 military judge or to the appellate court before
6 they can go to get access to those records.

7 My experience was and remains that
8 judges are trained well in these areas. There
9 are always new issues of particular facts that
10 make rulings difficult, but the judges and
11 practitioners understand the procedures and weigh
12 the respective interests in each area.

13 I will close, in respecting the time
14 that we have, but welcome any additional
15 discussion on this topic, as well as application
16 of M.R.E. 412 at courts-martial.

17 I would say, as for a recommendation,
18 I concur and would agree with Lieutenant Colonel
19 Faulkner's point about the breadth of what is
20 covered. That is often a discussion. Is it a
21 discussion, or is it more than that? I know
22 there is a recent case by the Coast Guard that

1 expanded it to include prescriptions and other
2 types of records, if you will.

3 The other area that I identify as
4 being an issue -- I am not sure today judges are
5 identifying in their ruling, as part of the
6 process per M.R.E. 513, subsection 3, it says for
7 the military judge must find prior to sentencing
8 that the moving party has showed and it gives a
9 list of things. Well number B is that the
10 requested information meets one of the enumerated
11 exceptions to subsection D of this rule. They
12 are taking away the constitutional -- allowing
13 the judge using the constitutional basis as the
14 exception to use. That is now gone. So what are
15 they now using as a basis? What enumerated rule
16 specifically in that process are they using to
17 get at their finding?

18 There is a recent case, we know, U.S.
19 vs. Martinez, which has gone up on writ. As I
20 was coming here today my staff found out there is
21 actually a filing in the U.S. District Court of
22 D.C. where that issue is being litigated, the

1 fact that the judge has ordered for release using
2 the constitutional basis, which now the Special
3 Legal Counsel has said, the Victims' Counsel has
4 said that exception doesn't apply anymore. So,
5 that is going to be heard here soon.

6 So as for a recommendation, I think it
7 needs to be cleaned up a little bit as to what
8 particular thing, what particular matter that the
9 -- whether it has to be an enumerated exception
10 or can it follow due process.

11 Subject to your questions, I will
12 pause here.

13 CHAIR HOLTZMAN: Thank you very much
14 Commander.

15 We will start with Mr. Taylor.

16 PROF. TAYLOR: Thank you very much,
17 Madam Chair, and thanks to all of you for coming
18 here and sharing your experiences with us today.

19 I have to say that in looking at the
20 read-ahead materials, we have looked not only at
21 the Martinez case but also the Duckworth case,
22 both of which had been criticized by other judges

1 for not following 513 to the letter, and
2 specifically in one case, Commander Luken, not
3 citing the specific exemption which would apply.
4 So I would like to start with that.

5 As I was studying the materials, I
6 wondered what your experience has been about
7 which exceptions judges normally do cite, if you
8 know of any, because none of them seem to fit the
9 kind of materials that we normally think of as
10 covered by 513 in normal situations. So does
11 anyone in the panel have an idea about that,
12 about what people are doing who do decide to have
13 a finding and admit materials? If anyone could
14 raise his or her hand, then we will go from
15 there.

16 Sir?

17 CDR LUKEN: Last night I sent an email
18 to the senior trial counsel in the field asking
19 that specific question. Having identified that,
20 you have to identify the enumerated rule. What
21 are judges doing? I believe that there is
22 simply, in their findings, they are not

1 addressing that, and they are skating over it.

2 LTCOL HARVEY: Yes, excuse me. I
3 would say most of the motions that are still
4 being filed post-rule change still cite to the
5 idea that you can't legislate out the
6 Constitution and so are still looking at
7 confrontation and due process as the basis for
8 the request. And I think probably most military
9 judges are still evaluating it on those grounds,
10 as opposed to under an enumerated exception.

11 PROF. TAYLOR: Anyone else have a
12 thought on that?

13 LTC FAULKNER: I agree with Colonel
14 Harvey. I mean I think if you follow the rule as
15 written, it is almost impossible to get an in
16 camera review. If the judge is going to give
17 one, he is going to have to bring it or to allow
18 it under some kind of due process,
19 constitutionally-required exception that is not
20 in the rule but that I think everybody recognizes
21 still exists.

22 PROF. TAYLOR: That is exactly what,

1 of course, Judge Bates said when he reviewed the
2 case. He referred specifically to that point,
3 that the order did not refer to a Rule 513
4 exemption. So it seems to me that those who have
5 looked at this area have recognized exactly what
6 you said, Colonel Faulkner, that this is a
7 disconnect in a pretty serious way.

8 A couple of you mentioned that you
9 thought it would be a good idea to focus on the
10 fact that when you had Medical Board
11 determinations or other medical records that
12 referred to various kinds of mental health
13 treatments a person might have had, that somehow
14 that be addressed. Would one way to do that be
15 to require the Medical Records Administrators who
16 are releasing this kind of information to scan it
17 very carefully, look at it seriously for this
18 kind of information and excise it, just as you
19 would in a Freedom of Information Act request as
20 something that should not be released to another
21 person, Colonel Faulkner?

22 LTC FAULKNER: I think that is an

1 answer. I just think that a typical -- it is not
2 untypical or atypical. I mean there are hundreds,
3 if not thousands of pages of medical records they
4 are asking some records clerk to go through. And
5 as Colonel Harvey pointed out, we don't
6 understand what is in those records. I don't
7 know that they understand either. Some medicine
8 or -- I don't know that it is feasible to ask a
9 clerk. I mean I guess there is somebody who
10 could go through there and redact out all that
11 information but, again, you are putting a large
12 burden on somebody to make that process happen.

13 PROF. TAYLOR: Anyone else have a
14 thought on that?

15 CDR LUKEN: Yes, sir. We have
16 recently received notice that hospitals are
17 actually not releasing these records anymore to
18 law enforcement. Instead, we are having to go
19 seek a subpoena or something from a judge. They
20 want to see something from a judge.

21 Also Navy and Marine Corps, we have
22 started training our trial counsel and our law

1 enforcement, NCIS, when they ask for these
2 records, if they were to get them, watch out for
3 the psych records and those need to be pulled
4 out. When it comes over to our trial offices, we
5 actually have a person separated to look through
6 those and make sure there are no psych records so
7 that we roll them off, if you will, in case we do
8 have an unnecessary or inadvertent spillage so
9 the whole team, the whole office doesn't get
10 conflicted out. We find those records, we report
11 it back to the VLC or the victim and return it
12 back to the hospital. We sealed it and we don't
13 use it. And then we go through the regular 513
14 process at that stage.

15 So, it is a multi-layer trying to
16 protect the interests and the privacy of the
17 victims.

18 PROF. TAYLOR: Well, I am glad you
19 mentioned that because I noticed in one of the
20 tasks that we had asked the Department to look at
21 in a previous report of ours, we had asked
22 specifically to reexamine the standards about

1 which law enforcement did get access to these
2 kinds of records. And the staff can correct me
3 on this but, to my knowledge, we haven't received
4 an answer to that. That is one of the points
5 that is still out there to be answered but we
6 need to follow-up on that ourselves, at some
7 point. But I am glad to hear that at least there
8 has been some progress made in that area.

9 So with that, Madam Chair, thank you.

10 CHAIR HOLTZMAN: Well thank you very
11 much. Judge Jones?

12 HON. JONES: No questions.

13 CHAIR HOLTZMAN: Admiral Tracey?

14 VADM TRACEY: No questions.

15 CHAIR HOLTZMAN: Mr. Stone?

16 MR. STONE: Yes, I would like to take
17 up, to start with, something Commander Luken just
18 mentioned and something I heard from all of the
19 people here on this panel.

20 Going back to the old rule, when you
21 still had more discretion to have, or at least
22 you felt you had more discretion, to have more in

1 camera hearings on the 513 material, I think I
2 heard pretty much that most of you didn't conduct
3 those hearings anyway because you didn't feel
4 there was enough of a proffer made. Maybe some
5 of you did.

6 LTCOL HARVEY: I would say it was more
7 common -- it was definitely more common than
8 after the rule was changed to receive records and
9 the type of records was certainly different. It
10 was everything. So, you would get the pages
11 where they just repeat all the information every
12 third page. I mean hundreds of pages.

13 So what really changed, it changed in
14 two ways. One, the number of times in which you
15 got to the level of requiring an *in camera*
16 review. And then secondly, what you were asking
17 for to be produced for *in camera* review. So that
18 was, I think the --

19 I think I did look at a lot more
20 records before the rule was changed than I did
21 after.

22 MR. STONE: Okay, then my question

1 having to do with that time when you served as
2 judges, as Commander Luken pointed out, it was
3 sort of the privacy protection was odd because
4 when the case went up on appeal after a
5 conviction, the appellate counsel, both of them
6 actually, could see all those records just on
7 asking that you didn't say that were sealed. And
8 I guess what I want to know is did any of you
9 have any significant number or even any reversals
10 of your convictions that you presided over
11 because of what the appellate counsel reviewed
12 that you didn't review? Did that ever happen?

13 CDR LUKEN: Not to me.

14 LTCOL HARVEY: Not that I am aware of.

15 MR. STONE: Okay because that was one
16 of the concerns that either the trial judges
17 didn't have enough experience and time in the job
18 or familiarity and that that needed to continue
19 at the appellate level because the trial judges
20 were either not skilled or not having enough time
21 to make proper 513 rulings. Is that common in
22 any of your experiences in your Service and with

1 the other judges you worked with?

2 CDR LUKEN: Well, I would echo what
3 Lieutenant Colonel Harvey stated, that we are
4 lawyers; we are not psychologists. So,
5 oftentimes, we needed to put it on the defense to
6 make sure to articulate what exactly am I looking
7 for and why am I looking for this.

8 If I heard judges rule that I am going
9 to do an *in camera* review and then say okay,
10 defense, what exactly am I looking for, well,
11 that doesn't make sense. You have had to make
12 that finding before you could make that ruling.
13 That matured.

14 Now, I do believe that if a judge
15 today has an issue of understanding the records
16 that they would seek out an expert to be
17 assigned, detailed, to the judge to assist them
18 in that process of reviewing.

19 MR. STONE: Thank you.

20 LTCOL HARVEY: I'm sorry. The only
21 comment I would make as far as appellate review
22 is, having been a former appellate counsel, I

1 certainly didn't know more about mental health
2 than I did when I became a judge. So, they are
3 probably suffering under the same, a lot of the
4 same perspectives that we are in looking at it.

5 MR. STONE: I guess my next question,
6 which still relates to that, has to do with
7 whether or not you saw and granted motions in
8 favor of the defense because they said they did
9 not have enough investigators to make the proffer
10 to require you to look at the *in camera* records.
11 Did you ever have any kind of motions like that
12 or issues like that come up in a case?

13 CDR LUKEN: Not as to resources, no.

14 CDR KITCHEN: Not as to resources.

15 LTCOL HARVEY: No.

16 LTC FAULKNER: No.

17 LT COL SHERMAN: No, sir.

18 MR. STONE: Okay. So I gather then if
19 those issues weren't raised, none of you had
20 reversals of convictions based on the defense
21 maintaining that it didn't have enough
22 investigative resources and, therefore, the

1 defendant was denied due process.

2 CDR KITCHEN: No, sir.

3 CDR LUKEN: Correct.

4 MR. STONE: Okay. I guess a question
5 that came up that I had recently was whether you
6 thought additional trial judges, military trial
7 judges might be helpful because of backlog
8 issues. Did any of you, when you were a trial
9 judge, feel like you wished there were twice as
10 many judges to handle the cases, something like
11 that?

12 CDR LUKEN: It really comes down to
13 the ebb and flow of cases. I was in a very busy
14 circuit but we used our Reserve forces to fill up
15 when we found ourselves on the higher end. We
16 are always looking for people, sir.

17 LT COL SHERMAN: Sir, I would say with
18 the Air Force judges also doing the Article 32s,
19 we could certainly use an influx of more judges,
20 if the Air Force is going to continue having
21 judges do the 32s.

22 When I said in my statement that it is

1 almost all of them, the reason it is almost all
2 is because there were some we just cannot
3 support. We just do not have the resources to do
4 so.

5 So, and I believe it is the Air
6 Force's policy to continue to have judges as
7 preliminary hearing officers at the Article 32s,
8 that does put a strain on our resources. Like
9 you said, sometimes we have to decline to provide
10 a judge for those.

11 MR. STONE: Following up on the
12 Article 32s for a moment, did any of you get, in
13 your experience as judges or hear from other
14 judges, that the changes in the Article 32s,
15 which limited the ability of the defense counsel
16 to call the victim, did you get motions that
17 said, given that limitation, we now need some
18 other discovery to compensate or this will not be
19 a fair trial? You got motions like that, I
20 presume.

21 LTC FAULKNER: Yes. And I think I had
22 one or two and I have seen other judges with

1 some, where the defense counsel then comes to the
2 judge asking to depose the alleged victim. But,
3 again, under the current law, the case law, I
4 don't think -- or I think it is extremely
5 difficult to meet a standard to get a deposition.

6 MR. STONE: And did you have any
7 reversals based on that?

8 CHAIR HOLTZMAN: Excuse me, Mr. Stone.
9 Could we restrict the questioning to the subject
10 matter, which is 412 and 513 please?

11 MR. STONE: Well they all testified
12 about the Article 32s --

13 CHAIR HOLTZMAN: Well, I know in
14 general but that is --

15 MR. STONE: -- and the subject matter
16 would be the 513, getting to the 513 material or
17 admitting the 412 at the trial. And I guess what
18 I want to know is whether any of you, just
19 generally, did any of you have reversals of
20 convictions based on your 513 and 412 rulings?

21 LTCOL HARVEY: No.

22 CDR KITCHEN: No.

1 LT COL SHERMAN: No, sir.

2 MR. STONE: I think that sort of
3 answered what I was worried about. Thank you.

4 CHAIR HOLTZMAN: Thanks very much.

5 Commander Luken, just to clarify in my
6 own mind, I'm not sure I understand the
7 procedure.

8 CDR LUKEN: Yes, ma'am.

9 CHAIR HOLTZMAN: You were talking
10 about how you handled, how trial counsel handled
11 the receipt of medical records that contained
12 psychiatric information or psychological
13 information -- mental health information. Does
14 that suggest -- to me that suggests that the
15 trial counsel is getting that material,
16 initially. But why isn't defense counsel getting
17 it? And so how does that -- could you clarify
18 why trial counsel is able then to screen or is
19 defense counsel not getting it?

20 CDR LUKEN: Yes, ma'am.

21 CHAIR HOLTZMAN: So, please assist me
22 in that.

1 CDR LUKEN: Yes, I will try to make it
2 clearer.

3 What happens is NCIS or the
4 investigative agency is able to get those records
5 through their investigating stage as part of
6 their report. They turn it over for discovery to
7 the prosecutor before we turn discovery over to
8 the defense. Before we turn over discovery to
9 the defense, we review the discovery to make sure
10 there is nothing there that shouldn't be there or
11 that is, in fact, actually discoverable under the
12 rules.

13 So, that is how the government is --
14 trial counsel may be getting it inadvertently as
15 part of the medical records that somehow came in
16 through the investigation. But again, the
17 practice I have seen just within the last six
18 month, I am getting reports that hospitals are
19 not releasing the medical records to law
20 enforcement during the investigation without
21 further subpoena or an order from the judge.

22 CHAIR HOLTZMAN: Okay.

1 LTC FAULKNER: If I could echo that.

2 CHAIR HOLTZMAN: Yes.

3 LTC FAULKNER: In those cases where
4 the hospitals are not responding to law
5 enforcement, oftentimes then the government
6 counsel gets a defense request for say for
7 example for the forensic exam that was done on
8 the alleged victim. And then the hospital is
9 then turning over those records to a trial
10 counsel who has subpoenaed them, and that is
11 where the inadvertent disclosures are made
12 because they just give them this big stack of
13 medical records without -- it doesn't appear that
14 the hospital is doing anything other than here is
15 a big stack of medical records that you asked
16 for.

17 CHAIR HOLTZMAN: Okay, I would like to
18 go back to 412 for a second, just to again
19 clarify what you said in my own mind.

20 At one point, I think it might have
21 been you, Colonel Harvey, talked about the gray
22 area under sexual disposition. What gray area

1 are you referring to in the sense of -- I mean is
2 the rule unclear in some point? And if that is
3 so, could you clarify that?

4 And is this a development, the lack of
5 clarity or the gray areas, is that something that
6 has happened as a result of the recent changes?

7 LTCOL HARVEY: Ma'am, I don't think
8 that it is something you could necessarily
9 clarify in the rule. It is just the language is
10 broad. And because of that, there are questions
11 about, for example, we have talked a lot about
12 existing relationships with someone that is
13 potentially motivated to fabricate an allegation.
14 Well, is the fact that somebody has a boyfriend
15 really a sexual predisposition or a sexual
16 behavior? No, not necessarily and depending on
17 how the questions are asked. And so a lot of
18 defense counsel don't think that that is
19 something that should be governed by M.R.E. 412
20 just being in a relationship.

21 Or for example, I have had defense
22 counsel say that well, the alleged victim sent

1 photos to the accused prior to this incident. Is
2 the fact that they sent photos 412? No. What
3 might be in the photos? So, that is always where
4 generally I took a broad view, just to be the
5 most careful and swept everything kind of into to
6 the lens of 412 to ensure. But then a lot of
7 those types of things came out the other end and
8 were admissible but, again, with a restriction.

9 So, for example, you know you can ask
10 whether or not she had a committed relationship
11 or a romantic relationship. There is obviously
12 no reason to ask about the actual sexual aspect
13 of a relationship most of the time. Things like
14 that. Or you can ask whether or not she sent
15 pictures and talk about them in this way but you
16 can't show the pictures.

17 So, that was, I guess what I was
18 referring to, ma'am. And I'm not sure there is a
19 way to clarify the rule to do that just because I
20 think a lot of these vagaries have come up
21 because of technology and we have a lot more
22 information about what people are doing. We can

1 see a lot more of texts and photos and things
2 like that. And so it is just not -- there is
3 just a lot more out there. And so I think that
4 that is the job of the judge, I guess, to figure
5 it out.

6 But those are the more difficult
7 issues.

8 CHAIR HOLTZMAN: Anybody else want to
9 make a comment about that?

10 Okay, well just one other question in
11 that regard. Somebody mentioned that 412
12 information, maybe Ms. Sherman, in a courts-
13 martial case would be used or admitted for
14 purposes of reputation. Can you clarify that?
15 Because I would like to understand how reputation
16 is relevant.

17 LT COL SHERMAN: Well what I meant to
18 say was that is what the defense is proffering it
19 for.

20 CHAIR HOLTZMAN: Okay.

21 LT COL SHERMAN: That is usually one
22 of their going in positions because she behaves

1 this way at this particular party that the
2 accused was at, you should, Your Honor, allow
3 this evidence in. Sometimes it can be relevant
4 if her interactions, again, are with the accused.
5 What would give this particular accused a reason
6 to believe that whatever the alleged victim was
7 doing was somehow a manifestation of consent? We
8 have seen shades of that.

9 But most of the time, what I meant
10 was, that is how it is proffered.

11 CHAIR HOLTZMAN: In other words, the
12 theory of the proffer is once a woman has said
13 yes, she will always say yes?

14 LT COL SHERMAN: Not quite that direct
15 but --

16 CHAIR HOLTZMAN: Close.

17 LT COL SHERMAN: -- sometimes and
18 maybe the defense counsel is better off to speak
19 to this than I, what I have heard them say was
20 generally because of the way she is behaving, my
21 client had reason to believe that she was
22 consenting.

1 CHAIR HOLTZMAN: I see. Okay.

2 I have no further questions so I just
3 want to say thank you very much for the expertise
4 you have provided us and very, very helpful
5 presentations from everyone. Thank you again for
6 sharing your expertise with us.

7 Shall we take a five-minute break?

8 (Whereupon, the above-entitled matter
9 went off the record at 10:33 a.m. and resumed at
10 10:47 a.m.)

11 CHAIR HOLTZMAN: Would the members of
12 the panel come forward and can we get started,
13 please?

14 Good morning, ladies and gentlemen.
15 Our next panel will be perspectives of trial
16 counsel on the application of M.R.E. 412 and 513
17 at Article 32 hearings and courts-martial. Thank
18 you very much for your appearance and sharing
19 your expertise with us.

20 We will begin with Major Ryan Reed,
21 U.S. Air Force, Senior Trial Counsel, Special
22 Victims' Unit. Major Reed, welcome.

1 MAJ REED: Thank you, ma'am. Good
2 morning, Madam Chair and Members of the Panel.

3 My name is Ryan Reed. I am a Senior
4 Trial Counsel in the Special Victims' Unit, Joint
5 Base San Antonio-Randolph. I have been there for
6 about two years. I have been in the Air Force
7 for seven years in litigation roles as defense
8 counsel at Keesler Air Force Base in Mississippi.
9 It is a pretty large training base in Biloxi.

10 Before that, I was a prosecutor at
11 Ramstein Air Base, Germany for about three years.

12 I am a former police officer in
13 Southwest Florida, was a detective, road patrol
14 supervisor. I even did a little bit of a school
15 resource officer role for a couple years in high
16 school and middle school setting. All the while
17 just commuting back and forth law school at
18 night.

19 So, I honestly think I have the best
20 job in the Air Force and look forward to your
21 questions.

22 CHAIR HOLTZMAN: Thank you.

1 The next presenter will be Lieutenant
2 Colonel Wade -- I'm sorry -- Lieutenant Commander
3 Geralyn van de Krol, U.S. Coast Guard Branch
4 Chief, Trial Services, Coast Guard Legal Services
5 Command.

6 Lieutenant Commander.

7 LCDR VAN DE KROL: Hi. Good morning,
8 Madam Chairman and Honorable -- or excuse me --
9 distinguished Panel. Thank you so much for
10 giving me the opportunity to speak with you today
11 in regard to both M.R.E. 412 and M.R.E. 513.

12 I have been serving as a prosecutor
13 for the U.S. Coast Guard for about five and a
14 half years now and I have to say I have a lot of
15 experience, especially with M.R.E. 412, I am sure
16 as many of my colleagues do.

17 So I think as the military judges who
18 spoke before us talked about the prevalence of
19 M.R.E. 412 at Article 32s and, in my experience,
20 related to adult sexual assaults, some party
21 tries to introduce M.R.E. 412 information in
22 almost every single proceeding. And when I say

1 some party it is because, I think as was stated
2 earlier, oftentimes it is the government trying
3 to seek that evidence.

4 So, the government, I as a prosecutor,
5 seek that evidence oftentimes to show lack of
6 consent. So if there is a prior consensual
7 sexual relationship, I think it is important
8 sometimes, one, for context -- nothing happens in
9 isolation -- and also to show how maybe the
10 incident of the assault is different from any
11 type of prior consensual sexual acts.

12 One thing I want to focus on and I
13 think, again, this was touched on a little bit
14 earlier, is the notice requirements. Obviously,
15 M.R.E. 412, there is a really strong procedural
16 aspect to the rule. R.C.M. 405 references in
17 Article 32, they reference back to M.R.E. 412 --
18 excuse me Article 32, they reference to M.R.E.
19 412. But the procedural requirements in M.R.E.
20 412 are really more positioned for a trial. For
21 example, it requires a five-day notice in advance
22 of pleas. Well, that has a hard time translating

1 back to the Article 32 proceeding.

2 Obviously, there is a policy concern
3 there, like the notice requirement is important.
4 It is important to put the victim, the SVC, the
5 VLC on notice to put the PHO on notice that this
6 is an issue that he or she is going to have to
7 deal with and put the counsel on notice.

8 And I mean one of the recommendations
9 I would make would be to go an amend R.C.M. 405
10 to put out really specific notice requirements in
11 regard to M.R.E. 412 information.

12 So as that new R.C.M. 405 stands,
13 there is kind of a notice requirement for the
14 government because the government must provide
15 the defense counsel with their evidence
16 approximately I think it is 14 days prior to the
17 hearing. So my practice is is when I provide
18 that notice, I also provide essentially an M.R.E.
19 412 notice along with that. And that gives both
20 the victim and the victim's counsel notice, the
21 defense notice, and also the PHO notice that this
22 is something I plan to present.

1 Oftentimes, the defense counsel does
2 not provide notice and they do try to present
3 this information during the actual proceeding and
4 it can be disruptive. If the PHO is not prepared
5 for it, sometimes it does take them a little bit
6 off-guard. And when victims are attending these
7 proceedings, and a lot of our victims are
8 attending these proceedings, I think they need to
9 have confidence in the entire system. That is
10 how you get the alleged victims to courts-martial
11 is confidence in the proceeding. And if you are
12 at a 32 hearing and it is all -- it doesn't go
13 smooth, I think that they lose confidence in the
14 system. I mean, the accused also should have
15 like a good, fair proceeding.

16 Now a second, one of the questions
17 asked had to do with whether or not the PHOs have
18 the requisite training and experience to be
19 conducting the 32s. It sounds like some of our
20 sister Services --

21 CHAIR HOLTZMAN: Excuse me, when you
22 say PHOs, is that the preliminary hearing

1 officers?

2 LCDR VAN DE KROL: Oh, excuse me,
3 ma'am. Yes, the preliminary hearing officer.
4 The question was whether or not the preliminary
5 hearing officers presiding over the Article 32s
6 have the training and experience that they need.

7 It sounds like some of our sister
8 Services have implemented policy to require --
9 well maybe not require but trying to have
10 military judges. The Coast Guard does not have
11 that policy. I do think it is a good policy.
12 Maybe not. But maybe that is something I think
13 that should be addressed through a Service policy
14 advice like any type of an amendment but minimum
15 qualifications, minimum experience I think is
16 essential.

17 But I think that minimum experience
18 and that minimum training requirements needs to
19 be applied to all parties involved, including the
20 prosecutors and including the defense counsel and
21 the SVC/VLC. For example, talking about like
22 some of the notice requirements, one thing that I

1 have seen prosecutors do very poorly is, we
2 talked a little bit about these paper cases,
3 where you just come in and you provide videos or
4 you provide statements of the victim, without
5 combing through those videos and statements and
6 editing out 412 information.

7 And so yes, it is inadvertent and
8 there are ways to kind of go back and seal it and
9 edit it out. But again, it goes back to just
10 kind of just poor process.

11 So trial counsel, prosecutors, they
12 need to be aware of that and they need to be --
13 and I think some of that comes from experience.
14 Experienced counsel, experienced PHOs, I mean,
15 really do help, I think, engender confidence in
16 the system and helps -- just improves the system
17 overall.

18 A little bit about writs. I do not
19 see writs being filed, at least in my experience.
20 And a lot of that has to do with the fear that it
21 is going to delay the process. So, I see victims
22 willing to sort of to waive their procedural

1 rights in order to move the system, like to move
2 the process along. And so when they are -- and
3 it all kind of goes back to resources. I know
4 that is not a topic we are talking about here,
5 but when they are waiving their 412 rights
6 because of a lack of resources, I think that they
7 kind of they do become -- there is some
8 relationship there.

9 I will talk a little bit about trial
10 and my experience with M.R.E. 412 at trial. Yes,
11 it comes up a lot, in almost every case. In my
12 experience, the judges do a really good job in
13 getting to the right decision eventually.

14 So one issue, though, I have seen has
15 to do with sentencing. So when M.R.E. 412
16 information is introduced, specifically related
17 to prior consensual sexual acts or a prior
18 relationship between the accused and the I guess
19 now victim, I think the sentences are a lot, I
20 would say, lighter than when there is no
21 relationship.

22 And it is anecdotal but it also is in

1 doing my debriefs with the panel afterwards.
2 There just seems to be that they don't -- it is
3 almost like a matter in mitigation or
4 extenuation, the fact that there was this prior
5 relationship that somehow it hasn't impacted the
6 victim in the same way.

7 And unfortunately, I've heard also
8 that some of our -- that there have been military
9 judges who have expressed similar thoughts on
10 that issue. And I don't know if there is a way,
11 though, to explicitly state that a prior
12 consensual sexual or other relationship between
13 the accused and the victim is not to be
14 considered as a matter of mitigation or
15 extenuation. I mean as an instruction, we assume
16 that our members of -- that our Panel Members can
17 follow instructions and it also gives the trial
18 counsel and the prosecutor some ammunition in
19 regard to sentencing or sentencing argument. You
20 cannot consider this.

21 Moving on to 513, I have a lot less
22 experience with 513 just because it doesn't come

1 up. It hasn't come up in my cases very often. I
2 do want to share, though, three specific cases
3 that I have been involved with where 513 became
4 an issue. And in two of those cases, one of
5 those cases, the judge did rule that the 513
6 information was going to go *in camera* and the
7 victim in that case, at that point, essentially
8 decided that she did not want to be part of the
9 process anymore and agreed to settlement. In one
10 of my other cases, it looked like it was going
11 there, where the defense counsel had filed a
12 pretty intrusive motion in regard to 513 and she
13 was a civilian and just dropped off the radar,
14 wanted nothing more to do with the process. And
15 I do -- I think that it had something to do with
16 that motion and with that fear.

17 Probably the most -- one example that
18 I have seen that I think really sums it up is I
19 have a child, a juvenile victim who explicitly
20 stated during an interview with the forensic
21 examiner that she was not going to seek
22 counseling like related to the act, the offense

1 because she feared that defense counsel would be
2 able to obtain those records and that they would
3 be used against her. So this is a child, well a
4 teenager, who has stated she is not going to seek
5 counseling because of what she just perceives to
6 be a potential intrusion into her privacy.

7 Now, I don't know if that necessarily
8 means that the rules need to be changed because
9 the rules are the rules. I mean I absolutely
10 believe in due process, but I would tie that back
11 again, I'm sorry, to resources in that we need to
12 get these -- these cases, they need to be moving
13 along. If this young woman is going to be
14 delaying her treatment because of this fear, well
15 then let's get to disposition. Let's get to
16 finality. So let's get there in three or four
17 months. Let's not do it in a year because every
18 month that she is delaying treatment, I would say
19 is further negatively impacting her as a person
20 as a victim.

21 Now pending any of your questions,
22 that is all that I have. Thank you.

1 CHAIR HOLTZMAN: Thank you very much
2 for your presentation.

3 Our next presenter will be Lieutenant
4 Commander Ben Robertson, U.S. Navy, Senior Trial
5 Counsel.

6 LCDR ROBERTSON: Thank you very much,
7 ma'am. I appreciate the opportunity. I am
8 currently the Senior Trial Counsel at Naval
9 District Washington. My area of responsibility
10 covers the Pentagon, the Washington Navy Yard,
11 the United States Naval Academy, and Patuxent
12 River and some of the other Navy units that are
13 attendant to those.

14 Prior to this, I was a prosecutor in
15 Norfolk, where I dealt with a large deployment, a
16 number of aircraft carriers.

17 Before that, I was an instructor of
18 evidence in trial advocacy at the Naval Justice
19 School.

20 I think I bring a unique perspective
21 because I, as my shop is organized, I handle the
22 prosecution of all the cases for the United

1 States Naval Academy. So, all cases dealing with
2 Midshipmen, both as victims and as suspects, I
3 deal with those. A lot of those had M.R.E. 412
4 issues because they deal with either other
5 sources of injury or prior sexual acts between
6 the suspect and the victim. So that becomes an
7 issue both at Article 32 hearings and at trial.

8 Additionally, another area that
9 recently has become unique is when we have
10 victims who either identify as homosexual or are
11 involved in same-sex assaults. M.R.E. 412
12 sometimes comes in there, when we are talking
13 about how the suspect and the victim met, whether
14 it was on a dating app that was directed
15 specifically at the homosexual community, Grindr,
16 or places that they may have gone together, it
17 brings a unique perspective to it and unique
18 situations and biases that we are, as a society,
19 are continuing to get past.

20 M.R.E. 513 seems to be an issue in
21 about half the cases that I deal with, both as it
22 applies to getting treatment for the assault that

1 is at issue, but also in a fair number of the
2 cases, the victims have previous sexual assaults
3 in their past and have sought mental health
4 counseling for those. And it appears as though
5 that as mental health treatment becomes more and
6 more sought after by people and acceptable, both
7 in society and in the military, that we are
8 seeing more and more people have gone and seen
9 it. And that is very good to see because people
10 are getting treatment and people are healing and
11 are going on to become functioning members of
12 society and the military, but it is also
13 something that the defense, obviously, wants to
14 see. Because if there are statements about the
15 incident, they are going to want to make sure
16 that those are consistent with what we are
17 looking at.

18 Preliminary hearing officers, my
19 office gets the preliminary hearing officer. We
20 are the ones that make the recommendation to the
21 convening authority as to who to appoint. So I
22 am going to say that all the preliminary hearing

1 officers that we have had have been qualified.

2 Otherwise, I am doing a terrible job.

3 And I think with the desire that the
4 preliminary hearing officer outrank or be equal
5 in rank to the trial counsel and to the defense
6 counsel, well, I am the trial counsel in about
7 half the cases. The Senior Defense Counsel is a
8 lieutenant commander. That means we are going to
9 have a lieutenant commander or a commander or a
10 captain that has significant experience and has
11 the ability to analyze the law, listen to
12 reasonable arguments from both sides, and make a
13 decision that is based in law.

14 Additionally, here in D.C. they have
15 stood up a Reserve unit that is made up of a
16 number of O-6s, who are Reserve officers, Reserve
17 Judge Advocates. And their sole job as
18 Reservists is to serve as preliminary hearing
19 officers.

20 I will tell you what. It is very nice
21 to go in and to have an O-6 who is extremely
22 experienced in military law but also in civilian

1 law and makes a whole lot of money practicing
2 civilian law to come in and say I heard your
3 argument; I heard your argument; now, let me tell
4 you the way the law works and lays it out for us.
5 And we say oh, okay. So, that is nice and it is
6 nice to have that control at Article 32 hearings.

7 Military judges have done a tremendous
8 job -- I hope Commander Luken is still here --
9 have done a tremendous job in both handling
10 M.R.E. 412 and M.R.E. 513 issues at trial. I
11 have not seen any writs filed either after a
12 trial or after an Article 32 hearing, and I
13 believe that is because the way that the process
14 is handled by trial counsel, by defense counsel,
15 and my military judges, and the victims' legal
16 counsel program and the Special Victims' Counsel
17 program in the other Services provides the victim
18 confidence in the process that if a judge makes a
19 determination that evidence is going to come in
20 or evidence is going to be reviewed *in camera* ,
21 that only that evidence that is relevant and has
22 to be admitted in order to provide due process

1 rights is going to come in, and that it is not
2 going to be a free-for-all on the victim's past,
3 whether it be sexual history or mental health
4 history. And I believe that because they have
5 that confidence in the process, that we are not
6 seeing the writs, and we are not seeing them fall
7 out of participation after those decisions have
8 been made.

9 That is where I am going to limit my
10 comments, and I look forward to any questions
11 that anybody may have.

12 CHAIR HOLTZMAN: Thank you very much,
13 Commander.

14 Our next presenter will be Major Adam
15 Workman, U.S. Marine Corps Legal Services Support
16 Team. Major, welcome. We look forward to your
17 presentation.

18 MAJ WORKMAN: Good morning, Madam
19 Chair and distinguished Panel Members. Thank you
20 for the opportunity to speak here today.

21 I am stationed aboard Camp Pendleton,
22 California. I was a complex trial counsel from

1 2014 to 2015 and the Senior Trial Counsel from
2 2015 to 2016.

3 With regard to Article 32 hearings and
4 M.R.E. 412, let me start off by saying that since
5 Article 32 and R.C.M. 405 were modified, the
6 trial counsel has a lot more control over the
7 presentation of evidence at the Article 32
8 hearing and, in most cases, the TC can appear
9 with the victim's statement and selected portions
10 of the NCIS investigation and establish probable
11 cause with those things.

12 Additionally, the TC has the burden of
13 screening that documentary evidence for any 412
14 material that might be in it. Rarely, will you
15 see a defense counsel object to it, and rarely
16 will the preliminary hearing officer make a sua
17 sponte objection to any of that 412 material that
18 might be in that documentary evidence.

19 So again, that burden is on the trial
20 counsel to make sure that it does not exist in
21 what has really become a paper 32.

22 Whether or not the defense tries to

1 admit M.R.E. 412 evidence has to do with the
2 nature of the evidence and the particular facts
3 of each individual case, if the facts support the
4 possibility of other source of injury, then the
5 defense is almost certainly going to try and
6 introduce the evidence. Additionally, if there
7 is evidence of prior sexual behavior between the
8 accused and the victim, then the defense is going
9 to offer that evidence in almost every case.

10 As far as the constitutionally-
11 required evidence, in my experience the defense
12 may still try to introduce that, despite the
13 legal prohibition that now exists. I have seen
14 this arise in cases where the defense wants to
15 introduce a text message conversation that
16 includes the victims' references to other sexual
17 behavior or instances where the defense wants to
18 introduce instances of other sexual conduct that
19 is close in proximity to the alleged assault in
20 order to show the victim was not incapacitated or
21 that at least there was an honest and reasonable
22 mistake of fact with regard to consent or

1 incapacitation issues.

2 In most cases where I have seen the
3 defense try to introduce it, the TC will object
4 to it. In most cases, the PHO is very vigilant
5 about keeping 412 evidence out.

6 In cases where M.R.E. 412 evidence is
7 specifically excluded, I can't say to what affect
8 the exclusion may have had on the ultimate TC
9 determination or disposition. I would suspect
10 that excluded evidence had little effect on the
11 ultimate recommendation of the preliminary
12 hearing officer. As far as the effect of
13 exclusion at the 32 on the ultimate trial, I
14 would say there is very little effect because I
15 would fully expect the defense to try and admit
16 and litigate the issues anew before a military
17 judge, once the case is referred to trial.

18 The removal of the constitutionally-
19 required exception has the effect of giving trial
20 counsel more leverage for objections and,
21 ultimately, the exclusion of M.R.E. 412 evidence.
22 Most preliminary hearing officers, in my

1 experience, are reluctant to deal with it, as I
2 said before, with 412 evidence they will readily
3 shut it down, when given the opportunity.

4 But removal of the constitutionally-
5 required exception makes it that much easier for
6 the folks to not admit 412 evidence and to focus
7 exclusively on a probable cause determination.

8 As you know, the detailed preliminary
9 hearing officer must be at least senior to the
10 parties involved and trained by MJS in the Navy
11 and Marine Corps. In my experience, I have found
12 most preliminary hearing officers to be well-
13 trained, competent and professional.

14 Occasionally, I have encountered PHOs
15 who did not have a solid understanding of certain
16 rules, including 412 and, in those cases, I
17 brought the matter to the highly qualified expert
18 and the regional trial counsel, and usually in
19 those cases that particular PHO was not re-
20 detailed to any cases.

21 I'm fortunate aboard Camp Pendleton.
22 We have a high density of Reservists around who

1 are looking for drill time. Many of these
2 Reservists are Assistant District Attorneys or
3 Assistant U.S. Attorneys that we can call upon to
4 serve as preliminary hearing officers. They are
5 well-versed in matters of criminal law. They
6 seem to understand M.R.E. 412 and do a good job
7 for us.

8 With respect to courts-martial, my
9 experience has been that in every case where the
10 defense has a colorable theory of other source of
11 injury or consent, they are going to try and
12 introduce M.R.E. 412 evidence. In cases where
13 the theory of admissibility is the constitutional
14 requirement, my experience has been defense tries
15 to admit the evidence in a preponderance of the
16 cases. I think Colonel Harvey said about 75
17 percent. She was a judge in my circuit and I
18 think that sounds about right.

19 In cases where M.R.E. 412 evidence is
20 excluded, the impact of exclusion is most easily
21 measured by appellate results. I can't think of
22 any cases in which I practiced or supervised,

1 where a case was overturned because of a 412
2 issue.

3 If evidence is admitted under the
4 constitutional exception, in my experience, it is
5 most often admitted to prove capacity.

6 Incapacitation cases oftentimes this would go in
7 hand-in-hand with a mistake of fact defense. For
8 example, if the victim is engaged in voluntary
9 sexual activity with somebody other than the
10 accused during the same early morning hours as an
11 allegation of incapacitation, then the defense
12 would seek to show that because the victim was
13 capable of consenting during the former sex, he
14 or she would be capable of consenting during the
15 latter sex.

16 In such situations where military
17 judges have admitted M.R.E. 412, the admission
18 has been narrowly tailored to what they find to
19 be admissible.

20 M.R.E. 412 evidence has the potential
21 to make or break a case, I believe, however,
22 because of the deliberation process is closed and

1 members are instructed to maintain
2 confidentiality of the process, it is difficult
3 to really assess what impact such evidence has on
4 the findings. I found that M.R.E. 412 evidence,
5 coupled with a salient motive to fabricate will
6 be hard for the government to overcome. For
7 example, if the defense can show that the victim
8 fabricated the sexual assault allegation to
9 protect a relationship she was in with another
10 individual with whom she was sexually involved,
11 Members will likely not find the government has
12 proved its case beyond a reasonable doubt.
13 However, as previously stated, without a front
14 row seat to the deliberative process, it is
15 difficult to really assess the impact of
16 admitting 412 evidence.

17 The military judges I have practiced
18 in front of have been extremely well-qualified to
19 conduct M.R.E. 412 hearings. These judges have
20 extensive experience with trial and defense
21 counsel, usually, and are well-trained as judges.
22 My only complaint might be is that judges aren't

1 always strict about enforcing the five-day notice
2 requirements. A lot of times, defense counsel
3 will allege that they got the evidence at the
4 last minute from trial counsel. So, in some
5 cases, that is true. It is up to trial counsel
6 to discover the evidence in a timely manner so
7 that the defense counsel can make their
8 appropriate notice requirements. But,
9 occasionally, judges aren't really strict about
10 enforcing those notice requirements, which can be
11 frustrating.

12 In any event, in other events, though,
13 I find that the requirements under 412 are
14 strictly adhered to.

15 With regard to 513, the trial counsel
16 under my supervision, and myself personally, did
17 not provide 513 material to the defense or to the
18 preliminary hearing officer at Article 32
19 hearings. This was not an issue as the PHO is
20 not authorized to admit the evidence anyway and
21 most defense counsel that are aware of mental
22 health issues will await until trial to raise the

1 issue, if they are aware of it.

2 At Camp Pendleton, the Klemick test is
3 being followed in accordance with the
4 modifications to M.R.E. 513. The military judges
5 I practiced in front of rarely reviewed 513
6 evidence *in camera* and only did so after the
7 defense had made the necessary showing.

8 The most recent exception I have seen
9 litigated was a child abuse exception. I know
10 the focus here today is on adults but the accused
11 was charged with child abuse and the defense
12 wanted the child's mental health records. The
13 military judge cited to the legislative intent of
14 the other M.R.E. 513 exceptions and articulated
15 the child abuse exception was designed to prevent
16 future harm, not past harms that had already been
17 reported. And despite the removal of the
18 constitutionally required exception, defense
19 counsel are still seeking records through that
20 exception. And although I have not seen an MJ
21 grant the request, they are still going through a
22 thorough legal analysis.

1 That is all I have. I look forward to
2 answering any questions.

3 CHAIR HOLTZMAN: Thank you very much,
4 Major. I appreciate your comments.

5 Our final presenter will be Captain
6 Brad Dixon, U.S. Army Trial Counsel Assistance
7 Program Training Officer. Captain, welcome.

8 CPT DIXON: Thank you, ma'am. Madam
9 Chair, distinguished Members, good morning and
10 Happy New Year. It is an honor for me to speak
11 with you today and the first thing I want to do
12 is just thank you for giving me the opportunity
13 to do so.

14 I am currently a training officer with
15 the Army's Trial Counsel Assistance Program. So
16 my job really involves working with trial counsel
17 throughout the entire Army on case-by-case issues
18 or the interpretation of law. We are kind of the
19 help center, if you will, for trial counsel in
20 the Army.

21 Prior to this, and I have been doing
22 that since earlier this summer, prior to that, I

1 was a Special Victims' prosecutor at Fort Lee and
2 Fort Eustis, Virginia for three years. So, I
3 speak to you today from a perspective of someone
4 who has fought from the fox hole and now someone
5 who gets to see the entire battlefield of what is
6 going on really. And here is what I can tell you
7 about how these rules are implemented and
8 practiced in the Army.

9 With the Article 32 stage for the
10 practice of M.R.E. 412, we really don't see it
11 very often. Over half the cases, half the
12 Article 32 preliminary hearings are waived by the
13 defense and that is a conservative number, I
14 think. Certainly not a statistically proven
15 number but having spoken with many Special Victim
16 prosecutors in my own experience, I think that is
17 fairly accurate.

18 Given that fact that probably over
19 half are waived, an even lesser percentage are
20 cases where the victim actually testifies and
21 appears at the Article 32, I would estimate that
22 around ten percent of all cases roughly. That

1 actually causes, I think, a decline in the use of
2 M.R.E. 412 evidence at the Article 32 for a
3 couple reasons, I think. One is, part of the way
4 the defense counsel typically utilize M.R.E. 412
5 evidence at an Article 32 is through the victim's
6 cross-examination. Obviously, not only do they
7 want the evidence before the preliminary hearing
8 officer but they want sworn testimony subject to
9 cross-examination so that they can use it at
10 trial later down the road, if the victim were to
11 testify differently.

12 And then the second reason I think is
13 there is no constitutional exception for M.R.E.
14 412 at the Article 32 stage. So there is just
15 not a lot of opportunities for the defense to get
16 that evidence in at that stage.

17 With regard to the trial, I can tell
18 you that filings of notice we see in almost every
19 case at trial for M.R.E. 412. The success rate
20 is much harder to define, though, I believe
21 because the military judges are balanced in the
22 privacy interest of the victim and the

1 constitutional rights of the accused. So
2 typically, the defense doesn't get everything
3 they asked for but they may get some watered down
4 version of it. For example, if the accused, if
5 the defense asks to elicit evidence that the
6 victim had sex with a boyfriend the day or days
7 before the assault, the judge may allow them to
8 enter evidence that they were in a relationship
9 with a boyfriend. That may cause them to
10 fabricate.

11 So, as to whether the notices and the
12 motions are successful, that is a tricky question
13 but I think in most cases the defense is able to
14 get some evidence in, enough to accomplish the
15 constitutional exception that they are going for.
16 And I do think that that is the greatest
17 exception, most commonly used exception that we
18 see the defense counsel use in 412 litigation is
19 the constitutional exception.

20 I would say the second most common is
21 alternate source of injury, prior consensual
22 sexual relations with the accused and that is

1 because the government is putting on DNA evidence
2 or salient evidence and the accused is aware of
3 knowledge or has knowledge that the victim is
4 engaged in sex with someone else in the days
5 before. So, we see that come up pretty often,
6 too.

7 We don't see a lot of, in the Army at
8 least, a lot of SVC, Special Victims' Counsel
9 motions or a writ. And I think that is due, in
10 great part, just to our relationships with the
11 SVCs. We work closely with them. I know in my
12 own personal experience, I trusted my SVC and my
13 SVC trusted me because they knew that I was going
14 to do right by the victim and they knew what I
15 was doing. I think that goes a long way.

16 So, we really don't see a lot of
17 litigation that involves the SVC in front of the
18 bar. I haven't seen any writs or petitions for
19 writs on an M.R.E. 412 by an SVC.

20 With respect to M.R.E. 513, at the
21 Article 32 stage, I rarely see defense use M.R.E.
22 513 at the Article 32 stage. And I think that is

1 mostly because there is no constitutional
2 exception. Victim interviews, typically, are not
3 done by the defense prior to the Article 32. And
4 I think that is because the defense wants the
5 victim to take the stand at the 32 and lock them
6 into their testimony and really do their
7 interview there. And that was more common before
8 the scope of the Article 32 narrowed. That was a
9 very common thing.

10 So ordinarily, with regard to 513
11 evidence, you normally see a defense counsel try
12 to elicit information that allows them to make
13 their motion later on down the road at trial at
14 the Article 32.

15 At the trial stage, I would estimate
16 roughly 60 percent of cases involve M.R.E. 513
17 litigation, far less than M.R.E. 412. *In camera*
18 reviews are very rare, especially now that the
19 Klemick test was adopted. It is just simply such
20 a high hurdle for the defense to get over.

21 There are cases, as the former judges
22 were mentioning earlier, where medical records

1 are sought by the prosecution or the government.
2 And some of those physical medical records may
3 contain information about behavioral health and a
4 lot of times, that is where you see the 513
5 litigation come in.

6 As far as production after an in
7 camera review goes, really the statistics are
8 probably close to zero percent. We see it very,
9 very rarely. I haven't seen it since the Klemick
10 test was adopted.

11 With regard to the deletion of the
12 constitutional exception, in the Army I think the
13 trial judiciary is split on that issue. Some
14 believe that the constitutional exception is gone
15 and that that privilege was strengthened closer
16 to the point of *Jaffee v. Redmond*. Others
17 believe that you simply can't write out the
18 Constitution through a rule of evidence.

19 However, in rulings we find the trial
20 judges typically don't have to get that far
21 because the defense simply can't meet their
22 burden to show a factual basis as to how this

1 evidence is really relevant. So, they usually
2 don't have to rely on the constitutional
3 exception and we don't have any case law,
4 appellate case law to help us out in that area
5 yet.

6 Again, we see SVC motions are rare
7 because typically our interests align. And I
8 haven't seen -- well, I take that back.
9 Yesterday, as a matter of fact, I was speaking to
10 an officer who works in the Government Appellate
11 Division and there was a petition for a writ of
12 mandamus by an SVC and it was with regard to
13 M.R.E. 513. That came up yesterday.

14 I do have recommendations as to some
15 changes to M.R.E. 513. If it pleases the Panel,
16 I could do that now or I can submit something in
17 writing later on, ma'am.

18 CHAIR HOLTZMAN: Please tell us now.

19 CPT DIXON: Okay. Thank you, ma'am.

20 CHAIR HOLTZMAN: Don't keep us in
21 suspense.

22 CPT DIXON: Okay. The first

1 recommendation I have is to add an exception.
2 There is no current exception for the government
3 to admit M.R.E. 412 evidence and we see this come
4 up in two specific cases a lot. One is in child
5 cases, where a child is seen or discovered
6 touching their own genitals, masturbating, and a
7 lot of times that is how the initial disclosure
8 arises. However, that is prior sexual conduct
9 and there is no exception under the rule for the
10 government to be able to admit that. And a lot
11 of time that is damning evidence that the
12 government can use.

13 The other instance that we see a lot
14 are cases, typically alcohol-facilitated cases
15 where the victims are homosexual. They are not
16 ashamed of that fact. It is well-known and, in
17 fact, the accused knows it. And the victim wants
18 to testify I am a homosexual and I never, ever
19 would have had sex, consensual sex, with that man
20 and we can't do that because we don't have an
21 exception.

22 So, my recommendation is add an

1 exception to M.R.E. 412(b)(1)(D) with simply the
2 language of evidence offered by the government.
3 One would think that you would need to add
4 something in the rule about victim's consent but
5 given that balancing test with the victim's
6 interest is involved, that would certainly ensure
7 that the victim's privacy interests are
8 considered. And, frankly, no prosecutor worth
9 their salt is going to offer that kind of
10 evidence without checking with the victim first
11 to see if that is okay.

12 My second recommendation with regard
13 to M.R.E. 412 is to delete in M.R.E. 412(a) the
14 language involving an alleged sexual offense.
15 Currently as drafted, the rule is drafted to only
16 apply in cases where sexual offenses are charged.
17 Well what about a domestic violence case, for
18 example, where the accused wants to elicit
19 evidence that the victim, the spouse, had an
20 affair with someone else and that this is simply
21 that the victim has a motive to fabricate? And
22 this is my own personal opinion but I don't see

1 how a sexual assault victim's privacy interest
2 with regard to the private sex life is any
3 different than any other victim of a crime. And
4 certainly the relevance is no stronger in any of
5 the other cases than here. So, I think that rule
6 should be applicable to all offenses involving
7 the victim of a crime.

8 With regard to M.R.E. 513, the first
9 recommendation I would make is to provide some
10 clarification as to the meaning of *in camera*
11 review. And I say that because I have seen
12 military judges conduct an *in camera* review by
13 inviting the counsel, and often the defense
14 expert psychologist into chambers to review the
15 records. And the method of thought is, well, the
16 counsel know the case better than me so they know
17 what is relevant better than me. But in reality
18 what that leads to is a disclosure of private
19 communications to three or four person who have
20 no business seeing that at that point.

21 So, I have fought that through motions
22 litigation and I have won at times but I know

1 other counsel who fought that battle and lost.
2 So, I think the rule should have some
3 clarification as to the meaning of *in camera*
4 review.

5 The last recommendation I would make
6 with M.R.E. 513 is the exception about -- this is
7 in 513(d)(3). It states that when a
8 communication is evidence of child abuse or of
9 neglect, or in a proceeding in which one spouse
10 is charged with a crime against a child of either
11 spouse. Now, the next exception goes on to
12 discuss it is an exception to the rule if the
13 information is required by state or federal law,
14 as a mandatory report, essentially.

15 A lot of times what we are seeing is
16 defense counsel use this child abuse exception to
17 get the child victim's behavioral health records
18 when the accused is the biological father,
19 stepfather or some other parent. And really what
20 that exception is doing, when read plainly like
21 that, is it is creating a subclass of victims and
22 completely carving out an entire exception just

1 because they are a child.

2 So my recommendation is to add some
3 language to that exception that would say when
4 the communication is evidence of child abuse or
5 of neglect and is made by a person other than the
6 alleged victim of the child abuse or neglect
7 because I think that exception was initially
8 intended to allow evidence of the accused
9 behavioral health records and confessions of
10 child neglect to the psychotherapist.

11 Ma'am, Panel Members, pending your
12 questions, that is all I have presented for
13 today.

14 CHAIR HOLTZMAN: Thank you very much,
15 Captain. I just want to mention that we have no
16 jurisdiction over child sexual abuse issues. So
17 if we don't respond to those recommendations, it
18 is not because they are not well thought out or
19 meritorious. Please understand.

20 CPT DIXON: Understood, ma'am.

21 CHAIR HOLTZMAN: We very much
22 appreciate those recommendations and I want to

1 say to the panel members here, you may not have
2 any recommendations you want to make to us now
3 but if you have recommendations at a future
4 point, please make them.

5 Of course, we are going out of
6 business in September. So you will have to get
7 your act together before then.

8 We will start now. Mr. Stone.

9 MR. STONE: Yes, I would like to start
10 with Lieutenant Commander van de Krol and go back
11 to the comments that you made about the victims,
12 why they are not objecting to their privacy being
13 invaded because they want to get the proceeding
14 over with, which actually harks back to something
15 we heard in the earlier panel where they said
16 there was an appeal pending for more than a year
17 so the case is not over. So they can envision an
18 long proceeding. Or them wanting to withdraw
19 from the proceeding, as their own self-help
20 method of protecting their records. And I guess
21 what I am asking is if you have thought at all,
22 or any of the presenters here have, about the

1 system that is used in the District of Columbia
2 and under federal law in 18 USC 3771 that says
3 that if a victim counsel has an issue on behalf
4 of their client, they have to raise it to an
5 appellate court within five days and the
6 appellate court has to decide it within the next
7 three days. That is in the law. I know the
8 appellate judges don't like that and sometimes
9 what they do -- and neither do the counsel
10 because it is so rushed, but the idea is if a
11 clear error was made you should be able to
12 surface it quickly and write it up and the judges
13 should be able to address it; where, if it is a
14 difficult issue, then probably they are going to
15 defer to the judge below. That is why it is done
16 so quickly. And sometimes those appellate judges
17 issue a decision that is one line and say opinion
18 will follow because they can't write it in three
19 days but they can decide it in three days. So,
20 the case can then continue. Or has been delayed
21 for a short period.

22 Have you ever thought about that kind

1 of solution? Do you think that your Service
2 needs that kind of solution? Do you think that
3 would get rid of victims either pulling out or
4 giving up and saying I don't want to turn this
5 over but get this thing moving? Have any of you
6 considered those kinds of interim immediate type
7 appeals by victims?

8 LCDR VAN DE KROL: Mr. Stone, and this
9 is a first, I don't have a lot of knowledge or
10 experience with the D.C. rules. I do know that I
11 think in my experience the victims would embrace
12 anything where they could protect their rights
13 and still keep the proceedings moving along in a
14 timely manner.

15 Most of the issues I have seen have
16 occurred during the 32 because the PHOs just
17 don't have the experience that the judges do and
18 so they are more prone to make bad decisions.

19 MR. STONE: Which folks?

20 LCDR VAN DE KROL: The PHOs. Oh,
21 excuse me, the preliminary hearing officers. In
22 my opinion, they are not good decisions. And I

1 don't know -- honestly I am not an expert on the
2 writ process. And maybe there is something,
3 maybe there is a different option, like instead
4 of either going up through the actual writ
5 process, maybe there is like another layer of
6 review like just with a military judge. Like a
7 military judge can review the preliminary hearing
8 officer's decision, which would probably, just
9 because of resources, we could probably move it
10 along a little bit faster. So, that would be my
11 suggestion.

12 MR. STONE: Well don't they
13 automatically review the PHO's decision when it
14 gets to the military trial? Doesn't the
15 prosecutor have a chance to say the preliminary
16 hearing officer decided that this 412 evidence
17 could go in but, Your Honor, I think you should
18 not allow it? Doesn't it automatically get
19 reviewed at the courts-martial hearing?

20 LCDR VAN DE KROL: Oh well, and so my
21 experience and my understanding is that the two
22 proceedings are separate. So if information

1 comes in during the Article 32 hearing, it
2 doesn't automatically come in during the trial.
3 So, there are absolutely two separate proceedings
4 and we have to re-litigate it all over again
5 during the trial process. However, if you think
6 of it as every disclosure is a potential
7 violation of the victim's rights, then I feel
8 that you need to stand your ground and protect it
9 at every single stage, even if it is a little bit
10 labor-intensive, every single violation.

11 So, I haven't had that experience
12 because my understanding is that they are
13 separate.

14 MR. STONE: Has anybody else had that
15 experience where the earlier experience is that
16 the 32 cannot be re-litigated at courts-martial
17 but, nonetheless, caused the victim to want to
18 back out of the case?

19 MAJ REED: Sir, speaking for the Air
20 Force and my personal experience, I think it just
21 starts out from the very beginning when you
22 introduce yourself to your victim, to the SVC,

1 you are telling them not getting into in the
2 first five minutes of your conversation about hey
3 I want to ask you all these things that happened
4 to you that were traumatic in your life, the most
5 sensitive things. I am trying to introduce
6 myself to them. I am telling them I am a father.
7 I have a son, a daughter. I have a French
8 bulldog. I am going to show them pictures of
9 them. I go through that whole litany before and
10 then I ask them questions. What are you worried
11 about? What are you concerned about? And that
12 usually brings up 412 and 513. And I am
13 explaining to them hey, this is where I think
14 this could go. Here is what I am going to try to
15 do for you. And then we try to -- we fight, like
16 the commander was saying in the 32 process. We
17 do our best to keep it out. I think in most
18 scenarios, in most situations in the 32, I think
19 that that stuff is prevented from coming in.

20 I think when we get to the trial
21 stage, if it is something that whether it is a
22 513 issue, a 412 issue, or just an issue of a

1 ruling that the military judge has, the
2 government has the opportunity to file a 62(a)
3 appeal.

4 If there was a situation I think where
5 a 513 issue came up or a 412 issue came up with
6 the SVC. If we were in discussions with the SVC
7 and we felt strongly about it, I think the
8 situations are in place right now to do a 62(a)
9 appeal. I don't think -- I don't know how long
10 the appellate process would work to try to get a
11 three-day or a five-day provision, sir, but I
12 think the concern for us is that we like -- in my
13 experience for a 62(a) appeal, we like to have
14 that additional time explained to the victim in
15 order for us, as the government, we are making
16 good case law. The concern I would have, as a
17 prosecutor, if we got really too fast in the
18 proceeding to an appellate court, I think that
19 would be a concern that I would have, just
20 following your question, sir.

21 MR. STONE: So, actually what your
22 comment suggests to me is that sometimes your

1 judgment as a prosecutor may differ from the
2 judgment of the victim and the Special Victims'
3 Counsel who is not worried about the case law but
4 worried about maybe we will get a record of their
5 psychological records.

6 MAJ REED: I think it is very rare.
7 In my experience, just dealing with the SVCs is
8 really, as soon as that 412 motion is filed, as
9 soon as that 513 motion is filed, I am on the
10 phone with the SVC. I am explaining here is what
11 is going on. What do you see and what do I see?
12 And we are going to have a phone conversation
13 with the victim going through where we see this
14 could go. So, it is very rare. It has not
15 happened since I have been a prosecutor where we
16 have had two different paths that we go on. Most
17 of the time, we are on the same playing field.

18 MR. STONE: So this is a question for
19 you and Captain Dixon because he alluded to this
20 same thing that a lot of times you are on the
21 same page.

22 So do you think it is unlikely, even

1 if -- that appellate courts in the military would
2 be facing a lot of victims' appeals, even if
3 victims had appellate rights?

4 MAJ REED: I don't know, sir. I think
5 --

6 MR. STONE: All right and then to
7 Captain Dixon, I noticed you said something, as
8 you talked about your recommendations that you
9 don't think the *in camera* review procedure is
10 very clear because there is lots of -- it is easy
11 for inadvertent disclosures to be made. But does
12 that really matter, given the fact that on appeal
13 the defense counsel is entitled to get everything
14 that was sealed?

15 CPT DIXON: Well, I think the
16 difference, sir, is at the trial level, as the
17 defense counsel and the accuser are preparing
18 their case for trial, if we considered the
19 appellate process, that is after trial. That is
20 after a verdict, unless we are talking about a
21 writ that is filed by the victim, of course. But
22 this is after action. So, with an *in camera*

1 review, by allowing all the parties to come in
2 and review the records, you are altering the
3 landscape of the knowledge that the parties have,
4 as they prepare for trial because someone may see
5 something in those records that, frankly, they
6 shouldn't see. And you can't erase that from
7 your mind, despite the protective order from the
8 judge that you won't release the information. If
9 you see a name in the records or an issue, that
10 may completely change your case.

11 MR. STONE: Well if the information,
12 though, was released on appeal and there is a
13 reversal, that same thing is going to occur. Or
14 in your experience, have you seen no reversals
15 based on that material?

16 CPT DIXON: I haven't, sir. I haven't
17 seen a reversal based on an M.R.E. 513 admission,
18 personally.

19 MR. STONE: And just to follow-up on
20 that first question I had, you also said you
21 thought that it was unlikely that the special
22 victims' counsel views were going to differ from

1 your views but that has to do with the fact that
2 you are looking at it as a prosecutor's point of
3 view. You are not suggesting they can never
4 differ from your point of view. Right?

5 CPT DIXON: Absolutely not, sir.

6 MR. STONE: Okay.

7 CPT DIXON: I mean it is certainly
8 possible. Just in my personal experience, I
9 haven't seen that.

10 MR. STONE: We get to the circumstance
11 that Lieutenant Commander van de Krol described
12 that a victim can just say well, I have had
13 enough. I want to pull out. I don't want to
14 testify. And the prosecution would have to go
15 forward but you have no case, right?

16 CPT DIXON: Sure. Yes, sir.

17 MR. STONE: Okay, thank you.

18 CHAIR HOLTZMAN: Thanks very much.
19 Admiral.

20 VADM TRACEY: I don't think I have any
21 questions. Thank you.

22 CHAIR HOLTZMAN: Judge Jones.

1 HON. JONES: I am interested in this
2 *in camera* -- obviously, since the amendments,
3 fewer judges, very few judges are even asking for
4 the materials to do an *in camera* review. So now
5 I am hearing that some judges may actually ask
6 for help in the *in camera* review. And what are
7 the rules about that? What has your experience
8 been? I mean can a judge bring in just an expert
9 to translate what he is looking at in the rules
10 or she is looking at in the rules? I am not
11 denying that what you're saying is accurate but
12 how often have any of you had an experience where
13 both counsel get to go in and maybe an expert,
14 too? I am just curious.

15 And obviously, those experiences must
16 have been before the changes to 513. Have you
17 had anything similar since? Maybe not because it
18 is such a small subset now where this even
19 occurs.

20 You look like, Major Reed, you
21 understood my question.

22 MAJ REED: Yes, ma'am, I think before

1 and after the answer would be no. In my practice
2 in the Air Force, we don't go into the *in camera*
3 reviews. The judge doesn't ask for kind of a
4 phone-a-friend to have somebody to come in to
5 review those.

6 I think for us it is, me, as the
7 prosecutor, if that were to occur, I would be --
8 I would feel like I would be obligated to say no,
9 Judge, I think you need to do the *in camera*
10 review by yourself.

11 HON. JONES: Right.

12 MAJ REED: I'm not aware of any case
13 law where a judge can ask for someone to come
14 into his office or his chambers to help review
15 these records. And I think that that would be
16 something --

17 HON. JONES: Well maybe I just
18 misunderstood.

19 MAJ REED: Yes, ma'am.

20 HON. JONES: So no one has an
21 experience with that ever happening.

22 MAJ REED: No, ma'am.

1 LCDR VAN DE KROL: Judge Jones, excuse
2 me. So the case that I had that eventually did
3 settle out, that is what the judge had
4 contemplated prior to -- we settled.

5 HON. JONES: I see.

6 LCDR VAN DE KROL: Not counsel.
7 Counsel is not going to be allowed in the room
8 but he was going to secure his own expert in
9 order to assist him through the records. And I
10 didn't object to it.

11 HON. JONES: Well, that is vastly
12 different, I suppose. That is certainly vastly
13 different than having counsel in there.

14 LCDR VAN DE KROL: Yes, that I would
15 object to.

16 HON. JONES: So, it doesn't happen or
17 it hasn't.

18 CPT DIXON: Well, ma'am, I have seen
19 it before and after the changes. Before the
20 changes, in my experience as a trial counsel,
21 that was a matter of course. An *in camera* review
22 for 513 records involved counsel coming into the

1 conference room outside the judge's chambers with
2 the records. No notes were allowed to be taken.
3 An order was given you don't discuss it but you
4 reviewed the records and each side had little
5 flags and you flagged the pages that you felt
6 were relevant.

7 The problem is, to answer your
8 question, ma'am, is there is no guidance,
9 actually, on what an *in camera* review is. And
10 when I have had to litigate that, and I have won
11 that issue on one occasion, I have had to reach
12 to state law, federal law because it is such a
13 common term, it is something that we don't really
14 think to define.

15 But I think the fact that these issues
16 are happening, and they may be rare, but the fact
17 that they are happening, I think that that may be
18 necessary to elaborate on the definition of that,
19 really.

20 LCDR ROBERTSON: Ma'am, I would say
21 that in the practice that I have had, judges have
22 not contemplated allowing either parties inside

1 or have felt the need to ask for an expert
2 because either the defense counsel, and this is
3 usually the case, is so well prepared and knows
4 what they are looking for and has either an
5 affidavit or testimony or something from their
6 expert, that they are able to say in their motion
7 these are the things that we think are in there
8 and this is what we are looking for. So the
9 military judge can go in there and say okay, here
10 we go. We have got this, or we have got a
11 diagnosis, or we have got these symptoms. Or the
12 military judge, in those rare cases where the
13 defense counsel hasn't given them the roadmap,
14 the military judge asks the questions during oral
15 argument well what am I looking for here. What
16 do you think is going to be relevant? And
17 defense counsel, 97 times out of 100, is able to
18 articulate I am looking for this. So, the judge
19 doesn't need any help.

20 And we've got some judges that are
21 very experienced in both trial counsel and
22 defense counsel and have worked with experts in

1 these areas themselves over the last 10 or 15
2 years and so kind of have the capability already
3 experientially to be able to say this is
4 important; this is not.

5 HON. JONES: Well certainly now that
6 the standard is higher for what the defense
7 typically has to show, you have a roadmap. I
8 agree.

9 MAJ WORKMAN: If the defense is able
10 to make that request without their own expert,
11 then perhaps a military judge can go through the
12 analysis without an expert as well but if the
13 defense did have an expert to make that request
14 and tailor their request, then maybe it does
15 become more important for the judge to have their
16 expert. And as Colonel Harvey said, then maybe
17 the appellate counsel and the appellate judge as
18 well.

19 CPT DIXON: Ma'am, I suppose I should
20 clarify. By the judge utilizing an expert, I
21 don't mean that the judge appointed an expert to
22 the court. I mean that the judge allowed the

1 defense counsel to bring in their expert
2 consultant to assist in reviewing.

3 HON. JONES: To assist.

4 CPT DIXON: Yes, ma'am.

5 HON. JONES: Okay. Thank you. I had
6 another question but I can't remember it. So, I
7 will come back or you may come back to me, if you
8 choose.

9 CHAIR HOLTZMAN: Okay. Thank you.

10 Mr. Taylor.

11 PROF. TAYLOR: So first of all, thank
12 you very much from your experience talking to us
13 about what it is like on the front lines because
14 I do think it makes a lot of difference in terms
15 of our understanding of the way these rules are
16 actually applying in real-world settings. So, I
17 think your insight has been invaluable. So thank
18 you all for that as well as for your service.

19 I would like to come back to something
20 that you mentioned, Commander van de Krol and
21 that has to do with the situations, as Mr. Stone
22 referred to, in which the victims decide that it

1 is too much trouble to continue.

2 I guess two questions about that. One
3 is you referred to one case in which, once the
4 military judge had ruled that he or she was going
5 to look at the information *in camera*, you settled
6 the case. We have been very interested in how
7 some of these cases actually end. So what did
8 you mean by settle the case?

9 LCDR VAN DE KROL: In that we -- I
10 don't want to say the victims drive the process
11 but their input is huge and the convening
12 authority and the recommendations that come up
13 from the prosecutor are informed by what the
14 victims' wishes are.

15 So in that case, what we do is if that
16 person does not want to go to a fully litigated
17 trial -- you know we try to keep them onboard as
18 much as possible -- we come up with some type of
19 an alternate resolution. Generally, it would be
20 an Article 120 like a sex offense being pled down
21 to some type of like a 128, like an assault
22 consummated by a battery.

1 PROF. TAYLOR: I see.

2 LCDR VAN DE KROL: So the defense is
3 happy with it and they get to testify at
4 sentencing but they don't have to go through the
5 same -- that whole process.

6 PROF. TAYLOR: I see. Thank you.

7 And you also mentioned that in the
8 three examples that you cited, that something
9 could or should be done about it. We talked
10 about Mr. Stone's proposal for some kind of
11 rocket docket to deal with these. You have
12 thought about this. Do you have any other
13 suggestions about recommendations that we should
14 consider?

15 LCDR VAN DE KROL: So I mean I just
16 think that it is just the process. And again, I
17 know this isn't maybe the right forum but the
18 process is just taking too long. From the
19 investigation through the whole entire litigation
20 process takes a long time and it impacts the
21 victims. It also impacts the unit, the good
22 order and discipline that having these accused

1 there, having the victims there unresolved --
2 this is not a civilian community -- it becomes
3 really like a poison to the entire unit.

4 So honestly, I don't have any other
5 better recommendations in regards to like
6 appellate writs, that type of thing. It would
7 just be a plea to more resources. We need more
8 defense counsel, more judges. Generally, that is
9 where the holdup is to get these cases moving
10 along.

11 PROF. TAYLOR: Well, that actually is
12 a good segue to my next question. A couple of
13 you mentioned that you have been able to leverage
14 Reservists in the area, particularly those who
15 were criminal practitioners or judges themselves.
16 And in light of the protracted nature of some of
17 these proceedings, have you encountered problems
18 using Reservists who also have either private
19 practices that they are trying to carry on or
20 other duties that they have? Is this a pretty
21 good solution or is this something that has its
22 own set of problems? Anyone can comment on that.

1 LCDR ROBERTSON: My use of Reservists
2 as preliminary hearing officers, I mean that is a
3 one day and then nine other days to write the
4 report and usually those reports are written
5 pretty quickly. So, that has not come into any
6 problems there.

7 I do know that if we attempted to use
8 Reservists either as trial counsel or defense
9 counsel to plus-up numbers, that that would cause
10 a significant issue with timing. We have run
11 into issues with there are not enough defense
12 counsel in the defense command. They are
13 overworked. So where are we going to get those
14 people?

15 Well, civilian counsel who take cases,
16 they also have a lot of clients. And so when we
17 are trying to docket cases, it is, where do we
18 fit these schedules onto the docket. And it is
19 very difficult. And I don't think using
20 Reservists would solve that problem.

21 MAJ WORKMAN: Yes, we use Reservists
22 primarily as PHOs and they are almost always

1 readily available. They want their drill points
2 and they are close in proximity. So, it works
3 well for us at Camp Pendleton. Putting them on
4 contested trials would be much different.

5 The logjam we usually see is with the
6 defense's docket. As a supervisory trial
7 counsel, I would actually reassign trial counsel
8 to cases just to keep things moving. So, if they
9 have a docket conflict or something like that, I
10 can plug and play with other trial counsel to
11 keep things moving expeditiously but you can't do
12 that with the defense counsel.

13 PROF. TAYLOR: Major Reed?

14 MAJ REED: Yes, sir. On the Air Force
15 side of the house, the only time we really use
16 Reservists, in my experience, is for cases other
17 than sexual assault. For our 120 cases, or above
18 that, or violent offenses, we are going with
19 military judges who have the experience that come
20 in and that they can handle these types of issues
21 in the 32 setting. So that is usually where we
22 will go to.

1 In terms of docketing for us, what we
2 try to do is before the Article 32 begins is we
3 are working with defense counsel; when is your
4 availability? And so that way when we go to --
5 when we ask Colonel Sherman, Retired Colonel
6 Sherman we need a judge for availability; ma'am,
7 here is our date that we have set up. If the
8 government is not available, kind of like what
9 the major just said, is we just plug and play
10 different trial counsel. Defense counsel, once
11 they establish that attorney-client relationship,
12 they are kind of locked in, unless they release
13 their defense counsel as you all, I am sure,
14 know, and then that is usually the driving factor
15 of when that date is going to be for the 32.

16 PROF. TAYLOR: So my final question is
17 an overarching policy question I guess for anyone
18 to answer. You have seen this from the front
19 lines. And I guess my question is in light of
20 your comments that half or over half of these
21 cases are now paper cases, as you have referred
22 to them, is there anything that bothers you about

1 that regarding the system itself or is this the
2 natural evolution of the practice that we are now
3 apparently on some sort of trajectory toward?

4 CPT DIXON: Sir, I think, and this may
5 not be necessarily a pro-prosecution sort of
6 statement, but I think that the use of Article 32
7 has declined since the amendment of that rule
8 because we used to use it as a litmus test to
9 determine the strength of our case, put the
10 victim on the stand and see how they do and how
11 they communicate on the stand and we just don't
12 do that anymore.

13 And frankly, I can't possibly blame
14 victims for not wanting to do that. It is a very
15 arduous process.

16 But I do think that there are cases
17 that pass an Article 32 stage as having probable
18 cause that maybe -- and wind up being referred
19 that maybe wouldn't if the old rules were in
20 place. And I don't know that that is a good
21 thing or a bad thing. I just think that is a
22 practical effect.

1 MAJ WORKMAN: I think it -- oh, go
2 ahead, sir.

3 LCDR ROBERTSON: I went first last
4 time.

5 MAJ WORKMAN: I think it causes some
6 frustration with the convening authorities, where
7 they have a case that may not be particularly
8 strong but they want to kind of test the
9 evidence. Well, let's send it to an Article 32
10 and kind of see how things shake out. You can't
11 really do that anymore. As the captain was
12 saying, it is a paper 32. If you send it to a
13 32, there is going to be probable cause in almost
14 every case and it is going to go to a general
15 courts-martial and you may end up with a case
16 that is not particularly strong that could have
17 been vetted out in a more traditional Article 32.

18 LCDR ROBERTSON: And of course this is
19 my personal opinion, but the historical purpose
20 of the Article 32 hearing that was initiated as
21 an investigation should be lost to history. What
22 we are seeing now, with a focus on military

1 justice, a focus on putting people who are
2 experienced and learned as trial counsel, that
3 have experience prosecuting cases, can identify
4 the difference between probable cause and a
5 reasonable likelihood of success. Convening
6 authorities don't need an independent officer
7 who, in most cases, is either a Reservist who has
8 not practiced military law in the courtroom for
9 some time, or is an operational attorney, or a
10 Staff Judge Advocate to come in and provide
11 opinion different or other than what the trial
12 counsel who has worked with the investigative
13 organization, who has met with witnesses, who has
14 met with the victim, who has had an opportunity
15 to take the evidence, distill it, look at it in
16 the case law that is most up to date and then
17 provide that recommendation. We don't need
18 another attorney to come in and say hold on, let
19 me do my own investigation. We don't need to
20 test that.

21 And trial counsel don't need another
22 forum to provide that litmus test. A trial

1 counsel that is experienced or a trial counsel
2 that has experienced supervisors, that has the
3 support of their command and has the trust of
4 their convening authorities don't need that.
5 They should be able to go forward and say this is
6 my recommendation.

7 And Article 32 should move towards the
8 civilian grand jury process. We don't need an
9 investigation. We don't need a hearing. We need
10 something more akin to a federal grand jury
11 process and we need to put the trust that the
12 trial counsel in the military, I believe, have
13 earned over the last five to ten years as
14 professionals. Other people that are going to
15 speak to you later may disagree and may say that
16 they need a right to confrontation different than
17 at a trial. That is not my opinion. In six
18 months, when I am the Senior Defense Counsel in
19 Norfolk, Virginia, I may change my mind. People
20 have told me I will but right now, from the
21 position I am in, having been a prosecutor for
22 the last nine years, we are working to get better

1 and I believe that we are on par with our state
2 and federal counterparts and should not be looked
3 at differently and should not have another
4 process that is different than theirs.

5 PROF. TAYLOR: Would anyone else like
6 to comment?

7 MAJ REED: Being a former civilian
8 cop, I just think that the way we are, we have
9 gone through this discovery process really for
10 the defense of Article 32. We are there to
11 protect victims' rights at these proceedings and
12 not scare these folks out of going to a courts-
13 martial. And I think that is the strength of the
14 new Article 32 process.

15 We still have Article 46. We still
16 have equal access to the witnesses and evidence.
17 We still have those proceedings that are greater
18 than what folks would have on the outside.

19 You know back in Charlotte County,
20 Florida, over in Punta Gorda Courthouse, the
21 prosecutor just filed information and, boom, we
22 are at trial. And I think for these types of

1 cases, I think with the protections that victims
2 have and the process that we have now is more
3 than adequate.

4 LCDR VAN DE KROL: And so quickly to
5 follow up on Lieutenant Commander Robertson's
6 statement, since it is not binding, the Article
7 32, the recommendation, it is not binding, it
8 really does lose, I guess some of its purpose. I
9 have had two cases recently where the Article 32
10 officer recommended not going forward, found no
11 probable cause and the Staff Judge Advocate
12 absolutely just disagreed and the cases were
13 referred. And so I don't know.

14 It really does more. I think it is
15 more based upon, you know like you said, the
16 trial counsel and acting, informing with the
17 Staff Judge Advocate.

18 CHAIR HOLTZMAN: Did you remember your
19 question?

20 HON. JONES: No, but I have one.

21 I'm just curious. So I have heard
22 from speakers that they mourn the loss of the 32

1 because they don't have the chance to see how the
2 victim is going to hold up on cross, which
3 frankly was not terribly persuasive to me. But
4 what about the Article 32 as the opportunity for
5 the defense to get discovery sooner? That is the
6 other thing that we have heard about
7 consistently. Although, frankly, most defense
8 counsel are much happier with the way things are
9 going now, which may well be evolving to no
10 Article 32, just as you suggest, the typical
11 civilian preliminary decision.

12 What about -- when does discovery
13 occur? Is it still adequate without the kinds of
14 discovery that was available before the demise of
15 the 32 or am I missing something about discovery
16 in the system?

17 LCDR ROBERTSON: No, ma'am. I believe
18 that if we got rid of the Article 32 process, the
19 defense would get the discovery sooner because we
20 would have preferral. We would immediately have
21 referral or referral within a couple of days,
22 depending on who did the preferral and who was

1 the general courts-martial convening authority.
2 And then the defense would get the discovery and
3 they would get it right there.

4 They would still file a discovery
5 request and there would still be litigation about
6 things that they wanted that either the
7 government needed to subpoena or the government
8 had to get and things like that but I think they
9 would get it sooner in the process and any delay
10 in them getting discovery would be adequately
11 addressed by filing a continuance request with a
12 military judge who, in almost all cases will
13 grant a reasonable discovery request -- or excuse
14 me a continuance request to review discovery or
15 to ask for more discovery. I don't think that it
16 would, and especially now with the way R.C.M. 405
17 is addressed, that you only get the discovery
18 that was relied upon to draft these charges and
19 was used for the preferral. Well, okay, a
20 prosecutor that wanted to be cute could try to
21 limit and then give a bunch. Let's prefer and
22 refer and let's give it to them all right now and

1 let's get this process moving. We could address
2 some of the commander's concern about the time
3 and maybe this would work out better for all
4 parties involved, not only the counsel and the
5 victim but also the accused who is going through
6 a tremendous emotional process here by being the
7 suspect and the accused in a courts-martial and
8 wants to get to a solution just as quickly as the
9 victim, if not more so.

10 HON. JONES: So as a discovery
11 process, virtually no utility would be your
12 answer for the 32.

13 LCDR ROBERTSON: I don't believe so,
14 ma'am.

15 HON. JONES: Okay, thank you.

16 CHAIR HOLTZMAN: Just a couple of
17 questions.

18 Also, Major Reed, you didn't have a
19 preliminary statement --

20 MAJ REED: Yes, ma'am.

21 CHAIR HOLTZMAN: -- and we would very
22 much appreciate hearing from you, both your

1 recommendations and your analysis of the impact
2 of 412 and 513 in the Air Force.

3 So if you don't have a prepared
4 statement for us now, you could submit it to us.

5 MAJ REED: I do, ma'am. And I was
6 going to piggyback after Captain Dixon spoke.
7 And it is my apology before you.

8 In terms of the 412 process, it
9 hasn't, to me it hasn't impacted -- if it does
10 come in, if evidence does come in, it hasn't
11 impacted the Article 32 process itself. I think
12 what we do is primarily what Commander van de
13 Krol stated, is if there is something that we
14 think is going to come in at trial or the Article
15 32 process that might be 412, we are screening
16 that. We are doing what we can do to look
17 through the videos and look through the
18 statements on the paper case and redacting those
19 documents out, going over that with the SVC prior
20 to a 32 process.

21 We do have, in terms of our military
22 judges are acting as our PHOs for Article 32

1 proceedings, so they are more than adequate and
2 better trained and better equipped to handle
3 these types of issues as they come up before
4 trial.

5 In terms of the trial, in terms of how
6 412 can affect a case, I primarily focus my trial
7 prep on what if all the 412 evidence comes in.
8 What if only some comes in? I am preparing for
9 that aspect to go forward but I am fighting to
10 keep it out. And the main thing is, I want to be
11 on the attack. I want to be on the attack both,
12 focus attention on the accused, not on the
13 victim, and that is how I primarily handle my
14 cases.

15 When I am going through that initial
16 brief with the victim, when I am talking with the
17 SVC, introducing myself, I am going over all the
18 things that I could foresee that could come up in
19 terms of 412 and in terms of 513 and I am
20 preparing them for that. That way, I try to
21 prevent someone bailing out. They are scared
22 about something. I am explaining to them, hey,

1 this is the worst-case scenario of what we could
2 see in a case. I want to get your thoughts on
3 that and what you think about that. Here is what
4 I am going to do for you. I can't guarantee how
5 the judge is going to rule but here is what I am
6 going to do. And so that is primarily what I
7 look at for 412.

8 For 513, in my experience, I have not
9 seen a scenario where we have had to do an in
10 camera review. I think 513, in my personal
11 opinion, is more than adequate. Defense counsel
12 in the Air Force are still using 513. They are
13 arguing constitutionality. They are arguing
14 constitutionality. I think they are trying to
15 set it up for the appellate courts to decide
16 whether or not that does exist. Until that plays
17 out, the Air Force judges are following 513 as it
18 is written and we are not even getting past the
19 *in camera* review -- we are not even getting into
20 the *in camera* review stage.

21 CHAIR HOLTZMAN: Okay. Here are a
22 couple of questions that I have. Getting into

1 the delay issue, which was mentioned as a factor
2 and discouraging victims from going forward, is
3 this a delay that has happened since the rules
4 changes, or are you seeing worse delays now, or
5 is this a situation that has been ongoing for
6 years?

7 LCDR VAN DE KROL: In my experience,
8 ongoing, ma'am. I guess with the new emphasis on
9 Article 120, there is more cases going to trial.
10 And it is not a result of the change in rules.
11 It is just a result in that we have just got more
12 cases that are being preferred, more reports,
13 more cases going forward. And I think our
14 defense counsel and our trial judiciary are
15 overburdened.

16 CHAIR HOLTZMAN: Okay just to follow-
17 up on that point, the bottlenecks, as you see the
18 problems in causing the delay, have to do with a
19 lack of resources in terms of trial judges and
20 defense counsel. Is that fair?

21 LCDR VAN DE KROL: Yes, Madam Chair.
22 I would also throw in there investigators. But

1 yes, ma'am.

2 CHAIR HOLTZMAN: Okay, so those three.

3 Anybody have any disagreement with
4 that?

5 MAJ WORKMAN: I would add forensics,
6 too. If there is DNA that takes a while to get
7 through USACIL.

8 CHAIR HOLTZMAN: Okay.

9 LCDR ROBERTSON: To piggyback off
10 that, I know that USACIL has a policy right now
11 that if there is a statement by the accused that
12 the sexual act at issue was consensual, they are
13 so backlogged they take that as an opportunity
14 not to conduct the analysis and we have to make a
15 specific request to have that analysis made
16 because in a lot of cases I don't want to put the
17 guy's statement on that says it was consensual.
18 I would much rather have the DNA to say something
19 happened. And so they are backed up and, as the
20 commander said, investigators are very
21 overworked.

22 MR. STONE: Which investigative

1 service are you talking about, so we know?

2 LCDR ROBERTSON: NCIS for specific is
3 not manned to the appropriate level.

4 MAJ WORKMAN: That is my experience as
5 well.

6 CHAIR HOLTZMAN: I have two other
7 questions to clarify some issues. You said that
8 there was a question raised about a problem at
9 the 32 hearing where the hearing officer could
10 admit certain 412 evidence, that the issue could
11 come up again at trial.

12 If the disclosure takes place at the
13 Article 32, hasn't the harm been done at that
14 point? This is just to follow up on a point that
15 you made, Mr. Stone. I wasn't sure that I
16 followed it.

17 So, if there is a release of evidence
18 at the Article 32, isn't that final? I mean
19 isn't the harm already done to the privacy of the
20 victim at that point?

21 LCDR VAN DE KROL: Madam Chair, I
22 agree that yes, in fact, that the harm has been

1 done.

2 CHAIR HOLTZMAN: I'm not arguing. I'm
3 just trying to understand.

4 LCDR VAN DE KROL: Oh, no, no. There
5 is the harm that has been done to the victim's
6 privacy but legally, in my experience, we go to
7 re-litigate the issue in front of a judge to see
8 whether or not that is going to come in again at
9 trial.

10 CHAIR HOLTZMAN: And what is the
11 format in which it comes in at the Article 32? I
12 mean will there be a discussion in a public forum
13 in the courtroom?

14 LCDR VAN DE KROL: I demand it to be
15 closed. They are using very similar procedures.
16 So I just essentially insert the M.R.E. 412 like
17 into the Article 32 proceeding. So we close the
18 hearing, kick everyone out of the courtroom. It
19 can be sealed, whatever, as necessary, needs to
20 be sealed. And then we go through the M.R.E.
21 412, 403 analysis and then the PHO generally, at
22 that time, makes a decision whether or not that

1 evidence is going to come in. And obviously, if
2 it doesn't come in, then it is not referenced in
3 his report.

4 You're right it is --

5 CHAIR HOLTZMAN: And if it does, then
6 what happens?

7 LCDR VAN DE KROL: Then it comes in.
8 Very similarly, like a lot of times it has to do
9 with me redacting out portions of the video or
10 redacting out portions of the statement. The
11 defense counsel argues that all of it needs to
12 come in. And so in which case, then I argue well
13 then okay, you can watch the video.

14 I don't do paper cases. I want -- I
15 don't do paper cases. I like context. But then
16 I will make the request that the preliminary
17 hearing officer view it privately.

18 So we try. Just because we lose one
19 battle, we don't lose all of the battles. We try
20 to minimize the impact on the victim.

21 MR. STONE: If I could just follow up
22 a little bit right on that answer. The three

1 cases you mentioned to us where victims basically
2 wanted to back out, were those all because of the
3 Article 32 or were they backing out after the
4 Article 32 when you were at the courts-martial?

5 LCDR VAN DE KROL: Those were 513
6 cases and both of them were after the Article 32
7 process. But the 513 information, in my
8 experience, has never come in at an Article 32,
9 generally because that information has not yet
10 been disclosed or discovered.

11 MAJ REED: Madam Chair, just to kind
12 of piggyback this into a recommendation in terms
13 of protecting privacy that deals with 412. And I
14 think if you look at R.C.M. 914, this is my own
15 personal recommendation, and if 914 is production
16 of statements and primarily it applies to the
17 government, if somebody testifies on direct, on
18 cross-examination, the opposing party can motion
19 the court to produce any and all statements by
20 that party.

21 What I like to do strategically in
22 court cases, particularly in 412, is the defense

1 is calling the victim to stand. It is their
2 witness. And so what I have been doing in court
3 is motioning the court under 914 to produce all
4 statements. And what I am trying to do is
5 prevent ambush on the victim at trial in terms of
6 Facebook messages, all types of things that we
7 have on social media that I don't think the MCM
8 particularly is explicit on.

9 If you read R.C.M. 914 in the UCMJ, it
10 primarily just talks about statements, meaning
11 more of a written statement or an oral statement.
12 But I would recommend to consider maybe hashing
13 that out a little bit more to deal with not only
14 that but also the aspect of social media and I
15 think that is a good safeguard for a victim at
16 trial is to order -- and the judge has, shall
17 order the defense counsel. Because a lot of
18 times the defense counsel like to go, well, we
19 don't know if we are going to use this yet in
20 evidence so, therefore, we are going to hold onto
21 it and then ambush you at trial. I think that
22 might be something that could protect victims in

1 these types of scenarios.

2 CHAIR HOLTZMAN: My last question has
3 to do with the suggestion about -- maybe this was
4 a suggestion you made, Commander Robertson, about
5 -- did I understand that you were suggesting that
6 the SJA not play a role with regard to advising
7 the convening authority?

8 LCDR ROBERTSON: No, ma'am.

9 CHAIR HOLTZMAN: So what were you
10 trying to suggest?

11 LCDR ROBERTSON: What I was trying to
12 suggest was that the convening authority who has
13 an SJA who serves in the role of a general
14 counsel to provide that person with the advice
15 that is going to talk about how that this is --
16 what is the best decision for the command as a
17 whole. Because when I come as a trial counsel, I
18 want you to prosecute this case, Commander,
19 because this person broke this law and this is
20 what I want to do. The convening authority is
21 going to come in and give a much broader picture
22 and say well, why don't we just send this person

1 --

2 CHAIR HOLTZMAN: You mean the SJA.

3 LCDR ROBERTSON: Yes, ma'am, the SJA
4 is going to come and say just take this person to
5 NJP and AdSep because if we can get it done in
6 six weeks, as opposed to a court-martial that is
7 going to take six months -- or let's do this or
8 let's do this.

9 What I am saying is that because the
10 convening authority has an SJA, they have a
11 professional prosecutor that is drafting the
12 charges and making a recommendation and has
13 ethically made a determination that there is
14 probable cause before they have drafted those
15 charges, that we don't need a preliminary hearing
16 officer to provide a third opinion or a third
17 recommendation.

18 Absolutely the Commander needs an SJA
19 because that SJA is not only going to give advice
20 that is based on what the trial counsel
21 recommendation is but is going to give that
22 bigger picture advice on what is best for the

1 maintenance of good order and discipline in that
2 command.

3 CHAIR HOLTZMAN: Okay, thank you. I
4 don't have any -- anybody else have a burning
5 question now?

6 Okay. Well, thank you again, members
7 of the panel for your expertise and sharing it
8 with us. We very much appreciate your testimony
9 today. Thanks.

10 I guess we will take a break for
11 lunch.

12 (Whereupon, the above-entitled matter
13 went off the record at 12:12 p.m. and resumed at
14 1:02 p.m.)

15 (1:02 p.m.)

16 CHAIR HOLTZMAN: Good afternoon
17 everyone.

18 I'm going to introduce our next panel,
19 which is Perspectives of Defense Counsel on the
20 Application of M.R.E. 412 and M.R.E. 513 at
21 Article 32 Hearings and Courts-Martial.

22 Thank the members of the panel who are

1 here and really appreciate your willingness to
2 share your experiences and your expertise with
3 us.

4 We'll begin with our first presenter
5 who is Major Benjamin Henley, U.S. Air Force
6 Senior Defense Counsel.

7 Major Henley, welcome. We're looking
8 forward to your presentation.

9 MAJ HENLEY: Thank you, ma'am.

10 Madam Chair, distinguished Members,
11 good afternoon. I am Major Benjamin Henley and
12 I'm currently the Senior Defense Counsel for the
13 North Central Region of the United States.

14 I've been a military defense counsel
15 for the past two and a half years. Prior to
16 serving as a senior defense counsel, I was a
17 senior trial counsel for two years out of
18 Colorado.

19 Prior to that, I was an area defense
20 counsel for two years, and, prior to that, I was
21 a local trial counsel for two years.

22 In these capacities, I've tried over

1 80 courts-martial, approximately 60 which would
2 be sex assault or Article 120 type offenses.

3 I'd like to begin by saying that my
4 comments represent my personal opinions and
5 experience and not the opinions of the Judge
6 Advocate General of the Air Force or that of the
7 Air Force Trial Defense Division.

8 With respect to the focus of this
9 session today and my capacity as a defense
10 counsel, the changes that have been made to the
11 Article 32 process have altered how I would --
12 how I try my Article 32 hearings.

13 I approach the Article 32 hearings a
14 little differently than I would have previously.

15 Prior to the changes, I would have put
16 on a much more robust Article 32 defense. Since
17 the changes have been made I recommend to my
18 junior counsel that work for me, and in my
19 experience, I usually put on less of a robust
20 case, obviously because of the lowered threshold
21 of probable cause that we're looking at.

22 As a result of that, I believe that

1 less information is presented and analyzed by the
2 pretrial hearing officer and less information is
3 presented to the general courts-martial convening
4 authority, the decision making authority as to
5 whether or not cases are referred.

6 And, as a result, more cases end up
7 being referred to courts-martial after the
8 Article 32 process.

9 Under the previous version of the
10 Article 32, we used -- the defense counsel would
11 use that hearing, and I specifically used that
12 hearing, as a discovery and investigatory tool.

13 It gave us an opportunity to question
14 witnesses, to put on witnesses at the Article 32
15 hearing. And, although we still have that
16 ability now, it's a much more limited purpose.
17 This Article 32 hearing serves a much more
18 limited purpose.

19 Since the changes to the 32, the
20 defense teams no longer are allowed to use the
21 hearing as a discovery tool. And, it's kind of
22 shifted the burden and the time line for the

1 defense to investigate a case.

2 Now, it's much more focused between
3 referral and trial.

4 Obviously, we have the same discovery
5 tools we've had previous to that where you could
6 submit discovery. But, we have found that, a lot
7 of times, government counsel won't necessarily
8 give you all the discovery you request prior to
9 an Article 32 hearing.

10 That doesn't change the nature of the
11 fact that we still can ask for discovery post-
12 referral if necessary.

13 But, it does change when I make
14 recommendations to my client, how I advise my
15 client.

16 It pushes those decisions and those
17 recommendations I make to my client usually much
18 later in the process, closer to trial.

19 As for Military Rule of Evidence 412,
20 the evidence that would be presented in an
21 Article 32 hearing, I have not really changed the
22 rationale, the quantity or the quality of M.R.E.

1 412 evidence that I would try or attempt to offer
2 at an Article 32 hearing.

3 Whether the pretrial hearing officer
4 considers the evidence in making their
5 recommendation to the convening authority differs
6 contingent on the facts of each case.

7 I can tell you that, a lot of times,
8 I don't put any evidence on at the 32 now based
9 on the lowered probable cause threshold and
10 because we've seen a larger number of cases
11 getting referred.

12 And, as a result, why would we show
13 our hand earlier in the case, in other words.

14 So, if the -- if it's not considered
15 by the pretrial hearing officer in their
16 analysis, I usually cite to the evidence, the 412
17 evidence and my objections to the report and
18 identify why it's important for the convening
19 authority to consider my objections are always
20 attached to the Article 32 hearing.

21 Officers report, in short, my practice
22 in regard to using M.R.E. 412 evidence at Article

1 32 hearings has really remained unchanged.

2 From my experience with regard to
3 M.R.E. 513 evidence, it's much less likely to be
4 an issue at Article 32 hearings just for the
5 simple fact that we don't -- there's not really
6 any 513 records that are presented to us usually
7 before an Article 32 hearing.

8 And, most psychotherapists won't
9 provide any information without a court order.
10 And so, we usually don't even have to address
11 that.

12 If there is mental health information
13 that's presented at the Article 32 hearing, it
14 usually falls outside the parameters of M.R.E.
15 513 because the information usually comes from a
16 third party, somebody that's not a
17 psychotherapist and therefore, it doesn't -- it's
18 not a privileged communication.

19 And, you don't necessarily have to
20 have the mental health providers to get that
21 information.

22 Now, trial, as a defense counsel, in

1 just about every Article 120 case I try, there's
2 just about every time, there's an M.R.E. 412
3 motion.

4 This is true just because of the
5 nature of sex assault cases. Usually, there's
6 just two people in the alleged offense and
7 whether or not -- it comes down to whether or not
8 it's consensual or not. And, a lot of times you
9 have to look at the surrounding circumstances to
10 determine and to build your defense of consent or
11 mistake of fact as to consent.

12 And, so, that's the general nature of
13 sex assault case demands as a defense counsel
14 that we bring an M.R.E. 412 hearing.

15 With regard to M.R.E. 513 evidence, in
16 my limited experience, I've found that more often
17 than not, the evidence is actually more
18 beneficial to the prosecution than it is to the
19 defense.

20 More often than not, the M.R.E. 513
21 records contain prior consistent statements of
22 the alleged victim which could be offered to

1 further bolster their allegations.

2 Consequently, I am cautious and
3 guarded in requesting M.R.E. 513 records and any
4 evidence of M.R.E. 513.

5 When assessing M.R.E. 513 evidence
6 admissibility, in my experience, Air Force
7 military judges carefully weigh the alleged
8 victim's privacy rights and follow the M.R.E. 513
9 procedures appropriately.

10 I am not aware of what response the
11 alleged victims would have to the admission of
12 M.R.E. 412 or 513 evidence at either the Article
13 32 hearing or at the trial.

14 With regard to what changes to Article
15 32 and M.R.E. 412 or M.R.E. 513 should this Panel
16 recommend?

17 Currently, I don't really think
18 there's been enough time that's elapsed since the
19 last set of changes for us to really evaluate
20 what type of precedent is going to come out of
21 this.

22 And, the reason that that's important

1 for us as defense counsel is because we use
2 precedent to advise our clients and it gives our
3 clients a certain amount of certainty.

4 And, I'm assuming, as an SVC, I'm not
5 -- I've never been an SVC. It's one of the few
6 areas of litigation that I haven't been, but I'm
7 assuming it's -- an SVC would give them a certain
8 amount of certainty for us to have a little more
9 time to develop the precedent necessary to give
10 them -- to have certainty in the process.

11 So, that's why, at this point, I'm --
12 my recommendation would be not to make any
13 changes for now so that we have enough time so
14 that the appellate courts can start to deal with
15 these issues as they come up.

16 In closing, let me say that I am
17 grateful to be here today and I appreciate the
18 opportunity to voice my opinion. I hope that
19 what I've said and will say will be of some help
20 in making future recommendations.

21 CHAIR HOLTZMAN: Thank you very much,
22 Major.

1 Our next presenter will be Major
2 Marcia Reyes-Steward, U.S. Army Senior Defense
3 Counsel.

4 Welcome, Major, and we look forward to
5 your testimony.

6 MAJ REYES-STEWARD: Thank you, ma'am.
7 And good afternoon, Panel Members. My name is
8 Major Marcia Reyes-Steward.

9 Thank you for affording the Military
10 Defense Bar continued opportunities to share our
11 viewpoints and experiences with you. It's our
12 honor to be a part of your mission to fully and
13 accurately assess our military judicial
14 proceedings for sexual assault offenses.

15 So, I currently serve as the Senior
16 Defense Counsel at Fort Leavenworth, Kansas, one
17 of 31 U.S. Army Trial Defense Service Field
18 Offices across the globe.

19 And, my remarks come from my personal
20 experience as a trial counsel for 12 months at
21 Fort Knox, as a trial counsel for 12 months at
22 Fort Bragg and as a defense counsel for the past

1 18 months.

2 And, as an aside, I would like to
3 mention that in my nearly 16 years of service in
4 the Army, this job of defense counsel, of
5 defending those who defend our nation has been by
6 far, not only the most challenging, but the most
7 rewarding and transformational experience both
8 professionally and personally of my career.

9 Now, in my experience, most of the
10 cases that are brought to trial are -- do involve
11 sexual assaults. And, an overwhelming majority
12 of those cases involve some form of 412 evidence.

13 And, from a defense perspective, if
14 it's 412 evidence, it's going to be an uphill
15 battle. It's an onerous endeavor, if you will,
16 for us to investigate, analyze and litigate the
17 412 motions to ensure that our clients have the
18 opportunity to put on a full defense.

19 Some examples of 412 evidence include
20 consensual sexual intercourse between the accused
21 and the complaining witness on occasions, either
22 weeks or a month or two prior to the charged

1 offense to show that the similar sexual encounter
2 concerning the charged offense was consensual.

3 Consensual sexual intercourse between
4 the accused and the complaining witness hours
5 prior to the charged offense to explain the
6 presence of DNA in the complaining witness's
7 underwear or other garments.

8 The complaining witness's sexual
9 activity with others within days or weeks after
10 the charged offense as rebuttal evidence, should
11 the complaining witness testify during pre-
12 sentencing proceedings that she has been
13 unwilling or unable to enter into sexual
14 relations due to any psychological trauma.

15 Another example is a complaining
16 witness being caught in her bedroom with her
17 boyfriend in the middle of the night where the
18 parents, the complaining witness being a
19 teenager, the parents find a wrapped condom and
20 subsequently call the police, physically hit
21 their daughter and impose harsh punishments as a
22 motive to fabricate.

1 So, all of these 412 examples were
2 litigated in an Article 39A pre-trial session.
3 Right? So, post-32.

4 Because, under the new Article 32,
5 evidence that will be constitutionally required
6 at trial is not admissible at the 32 preliminary
7 hearing.

8 And, so, we have important evidence
9 that cannot be considered by a preliminary
10 hearing officer and the result is uninformed
11 recommendations concerning both probable cause
12 and appropriate disposition.

13 While, it's always the facts of the
14 case that determine outcome, to the extent that a
15 preliminary hearing should be a filter to prevent
16 cases that have no reasonable chance of
17 conviction from going to trial, there has been
18 little success.

19 This leads to an accused who is
20 flagged, under pressure and, many times, not
21 allowed to continue in their main line of work
22 for much longer than necessary when a case could

1 have and should have been stopped at the point of
2 the Article 32 preliminary hearing.

3 So, a good example is a case I had in
4 which we had a retired Reservist was brought on
5 to active duty for the purpose of criminal
6 prosecution for an Article 120 offense.

7 The accused was taken from his job,
8 taken from his wife, from his children, thrown
9 into confusion and anxiety for months on end for
10 a case that had extremely weak evidence and
11 ultimately ended in a full acquittal.

12 And, so, a preliminary hearing officer
13 who cannot hear key evidence on credibility that
14 will be constitutionally required at trial,
15 coupled with the fact that an alleged victim can
16 refuse to testify, prevents an opportunity for a
17 fair and unbiased assessment of the merits of the
18 case.

19 In this, you know, it's not binding.
20 It is a recommendation, but it is helpful for all
21 parties in determining an appropriate
22 disposition.

1 And, we've even heard from our trial
2 counsel counterparts on the low utility of
3 Article 32s, that it's become a paper 32.

4 And, so, at the end of the day, we
5 need to really ask ourselves, does the Article 32
6 serve meaningful purpose or is it a rubberstamp
7 on a case that will automatically go to trial
8 because it's a sexual assault case?

9 And, even if that disposition is not
10 in the best interest of the alleged victim.

11 So, 412, as the rule of evidence, does
12 serve a meaningful purpose. Right? But, there
13 is a limit to the right to privacy of a
14 complaining witness when balanced against the
15 constitutional rights of the accused, especially
16 of someone who is accused of committing a sexual
17 offense that carries life-long consequences in
18 the form of a mandatory dishonorable discharge,
19 sex offender registration, future employment and
20 their abilities to become productive members of
21 society.

22 So, this limit on a complaining

1 witness's right to privacy was made clear in
2 CAAF's 2011 ruling of *U.S. v. Gaddis*.

3 But, this clarification has yet to
4 make its way into the wording of 412.
5 Specifically, the wording of 412(c)(3) requires
6 that the balancing test focused on the danger to
7 the victim's privacy be applied to all three 412
8 exceptions.

9 But *U.S. v. Gaddis* made clear that
10 this specific balancing test doesn't apply to
11 that third exception of the constitutionally
12 required evidence.

13 And, so, to the extent that this Panel
14 can have some influence on cleaning up the rules,
15 so to speak, I recommend amending 412 by deleting
16 that balancing test as applied to 412(c)(3).

17 You know, it's constitutionally
18 prohibited in most cases, the balancing test, and
19 it's confusing and it could result in errors that
20 cause appellate courts to overturn convictions.

21 And, lastly, Panel Members, while I,
22 and in my particular field office, have not had

1 direct experience with 513 evidence, I do just
2 want to comment on the challenge of defense
3 counsel in getting necessary, or access to,
4 necessary evidence in those psychotherapist
5 records, including evidence that affects the
6 person's competency as a witness, you know, such
7 as delusions and hallucinations.

8 And, these are real situations that
9 exist. And, so, a reasonable method to strike
10 the correct balance between a fair trial and that
11 psychotherapist privilege is to allow for an *in*
12 camera review of that person's records by a
13 judge.

14 We're not asking to review the records
15 ourselves, only that we're allowed to have, you
16 know, a fair trial by way of an *in camera* review
17 by a judge who can clinically review the records
18 alone, seal the records and issue appropriate
19 protective orders.

20 This would be a minimal invasion of
21 privacy and there can be no doubt that we can
22 trust our judges to do this properly. They can

1 surgically, you know, pull out that precise
2 information that we need -- would need as defense
3 for trial.

4 Again, Panel Members, thank you for
5 this opportunity and I welcome any questions you
6 may have.

7 CHAIR HOLTZMAN: Major, thank you very
8 much for your contribution and testimony.

9 We'll next hear from Major James
10 Argentina, Jr., U.S. Marine Corps Senior Defense
11 Counsel.

12 Thank you, Major, and welcome.

13 MAJ ARGENTINA: Good afternoon, Madam
14 Chair, distinguished Members of the Panel.

15 My name is Major James Argentina. I'm
16 the Senior Defense Counsel at Camp Lejeune, North
17 Carolina for the Eastern Region of the Defense
18 Services Organization for the United States
19 Marine Corps.

20 The Defense Service Organization
21 zealously defends Marines and Sailors facing
22 disciplinary action in order to safeguard the

1 rights of those who safeguard our nation.

2 We accomplish this mission through
3 tireless efforts and approximately employ 70
4 defense counsel, 20 enlisted defense legal
5 support specialists and our two civilian highly
6 qualified experts.

7 Despite the Systems Panel
8 recommendation that we have independent defense
9 investigators, it is not currently an asset that
10 we have at this time, which has effected, I
11 think, some delay in the trial when we look at
12 trying to invest the issues of 412 and 513 which
13 are going to report today.

14 Last year, my office alone serviced
15 376 clients and handled 119 courts-martial,
16 approximately 20 which involved Article 120 cases
17 just in my office alone.

18 CHAIR HOLTZMAN: Excuse me, I didn't
19 hear the percentage. What was it?

20 MAJ ARGENTINA: Approximately out of
21 119 courts-martial, approximately 20, so about
22 16.6 percent, ma'am, I believe, of the cases.

1 Of those cases, approximately, just
2 over 60 percent of those cases, 412 motions were
3 filed from the defense and approximately 80
4 percent of those cases, motions for M.R.E. 513
5 records were filed. And, that was just in 2016.

6 I think what's important when you're
7 looking at both of these rules, 412 and 513, is
8 perfectly stated in *People v. Beagle* in
9 California Supreme Court.

10 No witness is entitled to a false aura
11 of veracity.

12 And, that is really what the victim,
13 complaining witness, is getting when we don't
14 have access to these records or able to put on
15 evidence that's constitutionally required under
16 M.R.E. 412.

17 Because it sanitizes the entire
18 process and it may serve the benefit of providing
19 the victim privacy, but it's at the detriment to
20 the due process of an accused.

21 Now, the compulsory process clause
22 goes back, when we're talking about privileges,

1 all the way back to *U.S. v. Burr* in 1807 where
2 the presidential privilege was invoked and for a
3 letter that was sent to Jefferson.

4 And, even then, Chief Justice Marshall
5 said no, that the danger of a useful material
6 being inside those letters is too much to bear.

7 And, so, the presidential privilege of
8 secrecy was pierced and allowed.

9 And, so, that's where we start when
10 we're looking at how privileges impact the due
11 process of an accused.

12 And, that was echoed all the way, the
13 next real case is *U.S. v. Nixon* and then, we'll
14 go on to *Washington v. Texas* in 1967.

15 And then, most recently, a year ago,
16 ironically, a year ago today, our CAAF published
17 an opinion, *U.S. v. Bess* where they basically,
18 you know, laid out, it is undeniable that a
19 defendant has a constitutional right to present a
20 defense, whether it's rooted directly in the due
21 process clause or in the compulsory due process
22 clause or confrontation clause of the Sixth

1 Amendment, the Constitution guarantees criminal
2 defendants a meaningful opportunity to present a
3 complete defense.

4 And, that has been eroded based on how
5 the rule is being applied. It may not have been
6 the intention of the drafters of the rule, but
7 that is how, in practicality, it's being applied.

8 It intersects with what I mentioned
9 earlier about not having the resources to
10 investigate.

11 There's a circular argument that kind
12 of comes up, especially in M.R.E. 513. The
13 burden is so high, although, as the commander
14 earlier stated, that it should just be some
15 evidence, a preponderance standard.

16 But, it seems to be more like a clear
17 and convincing standard that is being applied by
18 judges just to get an *in camera* review.

19 You have to go and get -- do
20 independent research and an investigation without
21 defense investigators to do it.

22 And, when you do get some open source

1 information, whether that's through social media,
2 because that's prevalent with people using,
3 whether it's text messages or just doing witness
4 interviews, it takes -- that takes a long time to
5 do when you're doing it on your own as a lone
6 defense counsel.

7 When you balance that against what the
8 prosecution has to them, they have the NCIS, the
9 entire NCIS available to them. They have their
10 own trial investigators. And, usually, a larger
11 percentage of enlisted Marines to help out to do
12 investigations.

13 So, what we run into is sometimes not
14 being able to meet that burden and not being able
15 to file M.R.E. 513 cases or not be able to make a
16 mark.

17 But, what we're also seeing is, in
18 cases where we do a really good investigation,
19 and we do present evidence to the court, that
20 we're still not getting to the standard.

21 And, I can give an example of a case
22 that I tried where we knew what the prescriptions

1 were that the complaining witness was using
2 because she had disclosed it to NCIS.

3 And, only when we tried to get more
4 clarification on, you know, how they were
5 prescribed, what they were prescribed for and to
6 see if she was actually following the treatment
7 plan, because she had prior mental health issues
8 prior to the sexual assault, we weren't able to
9 get that information.

10 And, we only found that out when we
11 requested, you know, the complaining witness to
12 be a witness for the defense at an Article 39A
13 session. She was unavailable because she was in
14 inpatient treatment for sexual assault trauma.

15 So, now, we have a pre-existing mental
16 health history and now, also, you know, apparent
17 sexual assault trauma.

18 No ability to be able to find out if
19 the pre-existing mental health issues were
20 related to or not, despite the fact that we -- I
21 think that's some evidence to show the judge that
22 we need, at least, an *in camera* review of these

1 records.

2 And, so, even when you get to the
3 point where you have good evidence and
4 disclosures to third parties that would generally
5 pierce the privilege, our courts are generally
6 not providing that opportunity for us.

7 We have one case -- excuse me -- we
8 had one case where a judge did an *in camera*
9 review over the last year. And, in that case,
10 there was anxiety disorder, but there was a more
11 serious personality disorder that was found in
12 the *in camera* review.

13 However, the defense did not have
14 access to the materials and the only thing that
15 we were allowed to present was basically a
16 sanitized version for saying emotional outbursts,
17 so not able to call it anxiety, not, you know,
18 not being able to use what was actually known to
19 the court because it did affect how the
20 allegation came about.

21 So, we had to use about, I think, it
22 was eight to ten witnesses that the complaining

1 witness knew of these emotional outbursts.

2 But, what we weren't able to do is use
3 the forensic psychologist in order to look at
4 those records to give a more clarified answer as
5 to how that disorder interacted with the ability
6 to perceive, recall and, quite frankly, be a
7 reliable historian.

8 And, that's really the difficult
9 portion or job that we have to do.

10 Sexual assault cases, by nature, are
11 between, you know, one, two, three, four
12 individuals sometimes. But, those are the only
13 individuals that are in the room. So, it's an
14 entire case about credibility.

15 And, when you lack the ability to
16 confront a witness on credibility issues, you
17 fundamentally don't have a fair trial. The due
18 process rights of an accused are infringed.

19 And, mental health diagnoses, in and
20 of themselves, don't necessarily, just by knowing
21 them, cause a person not to be an unreliable
22 historian.

1 But, if they are on a mental health
2 treatment plan and not following it, that could
3 certainly do that.

4 If they are on medications like
5 benzodiazepines and you stop taking those types
6 of drugs, that can affect your ability to
7 perceive and recall.

8 But, we don't have the ability to get
9 that information to find out what the plan was
10 and if they were following it.

11 That is all critical in being able to
12 cross examine that witness. And that leads me
13 into the -- it's hard, and the judges panel that
14 spoke said, they don't quite understand the
15 mental health issues when they're reading the
16 records *in camera*.

17 And, so, and it's even harder when we
18 don't have access to experts ourselves to be able
19 to, even at the 39A level pre-trial be able to
20 say, hey, we have this expert who can -- and
21 sometimes, we'll get affidavits and everything
22 else to at least try and get a motion, you know,

1 win a motion for the records, but also, in
2 tangent, to try and actually get the expert to be
3 able to come and testify at trial.

4 But, you don't have that -- you don't
5 actually have the services of that expert, so
6 they're kind of doing it, you know, on the hope
7 that maybe they will be employed.

8 And, so, you have a very limited
9 access to, you know, you're at the, basically the
10 good will of the expert. That's what you're
11 getting.

12 And, you know, to contrast that to the
13 trial counsel, you know, they have -- if they
14 want an expert, all they have to do is ask. So,
15 I'll kind of refute what some of the trial
16 counsel said earlier which is, that we have
17 Article 46 is still available and we have equal
18 access to witnesses and evidence. We don't,
19 because, all they need to do is tell the
20 convening authority or an SJA, hey, this is what
21 I want and they get it.

22 And, the only way that we're going to

1 get it is if they already have one in that area,
2 an expert in that area, you know, whether it be
3 513 or an area in 412.

4 And, so, that limits our ability to
5 try and get to meet that threshold because we
6 don't have those resources.

7 And, I probably should have mentioned
8 earlier, but, my perspective is coming not just
9 from a defense counsel, I've been a defense
10 counsel for almost two years. I was the Senior
11 Trial Counsel at Camp Lejeune also before that
12 for a year.

13 I got my LLM at TJAGS in military
14 justice. And before that, I prosecuted for three
15 years to include a stint as a Special Assistant
16 U.S. Attorney with crossover as a trial counsel
17 and a complex trial counsel in between those.

18 So, I've prosecuted for four years, or
19 at least supervised and prosecuted for four
20 years. So, I have actually much more experience
21 in this -- in the military justice system as a
22 prosecutor.

1 And I know that it's very easy, you
2 just say, hey, SJA, hey, General, I need this
3 expert and you get it.

4 Well, they're supposed to be subject
5 to the same standards that our courts have put
6 out for expert assistance.

7 And that has hampered our ability to
8 investigate these cases. And I think that's also
9 what we're seeing as part of the delay in trials
10 because you investigate, you do the best you can
11 up front to investigate and get that information
12 to file your motion. But, you continue to
13 investigate because you're never satisfied with
14 your work.

15 And as you continue and you keep
16 finding this person or that person or, you know,
17 a new post on Facebook or something else, it
18 leads you further on down the road.

19 And with that, then you're going to
20 file a second motion based on this new
21 information.

22 And, so, it makes it -- it does, I

1 think, put delays in the process because it's our
2 duty to investigate these cases and bring forth
3 any issues, you know, related to the court.

4 So, if we find these new issues or,
5 you know, the judge will say, hey, that's not
6 enough. Hey, Judge, what more do I need to get
7 past the threshold? Well, I would need to know
8 how it affected, you know, the ability to recall
9 or perceive or whatever. And, then, we push down
10 that line and try and find that information that
11 just wasn't available before.

12 So, I think that the lack of resources
13 does cause a delay when we're trying to litigate
14 the 412 and 513 issues.

15 In specific regards to 412 and the
16 Article 32, it's basically nonexistent at the
17 Article 32. We do try and present it because I
18 agree with my counterpart. It's important
19 information in determining probable cause and the
20 disposition of the case.

21 But, routinely, it's being shoved
22 aside by the preliminary hearing officer as not

1 relevant to the proceeding, even in cases over
2 the last two months for no probable cause
3 determinations and disregarding -- still
4 disregarding the M.R.E. 412 evidence.

5 At least one of those cases as of
6 right now is being referred and we expect that
7 the other three are going to be referred as well.

8 That is a fundamental problem and a
9 flaw in the way that the Article 32 is being done
10 when you look at, you know, now the convening
11 authority doesn't see the 412 evidence. They're
12 not considering that in the probable cause
13 determination.

14 And, now, although the preliminary
15 hearing officer is saying, hey, I'm not using
16 that in my determination, it's very hard for a
17 human to separate what they've just seen and to
18 say, well, I'm, you know, because how do you get
19 to no probable cause when the motive to fabricate
20 is the reason for no probable cause or any other
21 412 issue? So, that is a problem.

22 M.R.E. 412 is also impacted the way

1 that we're receiving discovery in relation to the
2 victims' legal counsel and the trial counsel.

3 They are using 412 as a -- they are
4 becoming the gatekeepers of M.R.E. 412
5 information. Well, M.R.E. 412 doesn't apply
6 until trial or at the Article 32.

7 So, but, when they get that
8 information, and I think we heard a little bit
9 earlier, they're screening it out beforehand and
10 deciding whether or not we should get that
11 information. And, that, to me, is a problem.

12 And, the same thing is happening if
13 513 records are revealed. If it gets to law
14 enforcement, regardless if it's inadvertent, it's
15 in the hands of law enforcement, it's a part of
16 the law enforcement's file, therefore, Brady
17 applies and the trial counsel should not have the
18 ability to screen out what we can see. We should
19 be able to see the same things that the
20 government has in their possession.

21 And, so, when we look at -- it's not
22 just the Article 32 and it's not just the trial

1 itself, but it's the whole entire process that
2 has been affected.

3 And these rules, and I know the Panel
4 knows this, cannot be looked at in isolation when
5 you look at all the other rights that have been
6 afforded over 60 statutory changes made to the
7 military justice system over the past two years
8 and only one inuring the benefit of the accused
9 which is the repeal of the consensual sodomy as a
10 military-specific offense.

11 So, what it does, in my opinion, is
12 create a right or an entitlement or a benefit for
13 this ever growing military victim class.

14 And, it's making it easier to convict
15 Marines and Sailors and Soldiers of sexual
16 assault.

17 With specific regards to 513, we're
18 not seeing anything being filed at the Article 32
19 level. Usually, it's way too early. But, I can
20 tell you, the general practice is, upon preferral
21 of charges, within about two weeks, the Article
22 32 is being held, there's just not enough time to

1 investigate the case at that point.

2 And, if the materials were not
3 previously disclosed, which, most of the time,
4 they are not, then you're not getting them before
5 the Article 32.

6 Even if we did get them, I don't think
7 that, based on the rule, it would be -- it would
8 apply at all. So, it's non-existent at the
9 Article 32.

10 With regards to the Klemick standard
11 at trial, like I said, it's -- I think it's
12 actually a much higher burden than what the rule
13 says. I think it's more -- it's being applied
14 like a clear and convincing on the standard which
15 is -- should be way too high.

16 We do have an ex writ, the Panel's
17 aware, in *EV v. Robinson*.

18 Also, out in Okinawa, we had a case
19 where the command decided not to refer the case
20 to a general courts-martial convening authority
21 and the VLC, they threatened to sue the commander
22 in federal court in his personal capacity unless

1 the commander referred the charges to trial.

2 The commander did refer the charges to
3 trial and, thankfully, the defense attorney was
4 able in successfully litigating an unlawful
5 command influence motion.

6 But, I think that goes to the larger
7 problem of the pressure that is being exerted on
8 the government, the convening authorities, the
9 SJAs and the trial counsel to win at trial.

10 The military justice system or any
11 criminal justice system in the United States is
12 not about winning, in the prosecutor's manual,
13 it's about seeking justice.

14 And if we continue to erode the due
15 process, compulsory process rights and the
16 confrontation rights of an accused in the
17 military court system, we will fail at that
18 objective.

19 Thank you.

20 CHAIR HOLTZMAN: Thank you very much.

21 We appreciate the presentation.

22 Our final panel presenter will be

1 Lieutenant Commander Rachel Trest, U.S. Navy
2 Senior Defense Counsel.

3 Commander, welcome and we look forward
4 to your testimony.

5 LCDR TREST: Thank you, ma'am. Madam
6 Chair and distinguished Panel Members, thank you
7 for the opportunity to speak today.

8 I've been a Navy Judge Advocate for 13
9 years. Like, I think, the majority of the Panel
10 Members, I've spent most of my career as a
11 prosecutor.

12 I have been a staff judge advocate for
13 two years on an aircraft carrier where we dealt
14 with a lot of sexual assault cases.

15 And, I am, the last 18 months, been
16 the Senior Defense Counsel for Defense Service
17 Office North and we cover the U.S. Naval Academy,
18 the Washington, D.C. area, Pax River, Groton,
19 Connecticut, Great Lakes, Illinois where Recruit
20 Training Command is located.

21 And, we also assist with Europe and
22 our office in Bahrain. And, we also cover a lot

1 of the defense for the Coast Guard.

2 And, I understand that, today, you
3 have a difficult, but important, responsibility
4 in finding the balance between exercising
5 victims' rights and protecting the constitutional
6 rights of the accused to ensure a fair trial.

7 And, my comments, again, are not
8 attributed to the Navy. However, I have
9 consulted with my fellow Senior Defense Counsel,
10 our Appellate Defense leadership and our Defense
11 Counsel Assistance Program.

12 And, the consensus is that, we are
13 concerned more, now than ever before, that
14 innocent people are being wrongly accused,
15 investigated and on trial for sexual assault.

16 The result is an unprecedented
17 increase and the chance of convicting an innocent
18 Servicemember of sexual assault.

19 This is primarily because of the
20 change in the way sexual assaults are reported,
21 investigated and the process to courts-martial
22 has become, essentially, a one-way ratchet to

1 referral.

2 New policies have been implemented by
3 the Navy that incentivize making unrestricted
4 sexual assault reports. NCIS has changed their
5 investigative process. And, VLCs often impact
6 the investigation which skews the outcome in
7 favor of what the victim wants to happen despite
8 evidence to the contrary.

9 The Article 32 has been stripped of
10 its investigatory function and no longer
11 functions to truly assist the convening authority
12 in exercising prosecutorial discretion.

13 This is especially concerning when you
14 consider that almost every sexual assault case
15 involves acquaintances, often with prior
16 consensual sexual history and alcohol, which
17 often skews perception and memory of consensual
18 sexual conduct.

19 Once the case has been referred and is
20 at trial, the members, after the recent years of
21 SAPRO training, we have found are predisposed to
22 believe victims and misinterpret the legal

1 definition of consent and mistake of fact as to
2 consent.

3 The lack of a thorough pre-trial
4 investigation and prosecutorial discretion
5 combined with the nature of acquaintance sexual
6 assaults and the new incentives to fabricate are
7 a recipe for wrongful convictions.

8 Now, more than ever, the accused needs
9 to exercise his or her constitutional rights to
10 due process in confrontation at trial to ensure a
11 fair and just outcome.

12 The exceptions to M.R.E. 412,
13 especially the consent exception and the
14 constitutionally required exceptions are vital to
15 exercising these rights.

16 Additionally, mental health records
17 are increasingly important because military cases
18 deal with a population that has a high rate of
19 PTSD just from the nature of their jobs.

20 But, we also know from the data
21 collected by DSAID, or the Defense Sexual Assault
22 Incident Database, that there is also a

1 population that enters the military, that have
2 been survivors of prior sexual trauma and are
3 receiving mental health services through the
4 military.

5 The possibility of memory
6 contamination or perception issues are
7 dispositive to many of these cases.

8 Also, the age and the relationships
9 that these victims often have with the accused
10 and the VA benefits Servicemembers can now
11 receive for military sexual trauma call into
12 question the victim's motives for making the
13 report, their perceptions and mental health at
14 the time of the alleged event and the consistency
15 of their statements to law enforcement.

16 This constitutional exception and in
17 camera review process is more important now than
18 ever before. And, we would recommend it be added
19 back to M.R.E. 513.

20 In spite of these changes, we have had
21 success in obtaining acquittals, which is evident
22 by the low conviction rate in the Navy.

1 The high acquittal rate, however,
2 demonstrates that cases that should not be at
3 courts-martial are being pushed through the
4 system.

5 Although many of these accused are
6 later exonerated, there is a real cost to the
7 accused life, reputation, family and career.

8 Finally, anecdotally, we are seeing an
9 increase in the number of concerning convictions
10 or cases where experienced judge advocates are
11 shocked that members found the government proved
12 their case beyond a reasonable doubt because the
13 facts, as presented at trial, that was observed
14 just were not there.

15 These cases validate the Defense Bar's
16 concerns that the playing field has shifted too
17 far in favor of the victims' rights and it's now
18 at the expense of the freedom and constitutional
19 rights of our Servicemen and women.

20 Now, I would like to end on a bright
21 spot. And, that's that the Navy has actually
22 implemented the Defense Litigation Specialist,

1 and that's basically a defense investigator.

2 It's new to the Navy and we have ten
3 of them. And, I have one that I've been working
4 with since May of 2016. He has a prior law
5 enforcement background and his impact has been
6 monumental in making up some of the differences
7 that have been lost in the investigative process
8 from the Article 32.

9 He also is vital to gathering evidence
10 when we're looking to have 39A sessions for 412
11 motions and for 513 hearings. And, he is vital
12 at trial and he has been vital.

13 And, we have had acquittals because of
14 his assistance to our office.

15 And, so, we would like to, as I know
16 the other Services are in envy of our position,
17 but one of the issues that has come up is the
18 lack of investigative process and the speed now
19 in which these cases are being pushed through and
20 are going to trial.

21 And, although a Defense Litigation
22 Specialist is helpful and we would recommend that

1 the other Services benefit and we would want
2 more, frankly, if we could, because that is the
3 one caveat is, only one person can take so many
4 cases.

5 But, we would encourage that, not only
6 for 513, that the constitutional exception be
7 added back in and at 412, we would ask that the
8 constitutional exception be added back in at
9 Article 32 hearings.

10 We would hope that you recognize the
11 value of the DLSS and that it is a tool that is
12 in need now more than ever for the Defense Bar.

13 And, I look forward to your questions.
14 Thank you.

15 CHAIR HOLTZMAN: Thank you very much.
16 Appreciate your presentation.

17 Admiral?

18 VADM TRACEY: I'll try to ask this
19 question without sounding accusatory, but, how
20 has your view of the effects of these changes
21 changed as you've changed roles?

22 LCDR TREST: Yes.

1 Ma'am, well, what's interesting is, I
2 actually was a Senior Trial Counsel in Lieutenant
3 Commander Robertson's position. But, I left that
4 in 2012.

5 So, when I, now looking at it from the
6 defense perspective, a lot has changed since I
7 was a Senior Trial Counsel.

8 What has changed are some of these
9 incentives that victims now have. And, this is
10 to include expedited transfers that are offered
11 and this is really significant, to be on the
12 ship, that we were actually in the yards, which
13 is also not a fun period for Sailors when I was a
14 staff judge advocate.

15 But we do see people, expedited
16 transfers coming in to request to go be in
17 certain specific positions, not just to remove
18 themselves from the command, but actually go
19 certain ways, certain areas. And those are being
20 honored.

21 The other thing has been the Sexual
22 Assault Management Meeting which is a SACMG. And

1 that, I think, all the Services have something
2 similar.

3 But victims are actually meeting with
4 their commanding officers once a month once they
5 make an unrestricted report and the commanding
6 officer's job is to check on the well-being of
7 the victim.

8 But, at these meetings that happen, if
9 you have NCIS there, you have mental health
10 providers there, a chaplain. You have the CO of
11 the victim and you usually have sometimes a
12 victim legal counsel, but often times, a victim
13 advocate. The victim's not there.

14 But they meet and they talk about --
15 they're not supposed to talk about the case.
16 Having sat in them through my role as Staff Judge
17 Advocate, other information is talked about other
18 than just how's she or he doing? Good.

19 And, so, there's communications going
20 on about the case. And then you have a debrief
21 that the commanding officer then debriefs that
22 victim on the status.

1 And what's concerning especially as a
2 defense attorney is when the victim and the
3 accused are at the same command. And, is that
4 same commanding officer that is making
5 disposition determinations on where the case
6 should go.

7 And the Naval Academy is a prime
8 example where this is happening. And, that's
9 concerning.

10 Ma'am, also, the victims now have a
11 different separation authority. So, to be
12 separated from the military, it's no longer the
13 local command, it is elevated to the Navy
14 Personnel Command.

15 And, so, where this received play,
16 let's say there's a, what we call PFA failure,
17 basically, they're out of standards where other
18 Servicemembers may be separated, victims are
19 funneled in a different way and they're not
20 immediately separated because they'll have this
21 pending sexual assault case or they've made a new
22 allegation and then it halts everything.

1 And then, again, survivors of military
2 sexual assault, the military sexual trauma, we
3 have, and I have personally, as a defense
4 attorney, seen a 513 -- so, I went through their
5 513 records.

6 I've seen mental health records. In
7 my specific case that is ongoing, I can just say
8 that we didn't have a 513 hearing because there
9 had been a waiver. So, we, although the judge
10 did look at that, the analysis was under 510
11 because the victim had actually affirmatively
12 waived all his records for the purpose of NCIS to
13 obtain these mental health and physical health
14 records.

15 The mental health records were not
16 provided to us. That's why we went to the judge
17 and the judge found that, once the victim had
18 waived the privilege, they cannot now re-exert
19 the privilege.

20 So, and he did an *in camera* review,
21 the judge did an *in camera* review, reviewed those
22 mental health records and did disclose to us what

1 we believe is relevant.

2 Now, that trial hasn't taken place, so
3 I can't tell you what the impact will be, but in
4 reviewing them myself, I think there are motives
5 to fabricate that we can significantly see now
6 more than without having those records.

7 And, so, my point is that I think
8 these victim incentives are new and also the law
9 enforcement investigations have changed.

10 Working with NCIS closely as a
11 prosecutor and now as a defense attorney, they
12 use the FETI technique which has been
13 implemented. And, the FETI technique is a
14 Forensic Experimental Trauma Interview.

15 And what NCIS is doing is, when they
16 talk to victims, they ask, you know, how do you
17 feel? And it is supposed to build rapport, build
18 trust to get victims to disclose things, which is
19 fine.

20 But then what happens is, they don't
21 get a full story of what happened. And, now,
22 they have a VLC because, again, NCIS can't talk

1 to them unless they have a legal counsel.

2 And then there'll be information, say
3 through forensics or whatnot, that is extracted
4 that directly contradicts what the victim told
5 law enforcement.

6 Well, some law enforcement won't even
7 call them back in because they've been told not
8 to confront the victim, we're just going to move
9 this case forward and let the prosecutor deal
10 with it.

11 Some law enforcement try to call them
12 back in. But, of course, the VLC sees it's not
13 in their client's interest to have this
14 additional interview. And, so, we're stuck.

15 And this is where the investigative
16 process has faltered and is different than when I
17 was the Senior Trial Counsel.

18 And, again, to echo my colleagues, the
19 fact that we're going to 32s, and, in some cases,
20 when I go to a 32, I don't put on new evidence,
21 but I'll use the government's evidence that they
22 have discovered to me to point out to the PHO

1 that there is no probable cause.

2 And it's not every case, but there are
3 cases recently that we have had and the PHO who
4 actually -- we had a Reservist who had been a
5 military judge, was a senior Navy Captain, is a
6 practitioner in the civilian sector, a partner at
7 a litigation firm, so, very clear about the
8 roles, said not only is there no probable cause,
9 but you will not secure a conviction at trial.
10 The evidence is just not there. Still, this case
11 was referred to trial.

12 Now, we got an acquittal, but this was
13 an expense to the accused, his training, and you
14 still never know what's going to happen with
15 members.

16 And, so, I guess those are some of the
17 examples, ma'am, that have changed my focus and
18 why I am more concerned now than ever before of
19 the status of where we are.

20 VADM TRACEY: So, are there things --
21 has anybody actually served as a trial counsel
22 under these rules?

1 MAJ ARGENTINA: Yes, ma'am. So, I was
2 a senior trial counsel just two years ago, so I
3 was supervising and actually had some cases
4 myself that wound up not going to trial.

5 VADM TRACEY: So, are there things
6 that you see the trial counsel could do
7 differently to offset some of these effects?

8 MAJ ARGENTINA: I don't think that the
9 trial counsel can do anything differently to
10 affect the motives or the facts of the case.

11 What they are able to do under this
12 rule as compared to the old rules is a lot more
13 limited because of the access to the complaining
14 witnesses is often limited or chaperoned
15 interviews as opposed to when I, you know, was
16 interviewing them myself and was acting as their,
17 you know, quasi-representative.

18 Because it was my responsibility at
19 that point to assert any victims rights or
20 anything else because that was a mandate that we
21 had. We kind of had, you know, dual hats.

22 So, I don't think that trial counsel

1 can be doing anything different as far as that.

2 But I do think that they, and we've
3 seen where we've run into quandaries about we,
4 you know, you can tell that, you know, not all
5 cases, because a lot of the cases that we have,
6 we have -- a high majority of our cases do plead
7 out and all, and not just sexual assault cases.

8 But when you're dealing with a lot of
9 these incentives or the interplay between, you
10 know, other relationships and all that, and you
11 know, as a trial counsel, that it's going to be a
12 low probability or a zero probability of winning
13 at trial and you write your prosecutorial merit
14 memo which says, hey, we don't recommend you go
15 forward because here are all the issues.

16 And then the preliminary hearing
17 officer comes back and says no probable cause.
18 And then the convening authority sends it to
19 trial and it becomes an acquittal, it's very
20 demoralizing to your trial counsel who, and as a
21 supervisor, because it should not have been a
22 case that went to trial.

1 It was clear to everyone except that
2 the pressure on the system is so high, because no
3 General wants to, in my opinion, have, you know,
4 put the one case that should have gone forward
5 but the trial counsel maybe, you know, missed
6 something or new information comes out later on.

7 So, at the cost of, you know, that
8 very rare particular kind of case that could then
9 pop up later and say, hey, this was, you know, an
10 actual one that you should have gone forward
11 with, they go on the side of caution and just let
12 the system play itself out completely.

13 VADM TRACEY: I have one more
14 question.

15 CHAIR HOLTZMAN: Okay, sure.

16 VADM TRACEY: I think it was you,
17 Major Argentina, who said that it is how the rule
18 is being applied that is broken.

19 Could you just be a little bit clearer
20 about how would you change the way the rule is
21 being applied?

22 MAJ ARGENTINA: The standard is

1 obviously higher than it was before. But, it
2 seems to be, you know -- so, in one of the more
3 recent cases, again, this was an acquittal case,
4 so it's not ever going to be reviewed, and then,
5 the other case that I had cited that was my case,
6 it was wind up being a plea for adultery because,
7 ultimately, it was a consensual act. Because we
8 were getting close to getting the record, which I
9 believe someone said before, yes, there's a fear
10 of they don't want to go forward anymore.

11 Well, a part of that fear, there's two
12 sides to the fear coin. The other side is that
13 they had made a false allegation and it's going
14 to be exposed in their mental health records.

15 You know, the other fear is that, you
16 know, there's going to be private details and
17 that's a legitimate concern. But the way that
18 it's being applied, what I meant by that was, is
19 the sum evidence standard, the preponderance
20 standard seems to be a clear and convincing
21 standard that you use, and you have to get over
22 this high, high hurdle of providing information.

1 And even in the face of providing
2 multiple witnesses where disclosures were made
3 that they had, you know, this anxiety disorder or
4 this personality disorder. And, in that case, an
5 *in camera* review was granted but the access to
6 the records were limited. And, again, it was a
7 sanitized version of what was allowed to be
8 presented at trial.

9 They were only allowed to call it
10 emotional outbursts. And because they were
11 having panic, you know, panic attacks, but when
12 the evidence came out, the complaining witness
13 had panic attacks because they had something
14 wrong in their uniform and were corrected and
15 would have the same reaction.

16 So, that was an issue that they were
17 not allowed to fully develop and were, you know,
18 sanitized to emotional outbursts.

19 In the other case where we didn't get
20 the records, we presented Facebook messages, you
21 know, suicide attempts, other disclosures about
22 the types of medication we found in the same

1 exam, the types of medication that were being
2 used and the types that were prescribed and were
3 not being used.

4 And even in the face of all that
5 evidence of 513 *in camera* review was not ordered.
6 You know, the judge didn't want to do an M.R.E.
7 513 *in camera* review. It seems to be way too
8 high when you have that much information
9 presented to the court.

10 And, in that case, we were asked,
11 well, what enumerated exception are you using? I
12 said, Your Honor, take a look at our motion.
13 We're using the constitutional required
14 exception, the compulsory process clause, the due
15 process clause, that's what we're using for this.
16 And the judge said, well, that's not one of the
17 enumerated exceptions.

18 And, so, I think because it's not
19 written in there, it's being placed at such a
20 high standard and I think Mr. Taylor pointed out,
21 none of those exceptions even really apply in the
22 cases.

1 Those exceptions in there are for, you
2 know, exceptions for when people may be in
3 trouble in the future or to make sure that
4 there's care. It's not -- they are not designed
5 to find any of the type of information that will,
6 you know, go after credibility or perception or
7 the ability to recall and be an accurate
8 historian.

9 CHAIR HOLTZMAN: Thank you.

10 Judge Jones?

11 HON. JONES: I'm interested in the
12 Article 32. I understand, or at least I think
13 what I'm hearing is, when you had full-blown
14 Article 32s, much more information went to the
15 convening authority and fewer cases were
16 referred.

17 Why are defense counsel now either --
18 well, why are there waivers? Why would a defense
19 counsel simply waive? You get nothing if you
20 don't waive and go ahead?

21 I mean, you don't have to present --
22 yet, they still don't have -- the government or,

1 you know, still doesn't have to present the
2 victim at the 32. But, is there nothing you can
3 get and so you decide to waive?

4 I just don't quite understand what
5 happens at a 32 now that makes it -- well, you
6 still hear them, but I hear that it's like 50
7 percent waivers.

8 LCDR TREST: And, I can't speak to --
9 I have not waived them, but I have talked to my
10 colleagues who have.

11 So, the 32, you're looking at is there
12 probable cause? Is there jurisdiction? The
13 charges and then the disposition recommendation.

14 And it's regarding sort of the
15 charging. I think a lot of people have looked at
16 as, I don't want to have a 32 because this judge
17 advocate who's the preliminary hearing officer
18 may catch errors that the government made and
19 that gives them a chance to now perfect the
20 government's case.

21 Or, they may see errors that the trial
22 counsel is not picking up on that I'm seeing as

1 defense counsel, and I don't want them to have a
2 chance to perfect it before arraignment when they
3 can't make any changes.

4 So, strategically, there has been that
5 issue where we don't want this defense in that
6 specific case. There's nothing that you're going
7 to present. The evidence is pretty strong but
8 maybe their charging through is incorrect or
9 their missing something.

10 We don't want to aid the government in
11 giving them more time and another pair of eyes to
12 look at that and perfect the case forward when we
13 think we can maybe exploit something that they
14 missed. That's one thing I've seen.

15 MAJ ARGENTINA: And it's been our
16 general practice across the Marine Corps, we have
17 a shared network, a SharePoint that we -- across
18 the Marine Corps share, you know, what's going on
19 throughout, you know, throughout the world.

20 We generally don't waive the Article
21 32 because we haven't seen any case law that says
22 yet that, you know, that potentially the Article

1 32, the way that it is, which was originally
2 CAAF's concern, is a speed bump on the way to
3 trial.

4 Until that gets clarified that the
5 statutory framework is proper, you know, waiver
6 is only in certain instances, as was pointed out,
7 if you have a tactical reason, we're not waiving.
8 Because, again, if you waive then you lose any
9 rights or benefits that would flow from that.

10 So, generally speaking, we're not
11 waiving. We may, just like you said, ma'am, go
12 and let the government put on their case.

13 You know, even in some cases, we've
14 started with a sexual assault case, have gotten
15 no probable cause and come out on the other end
16 with an aggravated assault charge.

17 So, you know, a really good job at the
18 Article 32 and then you come out with a different
19 charge, which is okay. You know, that's what
20 the, you know, what the defense counsel was
21 trying to prevent, but you do run that risk if
22 you do, you know, present now because, you know,

1 quite honestly, it is a speed bump on the way to
2 trial.

3 So, if you do anything to highlight
4 any problems with the case, you may be looking at
5 added charges or possibly getting the charged
6 fixed.

7 HON. JONES: You don't want to reveal?

8 MAJ ARGENTINA: Yes, ma'am. So, you
9 like the best practice that you're not doing it
10 just to sit and do nothing.

11 MAJ REYES-STEWARD: And there's
12 certainly no blanket opinion that all 32s should
13 be waived because the idea that it's a speed
14 bump. And the reason that my counterparts echoed
15 for waiving a 32 are certainly reasons for it.

16 But, you know, despite there being
17 overwhelming evidence, you know, we know probable
18 cause is going to be met. But, it's a good
19 opportunity to kind of give our client that
20 second opinion, you know, hey, look at the facts
21 here. Let's talk about a guilty plea, you know.

22 And, so, in that case, the Article 32

1 does serve a purpose, you know, for us as defense
2 counsel to --

3 HON. JONES: To counsel your client?

4 MAJ REYES-STEWARD: Exactly, ma'am,
5 yes.

6 MAJ HENLEY: We very seldom, in my
7 region, very seldom do we waive Article 32
8 hearings.

9 They provide extremely valuable
10 opportunity for face time with your client just
11 like my cohort here said.

12 But in addition to that, it exposes
13 the alleged victim to the process, too. And, in
14 the process of doing that, sometimes that
15 contributes to whether or not they support an
16 alternate disposition or whether or not they
17 decide not to go forward.

18 So, it's not just for the accused,
19 although it's the accused that is the one that
20 benefits mostly from it.

21 You know, personally, I would like to
22 see the government pursue Article 32 hearings

1 more vigorously by putting more evidence in.

2 When I was a senior trial counsel, I
3 preferred that because by the time we got to
4 trial, I had a -- by the time I got -- saw the
5 case, four other experienced individuals had kind
6 of gone through it and pointed out problems. And
7 we could fix the problems or we could dismiss the
8 cases that should be dismissed.

9 Unfortunately, with the lowered
10 threshold of probable cause, we're ending up at
11 trial where both the accused has to suffer
12 through the circumstances and the alleged victims
13 have to suffer through the circumstances of cases
14 that just don't stand a chance at trial.

15 HON. JONES: So, the notion of
16 probable cause is a very interesting one. And,
17 if the victim testifies that X, Y, Z happened and
18 I did not consent, credibility doesn't come into
19 that for probable cause.

20 So, it seemed to me, or at least
21 that's what happens in grand juries, that's
22 enough.

1 I think what I'm hearing is the
2 military had an extraordinary way to vet an
3 entire case. But the commander wasn't making a
4 probable cause decision in most instances. He
5 was making a decision with a lot of information,
6 much more than he has now, that actually went to
7 I guess two things.

8 Do I believe it? One. Or, two, even
9 if I believe it, is there any -- is the evidence
10 strong enough?

11 And, so, you know, it's -- I just find
12 it every interesting because you don't get that
13 vetting in the civil system and it sounds like
14 you're on your way to not getting that vetting or
15 are there already, here.

16 MAJ HENLEY: Well, and, ma'am,
17 granted, if somebody takes the stand and says
18 that, I completely understand. But, a lot of our
19 cases aren't that clear.

20 A lot of our cases are Air Force Form
21 1168 to written statements made by alleged
22 victims and those statements basically say, I

1 remember drinking with these individuals. I
2 remember -- the next thing I remember is waking
3 up in bed with this individual and he claims that
4 we had sex. And that's it.

5 And, so, probable cause is not
6 necessarily that clear in a lot of our cases.
7 And, that's why having a more vetted process can
8 potentially benefit. Because some of the charges
9 that we have in the Air Force are not -- or in
10 the military are not the same charges that are
11 available to civilian authorities.

12 MAJ ARGENTINA: And, ma'am, if I may,
13 obviously you know the difference between the
14 civilian and the military justice system is you
15 have professional prosecutors at the highest
16 level have been doing 20, 30, 40 years making
17 those decision for their prosecutors.

18 So, it's much different when I was a
19 Special Assistant U.S. Attorney bringing cases to
20 the grand jury. We had the discretion there at
21 the office to say, hey, we're going to bring this
22 forward or we're not going to bring this forward.

1 And I had a civilian supervisor who, you know,
2 had 20-plus years of experience.

3 So, that's different in -- and I think
4 the purpose of the old Article 32 was to provide
5 that commander the assurances and guarantees that
6 this was a valid, you know, process because he
7 doesn't have any experience.

8 And even the SJAs, at that level, may
9 not have been in the court room for 10, you know,
10 or 15 years. So, they have never seen these
11 rules before. So, they only know the application
12 of these rules based on what they're hearing from
13 trial counsel. Because everything that they've
14 done was different back then. So, it's a whole
15 new ball game and now, they're trying to advise
16 the commander.

17 So, what you end up with is when
18 you're doing your risk assessment, I believe as a
19 commander, if you don't have enough information
20 or you have less information than you had before,
21 then it's obvious that you're going to, you know,
22 be cautious about your decision.

1 If you have more information, you can
2 be certain that you'll be, when someone looks at
3 your decision and with all that information, that
4 they're probably going to come out the same way
5 you are.

6 But, now, with lack of information and
7 what's being put out at Article 32, it really
8 leaves no choice for the commander but to refer
9 the case.

10 HON. JONES: Well, with a basic, and
11 I understand your point, Major Henley, but with a
12 basic PC standard with nothing else, I agree with
13 you.

14 MAJ HENLEY: Ma'am, if I may add just
15 a little bit? We, in addition to the probable
16 cause that comes out of an Article 32 hearing, we
17 have the pre-trial hearing officer has to make a
18 recommendation as to disposition.

19 And, so, it's not just necessarily a
20 probable cause hearing to determine, you know,
21 does it meet probable cause? That's one of the
22 four thresholds that they have to meet.

1 HON. JONES: So, disposition is, I
2 find probable cause of a sexual assault here, but
3 I would dispose of it this way as opposed to a
4 general courts-martial? Is that what you're
5 talking about?

6 MAJ HENLEY: Yes, ma'am. I find
7 probable cause, so it meets that threshold. But,
8 in addition to that, I recommend disposition at
9 general courts-martial, special courts-martial,
10 summary court --

11 HON. JONES: Of the non-judicial
12 punishments?

13 MAJ HENLEY: Yes, ma'am.

14 HON. JONES: Okay. Thank you.

15 CHAIR HOLTZMAN: Mr. Taylor?

16 PROF. TAYLOR: Yes, thank you.

17 First of all, thanks, again, for your
18 perspectives from the frontlines because that's
19 certainly what you're bringing to us, and for
20 your service as well.

21 Major Henley, you talked about, in
22 your initial statement, that the changes to the

1 Article 32 proceedings have certainly caused it
2 to be less robust, I think, was your terminology.

3 MAJ HENLEY: Yes, sir.

4 PROF. TAYLOR: And, then, you talked
5 about the fact that you can no longer really use
6 the Article 32s for discovery and you've
7 elaborated on them a little bit.

8 But other than the 412 issue
9 involving, again, whether or not the victim has
10 to appear, were there other changes involving 412
11 and 513 that affects your judgment in that
12 regard? Changes that have been made that in any
13 way affects your views of Article 32 or military
14 courts-martial proceedings?

15 MAJ HENLEY: Well, sir, obviously, if
16 we could -- as a defense counsel, we would like
17 to be able to get into the entire array at the
18 Article 32 hearing of 412 and 513 evidence.

19 You know, I understand the concept
20 that we don't want to revictimize the victim
21 multiple times and I appreciate that.

22 But, at the end of the day, if a case

1 with the 412 or 513 evidence is less likely to
2 win at trial, it would be beneficial for the
3 alleged victim to know that on the front end to
4 determine whether or not she wants to go, or he
5 wants to go forward at that point.

6 And, so, I appreciate the idea of not
7 victimizing and not exposing their privacy before
8 large groups of people, but we do use the same
9 standards at the Article 32 hearing when it comes
10 to protecting an alleged victim's privacy.

11 PROF. TAYLOR: Right.

12 MAJ HENLEY: We close those hearings.
13 We limit the amount of information that's allowed
14 outside of those hearings. And, obviously, we
15 seal the records.

16 PROF. TAYLOR: Right. Would anyone
17 else like to comment on that?

18 MAJ REYES-STEWARD: Well, to just more
19 specifically is the constitutionally required
20 exception, you know, that the hearing officers
21 are not allowed to consider when making their
22 determinations, specifically, their

1 recommendation for a disposition. Because you
2 may very well have probable cause, but to get to
3 that beyond a reasonable doubt standard, it's
4 clear that it's just not going to come.

5 And, so, you kind of -- you prohibit
6 the hearing officer from truly assessing all the
7 evidence that's available or out there to make a
8 good recommendation for the GCMC.

9 PROF. TAYLOR: Okay. But, if you know
10 about 513, if you have a suspicion that there's
11 513 type evidence out there, then you have the
12 right to at least explore it at that point to see
13 what will happen, right?

14 MAJ ARGENTINA: At the stage of the
15 Article 32, sir?

16 PROF. TAYLOR: Yes.

17 MAJ ARGENTINA: No, because there's no
18 way to access those records to know.

19 PROF. TAYLOR: Well, I said if you
20 knew that there was something out there, you
21 could at least raise it, but that hasn't happened
22 for the most part, I gather.

1 LCDR TREST: Well, one thing that has
2 been related to me was that -- so, another
3 popular -- a lot of cases that we have are
4 marital cases actually that people are married
5 and then report sexual assault and, oh by the
6 way, a lot of times divorce proceedings happen to
7 be going on in the civilian sector.

8 And, recently, one of the senior
9 defense counsel's reported to me that they had a
10 public record from a divorce case and there were
11 mental health records in that public record
12 because it was part of the trial.

13 And then she had simultaneously filed
14 a sexual assault claim against him for actions
15 during the marriage.

16 And at the 32, the defense counsel
17 tried to produce this, because they did have
18 access to it. But, the PHO wouldn't consider it
19 because they were so afraid of just the word
20 mental health --

21 PROF. TAYLOR: I see.

22 LCDR TREST: -- as being misapplied

1 and considered 513. And, so, I'm not even going
2 to consider it.

3 And, so, that is information that now
4 the convening authority does not have to make an
5 informed decision about the proper disposition.

6 PROF. TAYLOR: Well, that's the kind
7 of example I was thinking --

8 LCDR TREST: Yes, sir, so it is
9 happening.

10 PROF. TAYLOR: -- on experience.

11 Thank you.

12 So, back to a comment that you made,
13 Major Argentina, and thank you for picking up on
14 my question this morning on this point, if you
15 look at the enumerated exceptions in 513 and then
16 look at the examples that you cited regarding
17 possible PTSD, medication, lack of medication,
18 not taking medications, have you, as a defense
19 counsel, found it very difficult to fit that
20 within any one of the exceptions anyway which
21 sort of moves you to the default position of some
22 sort of constitutional requirement?

1 MAJ ARGENTINA: Yes, sir, none of
2 those fit the exception. Any of the enumerated
3 exceptions, you are correct and none of the
4 normal aspects of when you're looking at
5 perception and reliability, credibility fall
6 under any of the enumerated exceptions.

7 PROF. TAYLOR: So, has anyone here at
8 the panel had any luck in finding an exception
9 that worked for some information that you were
10 trying to get at? Any of the exemptions?

11 LCDR TREST: No, sir. And, I think
12 that's been since 513 has been changed, that's
13 been the specific issue. In fact, that --

14 PROF. TAYLOR: Yes, that's what I
15 thought.

16 LCDR TREST: Yes.

17 PROF. TAYLOR: Okay.

18 And, I guess the final question, to be
19 fair, is the same question I asked the trial
20 counsel panel this morning. And, that is, this
21 trend toward paper Article 32s, particularly in
22 sexual assault cases, overall, a cause for

1 concern in terms of the fairness of the system.

2 And as part of that, I guess, one
3 question would be, is it a better policy to have
4 more cases tried, even if they end up in more
5 acquittals, or is it better for the system to
6 have fewer cases tried based on more stringent
7 Article 32s given the impact of good order and
8 discipline as part of the equation?

9 MAJ REYES-STEWARD: And I think your
10 question encompasses the answer, sir. Because
11 our, you know, in the military context, we need
12 to process efficiently.

13 And, so, to the extent that the
14 Article 32 can act as that gateway, yes, that's
15 what we prefer. It's better for everyone.

16 You have an accused who has this
17 hanging over their head, they're in limbo. They
18 don't know what the end result is going to be.
19 The same for the alleged victim.

20 And, so, the sooner we can get an
21 accurate and honest assessment of the evidence,
22 the better for everyone involved.

1 PROF. TAYLOR: Anyone else like to
2 comment on that?

3 MAJ HENLEY: It really depends on how
4 much money you want to spend because these cases
5 are very expensive to litigate.

6 And I understand that we don't put a
7 number of a cost on justice, but realistically,
8 when you start talking about, you know, asking
9 for more money from Congress, there is a limit to
10 the price.

11 So, in addition to the emotional and
12 the human aspect of it, of putting people through
13 a trial when they would never necessarily get a
14 conviction, you've got financial costs to it
15 also.

16 MAJ ARGENTINA: And I think that we
17 are running the risk right now of these paper 32s
18 of putting too many people through the process
19 that don't belong being put through the process.

20 It should be hard for the government
21 to restrict someone's life and liberty. That's
22 what the Constitution requires.

1 But now it's much easier to do that
2 because there is no real -- there's nobody in the
3 government's way to bring this person to trial.
4 There's nothing.

5 And, at least before, when you had a
6 little bit more confrontation rights at the
7 Article 32 and the vetting process was more
8 steep, you could affect good order and
9 discipline, sir, to answer your question, better,
10 I think.

11 We have cases that are lingering, and
12 not just from the beginning of trial or when the
13 defense gets the case all the way to the end of
14 trial, but from the initial allegation, sometimes
15 two years down the road.

16 You've put an 18, 19, 20-year-old
17 kid's life on hold for two years. Not just the
18 accused, but the victim as well.

19 So, is there value in having a harsher
20 vetting process at the beginning so, you know,
21 that they can move on, both can move on with
22 their life and get the services they need and not

1 have to worry about 513 or anything else.

2 Yes, maybe there is, because, at the
3 expense of the, you know, the rights of the
4 accused, the right to a speedy trial, due
5 process, I think, my opinion is, it's been
6 eroded.

7 LCDR TREST: And I would just agree
8 that everything is at stake at the courts-
9 martial.

10 And that is not where these, you know, basic
11 baseline floor, probable cause determinations
12 should be going.

13 We should have standards in place to
14 make sure that we're at the correct forum, that
15 the resources are there and that it's fair and
16 just. Because, otherwise, innocent people can be
17 convicted.

18 And I will say that -- and I mentioned
19 earlier in my comments that the SAPRO training, I
20 mean, it's good that we have seen a shift in
21 education. But there is a consequence to that
22 shift as well.

1 And especially as a defense counsel
2 who services the Naval Academy and also Recruit
3 Training Command, where SAPRO sexual assault
4 education is out there in full force from the
5 minute you're into boot camp or you're into the
6 Naval Academy, you are getting it over your head,
7 which is important.

8 Except that, there are consequences
9 when it comes to consent because people are
10 making it, I don't want to say dumbing it down,
11 but they're trying to say, if you're drinking,
12 you can't consent. We know that's not the law,
13 but that is what is being put out.

14 Now, we have voir dire and we use voir
15 dire. But, it's just not getting -- and we're
16 not being able to vet these biases that people
17 are being trained on.

18 And, so, when you're leaving it to
19 members at a courts-martial to determine the
20 evidence in front of them, and a lot of them
21 think, well -- and we ask this question in voir
22 dire, do you believe just because we're at a

1 courts-martial that, you know, this person is,
2 you know, not innocent until proven guilty? Oh
3 no.

4 But, they think that. I mean, you get
5 that impression. I've debriefed members as an
6 SJA after their experience. It's concerning.

7 We have a job and a duty to ensure
8 that justice is not just at the courts-martial
9 process, but every step to get there. And I feel
10 that the changes have just -- the sands have
11 shifted in favor of the victim at the expense of
12 the accused.

13 CHAIR HOLTZMAN: Thank you.

14 Mr. Stone?

15 MR. STONE: Yes. I guess I want to
16 ask about the comment that was just made. You
17 said, Lieutenant Commander Trest, that innocent
18 people can be convicted.

19 But we know that the rules right now
20 at the appellate level is that appellate defense
21 counsel, just upon asking, gets the entire sealed
22 provision, even if the trial court judge didn't

1 want to look at it.

2 And I heard Major Argentina worry
3 about Brady problems. But, the other panels this
4 morning couldn't tell me about any reversals they
5 knew on Brady grounds based on the sealed
6 material.

7 Do you guys have citations to those
8 cases that we could look at?

9 LCDR TREST: Well, sir, I can tell you
10 that part of the issue -- and I did pulse our
11 Appellate Defense Bar for this -- and they have
12 cited that there are three 412 cases currently
13 pending at the appellate level and also three 513
14 cases regarding constitutional requirement at the
15 appellate level.

16 So, the things is, I don't think we've
17 had any decisions yet because this has been a new
18 change and it takes time to get through the
19 system, have everybody debriefed.

20 And, so, I think we're going to see
21 some information or decisions come out,
22 hopefully, that will indicate if there has been a

1 miscarriage of justice.

2 MR. STONE: Okay. But, we don't have
3 any now?

4 LCDR TREST: We don't have any now at
5 this point.

6 MR. STONE: Okay, that's what I wanted
7 to know.

8 MAJ ARGENTINA: And, sir, to address
9 your point, if I may?

10 We also heard from the panel and, you
11 know, the trial counsel and the judicial panel
12 that it's basically nonexistent to do an in
13 camera review at this point. So, at least for
14 513.

15 So, what you're getting is anything
16 that is, you know, getting to the appellate level
17 with a conviction, you don't have the records to
18 begin with.

19 So, what we've seen, like I said, I
20 have one case in the last year where the judge
21 actually did an *in camera* review. All of the
22 other cases out of the, you know, 80 percent that

1 we filed 513 motions, they're not there.

2 In addition, the high acquittal rate
3 is actually, I think, masking some of the issues,
4 you know, the rulings that are not, you know, you
5 know, that would have been looked at because
6 we're getting the evidence in some other way,
7 maybe not in 513, but we're able to present it
8 through other witnesses or something else.

9 So, you're not actually, you know,
10 maybe providing the diagnosis to them or an
11 expert testimony to be more useful to the
12 members, but you're using, you know, friends or,
13 you know, Facebook posts or other things that are
14 actually showing and then the members kind of
15 sense, hey, there's something wrong here.

16 So, I think that it's also a little
17 bit premature that we don't have those, but also
18 that there's no records for there to be a
19 reversal in 513.

20 MR. STONE: When you don't get 513
21 evidence and the judge says, no, I'm not going to
22 review it, don't you ask them to seal it so it

1 becomes part of the record so that, on appeal, it
2 can be there?

3 MAJ ARGENTINA: The judge doesn't even
4 get the record, sir. That's what I'm saying,
5 they're not even -- we're not getting past the in
6 camera review threshold. They're not even
7 receiving or giving the military judges orders to
8 get the records.

9 MR. STONE: So, then, an issue on
10 appeal, though, can be that you think you made
11 the threshold and he didn't even get the record?
12 So that is tested on appeal?

13 MAJ ARGENTINA: Yes, sir.

14 MR. STONE: Okay.

15 MAJ ARGENTINA: And, like I'm saying,
16 the cases that I know of, we --

17 MR. STONE: Right. So, where you feel
18 that maybe you didn't have the constitutional
19 exception or something, you're able to test that
20 part, it's just waiting to be decided?

21 MAJ ARGENTINA: Yes, sir. And,
22 actually, the cases that I have specifically

1 either have ended in acquittals or a plea to an
2 alternate charge in like the one case it was
3 adultery or an Article 128, so they've -- there's
4 a large portion of waiver when they're pleading
5 out to some of these cases, too.

6 MR. STONE: I have a question for
7 Major Henley. You mentioned that you thought
8 this was a useful process so that the victim can
9 decide earlier that they don't want to go forward
10 if there was a more robust Article 32 proceeding.

11 MAJ HENLEY: Yes, sir.

12 MR. STONE: I guess that suggests to
13 me that you don't think that the SVCs are doing
14 their job the way they should because that's
15 really their decision, just like, I mean, they
16 get to talk in a privileged manner with their
17 client just like you do and, if they're doing
18 their job, then presumably, I mean, I can't
19 imagine why not, they're advising their client of
20 exactly all the things -- many more things than
21 that would come out at a public Article 32.

22 So, I mean, it seems to me, isn't that

1 what the SVCs are for?

2 MAJ HENLEY: Sure, absolutely.

3 However, just the same as I like my client to sit
4 through an Article 32 hearing and to experience
5 the process itself, they value -- the alleged
6 victim can gain value that way also by seeing
7 that this is in a public forum.

8 That, by walking into the court room
9 and sometimes that's the first time they've ever
10 seen a court room and sometimes, it's the first
11 time they've ever seen a witness stand.

12 And, so, by getting them in the court
13 room and in that area, and I understand, you
14 know, the concept is that SVCs will disclose to
15 them everything in the record, they may not know
16 about everything in the record just because an
17 SVC -- an alleged victim has an SVC, that SVC
18 doesn't necessarily get unfettered access to the
19 investigatory -- the government's investigatory
20 file.

21 MR. STONE: That's true, but they do
22 get unfettered access to their client, don't

1 they?

2 MAJ HENLEY: They do, absolutely.

3 MR. STONE: I would presume that when
4 your defendants talk to you, they can talk to you
5 about stuff that nobody else at the hearing knows
6 and that's exactly the same circumstance for the
7 SVC.

8 MAJ HENLEY: Absolutely.

9 MR. STONE: I was wondering whether,
10 since this panel doesn't really, for the most
11 part, we are concerned with the Military Rules of
12 Evidence and the military articles, but not
13 statutes that Congress decides, some of which
14 have changed some of those rules.

15 What occurred to me while I was
16 hearing your testimony is whether if -- whether
17 the defense counsel, as a remedy that we could
18 recommend for some of these things that you don't
19 like, would like at any point to be able to say
20 to the military system, excuse me, Your Honor, I
21 have a motion. My client would like to remove
22 this case to state or federal court?

1 I don't like the way the balance has
2 been set here in the military courts, we'd like
3 to remove it. They'll get a civilian jury.
4 They'll get all the things that the state or the
5 federal government provides in that other forum.
6 Because this clearly, that's something that could
7 be done, we heard at the outset, that it's based
8 on an MOU that these cases are tried in the
9 military and not in federal civilian court.

10 And then you'll get everything
11 everybody else gets without -- including a
12 civilian jury without worrying about this,
13 without worrying about the standard also.

14 So, I wonder if any of you have a
15 thought about that, whether that's something we
16 should consider recommending?

17 MAJ REYES-STEWARD: I'm not sure what
18 the value in transferring jurisdiction would be
19 for our clients.

20 MR. STONE: Well, part of that was
21 because I had mentioned because Major Argentina
22 said he'd like to see -- he was a Special

1 Assistant U.S. Attorney and he thought in that
2 office they won't go forward without somebody
3 with maybe 20 years' experience looking at it and
4 saying, yes, this should go forward.

5 So, by removing it to there, you'll
6 get these more experienced people on all sides of
7 the case, judges, public defenders, everybody.

8 LCDR TREST: Just some thought, sir,
9 just having been a staff judge advocate and a
10 prosecutor that's worked with civilian
11 authorities, they don't want these cases. I
12 mean, they wouldn't take them.

13 Just flat out, when even as an SJA, if
14 you had Virginia Beach respond to a case and
15 NCIS, they're like, you can have it. It's a sex
16 assault he said, she said, drinking, I don't want
17 it. And I don't know, you know, that -- so, one,
18 you know, there is that issue.

19 But, two, is I'm not licensed in any
20 of the, you know, I'm licensed in Illinois. I
21 work at Washington, D.C. I don't know what the
22 local -- I could never inform my client what the

1 local jurisdiction would do and be able to make
2 that determination because I'm not even licensed
3 in that area to understand specifically what that
4 local jurisdiction would do or who would even
5 take it.

6 So, I don't think that is a realistic
7 possibility. What I would like to see is our
8 prosecutors or the convening authority exercise
9 more prosecutorial discretion similar to what the
10 state and federals do and actually push cases
11 forward that can have evidence that can secure a
12 conviction at trial, not the baseline probable
13 cause where a victim's accusations meet the
14 elements of a crime. Okay, let's push it
15 forward.

16 And, actual looking at the case and
17 what the success rate will be and can we get a
18 conviction beyond reasonable doubt.

19 MR. STONE: Well, the legal standard
20 is going to be the same as yours, it's going to
21 baseline probable cause in state and federal
22 proceedings.

1 But if you're correct that the local
2 prosecutors would never take these cases, then it
3 seems to me would benefit your clients because
4 you'd come back to the military and say, okay,
5 legal prosecution of this guy has been declined,
6 you can do no more at this point on this sexual
7 assault crime than -- I mean, maybe you might
8 have some administrative thing that in the
9 barracks or something for some other lower
10 violation, but the crime that you wanted to
11 charge has been declined. It's done and you get
12 the professional determination that you might
13 like.

14 It seems to me you avoid all these
15 problems of people without enough experience, a
16 convening authority who's not used to these
17 cases, all the issues you mentioned. And, I just
18 wonder if an opt out provision is something you
19 may want to even get back to us and recommend.
20 Because I certainly have an open mind towards
21 that.

22 If anybody has any other thoughts,

1 that's my recommendation.

2 CHAIR HOLTZMAN: Okay, thanks very
3 much for your testimony.

4 I guess I just want to express my
5 concern about what you call the incentives for
6 fraud. And you mentioned -- I was participating
7 in a number of site visits around the country
8 with the Subcommittee of this Panel, so I'm
9 familiar with some of the points you've -- many
10 of the points you've made.

11 But the expedited transfers is one of
12 those and what are the other incentives for
13 fraud?

14 LCDR TREST: Yes, ma'am, the Sexual
15 Assault Management Meetings --

16 CHAIR HOLTZMAN: Why do those create
17 an incentive for fraud?

18 LCDR TREST: Because what is giving in
19 the -- is the victim now makes an allegation that
20 it has to be unrestricted, obviously, so they
21 want to be identified.

22 CHAIR HOLTZMAN: Right.

1 LCDR TREST: And now they have
2 basically the ear of the commanding -- their
3 commanding officer.

4 CHAIR HOLTZMAN: So, they're likely to
5 get -- are you saying they're likely to give
6 preferential treatment in the barracks and
7 assignments and is that what you're saying?

8 LCDR TREST: Yes, ma'am. I would say
9 that --

10 CHAIR HOLTZMAN: And, is there
11 evidence of that, that that happened?

12 LCDR TREST: I would say anecdotally
13 the majority, I would say, don't abuse it.
14 However, as a staff judge advocate, I saw a
15 specific victim whose case leader was determined
16 to have no merit but had to be worked up, use the
17 opportunity to ask for special request chits to
18 get in touch with the commanding officer.

19 Now, as SJA, I was able to, you know,
20 insert myself there. But not every commanding
21 officer has a staff judge advocate or that are
22 savvy with the courts-martial process and how

1 those implications can affect the courts-martial.

2 And, I've heard anecdotally, although
3 I haven't been witness to, and haven't done a
4 full investigation of, but at the Naval Academy,
5 the Commandant of -- I'm sorry, the
6 Superintendent of the Naval Academy sits on these
7 meetings and more times than not, we are having
8 accused and victims who are both students at the
9 Naval Academy.

10 And that's concerning because, yes,
11 victims are going to have real consequences, and
12 we're not trying to say there might not be
13 legitimate policy reasons when they have slips of
14 grades and things from being traumatized.

15 But one of the effects of having a
16 policy are the consequences that are created.
17 And, that's what we're trying to acknowledge is
18 that there are real consequences to these policy
19 initiatives where commanding officers are now
20 meeting face to face with these victims. They're
21 putting names with faces.

22 CHAIR HOLTZMAN: So, this is creating

1 a possibility for influence?

2 LCDR TREST: Yes.

3 CHAIR HOLTZMAN: Command influence?

4 LCDR TREST: And it's hard to
5 articulate. I mean, it is hard to articulate
6 this in a motions practice. But, it's there and
7 it's still developed would be my thought, ma'am.

8 MAJ ARGENTINA: And I think it goes to
9 the -- what really, and I, you know, tried to
10 litigate this as it really it comes down to a
11 Giglio issue.

12 That, you know, are they -- do they
13 have some type of incentive that they are
14 promised before a sexual assault happens and then
15 execute it when something goes wrong?

16 Because I've seen cases where they get
17 in trouble for something minor, let's say
18 disrespect or under-aged drinking. When they get
19 confronted about that, well, I was sexually
20 assaulted.

21 Now, that other misconduct may get
22 taken care of at NJP or something else, but they

1 know that they are going to get preferential
2 treatment from that.

3 I have one specific case when I was
4 senior trial counsel where the complaining
5 witness actually got out through military, you
6 know, PTSD and also a back injury.

7 But she had alleged sexual assault, a
8 gang rape of eight individuals at a party. She
9 then changed her story to five, and then it went
10 down to two. And, then, ultimately, it was found
11 through the investigation through NCIS that it
12 was all a lie and they had one specific piece of
13 evidence and DNA evidence that didn't quite match
14 up.

15 It was a consensual activity between
16 her and another person trying to mask that from
17 her boyfriend and so created this allegation of
18 gang rape. But she got out with full disability
19 benefits, more than 30 percent and has a medical
20 retirement and everything else.

21 So, that's a real incentive when you
22 know the process. And, I agree, that it's not --

1 I don't think this is a widespread thing, but it
2 did put eight Marines' lives on hold for a period
3 of time, and ultimately no one was charged.

4 I was the senior trial counsel at that
5 point and did all the PMMs recommending not going
6 forward.

7 CHAIR HOLTZMAN: Okay. I just want to
8 go back to the constitutional exception and your
9 plea that that be restored.

10 Why isn't it sufficient just to have
11 this Constitution out there? Why does it have to
12 be written into every Statute?

13 I mean, we have, I don't know, how
14 many laws, federal and state laws in the United
15 States? I mean, we probably have maybe a million
16 of them if you added them all up.

17 And I can't think of any others aside
18 from these two that had the constitutional, by
19 the way, this law has to comply with the U.S.
20 Constitution.

21 And, somehow, judges and lawyers and
22 the Supreme Court manage to construe these

1 Statutes in light of the Constitution.

2 So, why is that such a big problem
3 here?

4 MAJ REYES-STEWARD: Well, at the 32,
5 ma'am, the constitutional protection of the right
6 to confrontational -- first of all, those don't
7 apply at the 32. It only applies at trial. And,
8 so, it does create the necessity for a rule to be
9 written in that the evidence be assessed under
10 the same rules that the evidence is going to be
11 assessed at trial.

12 And, so, from my perspective, anyway,
13 that's why I believe that that constitutional
14 exception be reinstated into the 32.

15 CHAIR HOLTZMAN: But, the theory on
16 which you're operating is not necessarily the
17 theory that I was raising earlier.

18 I mean, the fact of the matter is, the
19 courts can always find that the Statute violates
20 the Constitution, whether in its writing or in
21 its application. There's nothing that stops --
22 there's nothing to stop any military judge or any

1 other judge from making such a conclusion.

2 So, I still don't --

3 LCDR TREST: And, ma'am, if I may?

4 When we leave it to the courts, which is what's
5 been pending, what we're getting is inconsistent
6 application.

7 And when we have an inconsistent
8 application by each judge because there's this
9 ambiguity, it was here, now it's not here.
10 What's the intent?

11 Now, we're causing more litigation and
12 an uncertainty in the system for both the victims
13 on securing that conviction and also the accused.

14 And, now, we're at a place where cases
15 are likely to be flipped and now we're going back
16 to where we started and where's the justice if we
17 could, in that process for anybody?

18 If we could be clear, and military
19 likes rules that are clear, then I think that
20 would take out the unnecessary litigation that
21 will be pending after trial and trying to resolve
22 this issue.

1 And, so, I think that's where it would
2 be helpful, ma'am.

3 CHAIR HOLTZMAN: Okay. I guess my
4 final point is that, I think some of the -- many
5 of the issues you've raised we've heard and I've
6 heard, and I think they're very concerning.

7 Investigation resources is vital.
8 Right to expert testimony and all of that, I
9 think are very legitimate concerns.

10 What troubled me very much about the
11 testimony here today, and I guess I had never
12 really been aware of it before, I should have
13 probably, but is that the Article 32 was as much
14 a vehicle for the convening authority as for the
15 parties in the process.

16 And that when you abbreviate that or
17 you minimize that or you make it, you know, just
18 a puny little model of what it used to be, and
19 you still have the framework of the convening
20 authority making this determination about
21 prosecution, what are the consequences of that?

22 I mean, it's very different, the

1 system in the civilian world because the
2 prosecutor makes that decision. And, here, you
3 could have trial counsel saying, we're not going
4 to proceed because there's no possibility of a
5 conviction or a remote.

6 You can have the hearing officers say,
7 this shouldn't go forward, but you're still
8 having convening authority making a different
9 decision.

10 But based from what you're saying now,
11 the evidence or the material or the information
12 that's going to be part of that decision making
13 process by the convening authority is really
14 abbreviated.

15 And if we're relying on the model of
16 -- it's not a prosecutorial-centric system, this
17 is a convening authority-centric system, then
18 have we somehow left tools that were out of the
19 convening authority's toolbox here?

20 And is that one of the reasons, and I
21 don't know that, I mean, maybe you have an answer
22 for it, although none of you is a convening

1 authority.

2 But, I mean, I'm just very concerned
3 that by trying to address this part of the system
4 here and this part of the system here, and that
5 part of the system here, that, I mean,
6 everybody's acting out of the best of motives and
7 intentions to try to make the system fair to the
8 victim, which it wasn't, no question about that.

9 But all the -- leaving out the tools
10 that the key -- a key component that the system
11 needs and I'm just very concerned that that's
12 been overlooked in this process.

13 LCDR TREST: And, ma'am, if I may?
14 And, the only person a convening authority has to
15 listen to is the victim. That being said --

16 CHAIR HOLTZMAN: Well, the SJA, too.

17 LCDR TREST: Well the -- yes, on that
18 authority for advice, you're right.

19 But what the victims say is so
20 monumental in this because if the victim doesn't
21 want to go forward, then it's our policy, DoD,
22 that it goes away.

1 And there are times that we have had
2 cases where the prosecutor has said, there is
3 evidence and the victims didn't want to go
4 forward, and the convening authority drops the
5 case.

6 But the same way there has been times
7 where the prosecutors say it shouldn't go forward
8 and the PHO says it should go forward, but the
9 victim wants to have her or his day in court, it
10 goes forward.

11 CHAIR HOLTZMAN: Right, but that's not
12 the policy yet.

13 LCDR TREST: Yet, no, but that's --

14 CHAIR HOLTZMAN: Of the Department of
15 Defense, it has a policy with regard to if the
16 victim says no. And I'm just concerned that,
17 when we're giving the commander, and I believe
18 justifiably so, the discretion to make this
19 decision, we should be giving the convening
20 authority as much information as they need to do
21 that.

22 And maybe that's just a concern that

1 I have just as a result of your testimony here
2 today. I don't have any further questions or
3 comments.

4 Thank you very, very much for sharing
5 your experience and expertise with us.

6 I guess we'll -- maybe we should take
7 a five minutes -- really five minutes because now
8 we're late. So, really do five minutes, and
9 we'll hear from our next panel.

10 (Whereupon, the above-entitled matter
11 went off the record at 2:47 p.m. at 2:57 p.m.)

12 HON. HOLTZMAN: Okay. Are we ready to
13 proceed? I think we're ready to proceed.
14 Please, members of the audience, take your seats.
15 Go outside if you need to converse. Thank you.
16 We want to start, and finish, if we can.

17 Our next panel, I want to thank all
18 the members for being here, deals with
19 perspectives of Special Victims' Counsel and
20 Victims' Legal Counsel on the application of
21 M.R.E. 412 and M.R.E. 513 at Article 32 Hearings
22 and Courts-Martial. We will begin with Major

1 Aran Walsh, U.S. Marine Corps, Regional Victims'
2 Legal Counsel-West.

3 Major, thank you and welcome.

4 MAJ WALSH: Thank you, ma'am.

5 Good afternoon, Madam Chair, Members
6 of the Panel. Thank you for having me here
7 today.

8 Since July of 2016 I have served as
9 the Marine Corps' Regional Victims' Legal Counsel
10 for the Western Region of the United States.

11 Prior to assuming that position I served as the
12 Victims' Legal Counsel for Marine Corps Base

13 Hawaii for approximately a year. Prior to that
14 position I served as the defense counsel on

15 Marine Corps Base Hawaii where I defended
16 Servicemembers against sexual assault allegations
17 in numerous cases.

18 In developing my comments for today
19 I've drawn upon my personal experience in
20 representing approximately 50 victims of rape,
21 sexual assault and domestic violence. While I
22 believe that my sample size was insufficient to

1 provide adequate comments, I have expanded my
2 considerations to the region which I supervise,
3 which currently provides over 150 victims of
4 legal services.

5 I'll begin my testimony by discussing
6 my perception of the new Article 32 hearing as
7 amended by recent case law and recent change to
8 the law. And as this has been stated earlier,
9 but an important trend to consider is the
10 victim's right to decline to testify at that
11 hearing how the defense has responded to that.

12 In both my time in Hawaii and as a
13 supervising attorney in the Western Region I have
14 observed that the majority of Article 32 hearings
15 are now what is referred to as a paper 32. This
16 is where parties essentially attend the hearing
17 and submit written documentation, provide
18 comments and then close the hearing. Very
19 little, if any, testimonial evidence is elicited
20 and documentation evidence is usually submitted
21 at large just in a bulk submission.

22 Considering this, I would approximate

1 that about 70 percent of Article 32 hearings, the
2 defense offers little to no evidence in the
3 matter except to show up at the hearing and
4 object to the forum and the rule changes as a
5 unconstitutional change to the law.

6 This paper nature to the hearing
7 creates its own challenges to victim
8 representation as well, specifically notice and
9 transparency as to what is being admitted into
10 evidence. We have dealt with issues where the
11 hearing officer has failed to adhere to the
12 procedural requirements of Military Rule of
13 Evidence 412. The hearing officer seems
14 disinclined to consider 412, however, in
15 responding to this they tend to admit the
16 evidence but then state that they did not
17 consider it. Then the VLC is left to after the
18 fact move to have it sealed in accordance with
19 the procedure and then articulate the objection
20 that the procedural notice wasn't adhered to.

21 Now, we have not seen a writ in this
22 situation, but this is an area that I could

1 envision a writ being filed. But, as is often
2 the case, the victim usually wants to proceed
3 forward and does not want to redo anything.

4 My personal interpretation of Article
5 32, as well as my guidance to the VLCs in my
6 region, is that the rule, the RCM for the Article
7 32, imports not only the exclusionary rule of
8 412, but also the procedural requirements and the
9 notice requirement of five days for the victim.
10 However, absent having a meaningful right to
11 inspect the evidence that's being submitted in
12 documentation form and a right to the Article 32
13 report after it is completed, the VLC, and
14 therefore the victim, is hampered in their
15 ability to ensure that M.R.E. 412 evidence is not
16 being admitted.

17 Moving to M.R.E. 513 evidence at the
18 Article 32. I'll start by stating that I do not
19 believe copies of these documents and evidence of
20 this nature should be provided to the defense at
21 this base. That said, no hearing officer has
22 attempted to order production of M.R.E. 513

1 evidence and I have not seen a defense counsel
2 who has sought to enter it or have it produced at
3 this base, the Article 32.

4 My position on the discovery prior to
5 arraignment is found in my attempt to advance the
6 practice of victim legal representation to inform
7 more closely with federal jurisdictions with
8 respect to discovery of sensitive information and
9 then also the victim's ability to obtain a
10 protective order, a judicial protective order,
11 where it's necessary.

12 I feel strongly that such evidence
13 such as mental health records, victim contact
14 information, sexual assault forensic examination
15 photos and the like should not be copied and
16 provided to the defense until the victim legal
17 counsel has reviewed them and had the opportunity
18 to seek a protective order from the judge. And
19 in our system, as you know, the judge doesn't
20 really exist until the convening authority and
21 the referral.

22 There are mechanisms in the Rules for

1 Courts-Martial that allow for sealing of exhibits
2 and control, but I appreciate the power of a
3 court order a little bit more than those
4 mechanisms, especially when dealing with civilian
5 counsel and defendants who may leave the military
6 and not be subject to military orders, but would
7 still be subject a court order if they violated
8 it.

9 I'll turn next to the topic of
10 Military Rules of Evidence 412 during the course
11 of a courts-martial. In my experience the
12 defense always seeks to admit M.R.E. 412-type
13 evidence in a contested courts-martial dealing
14 with an Article 120 violation.

15 As M.R.E. 412 is a rule of relevancy,
16 the 412 closed session essentially provides the
17 parties with a ruling of admissibility in advance
18 of the trial on the merits. As such, the defense
19 has begun offering to admit a laundry list of
20 M.R.E. 412-type evidence because they'll be
21 essentially told what's admissible and what's not
22 admissible in advance. Some of this evidence

1 sometimes, as we've heard before, is quite
2 possibly not 412, but in an abundance of caution
3 the Defense Bar presents at the 412 hearing.

4 I find that in approximately 20 to 30
5 percent of the cases the defense offers evidence
6 of an alternate source of semen, injury or
7 physical evidence. This type of evidence is
8 often found admissible and accounts for a
9 significant portion of the evidence admitted
10 pursuant to an exception to M.R.E. 412.

11 Evidence of consent or mistake of --
12 as to consent is almost always offered at a 412
13 hearing by the defense. I would estimate it is
14 offered in excess of more than 80 percent of the
15 cases. However, military judges tend to subject
16 this offered evidence to a high level of scrutiny
17 and many of the written opinions and analyses are
18 of a high quality from the bench. I would
19 estimate that 50 to 70 percent of the offered
20 consent evidence is admitted, however, the judge
21 usually narrowly tailors this evidence and limits
22 its use at trial.

1 Finally, we have struggled with offers
2 of M.R.E. 412 evidence pursuant to the
3 constitutionally required exception. Here the
4 theory of admissibility often takes an amorphic
5 pseudo-scientific psychological theory. Theories
6 such as transference of the offender's identity
7 or cognitive inability to perceive the nature of
8 reality are often presented by the defense.

9 These theories have an extremely low
10 chance of admission, however, and unfortunately,
11 these theories also tend to involve the most
12 personal of M.R.E. 412-type evidence such as past
13 childhood sexual abuse, past sexual trauma or
14 gender orientation identity issues. I cannot
15 overstate the importance of the implementation of
16 a closed and sealed session for the M.R.E. 412.

17 The privacy offered by the closed
18 session offers immeasurable comfort when advising
19 a client who is usually confused, outraged, hurt
20 or any combination of the above by the fact that
21 this is even being discussed. In cases where
22 evidence of sexual history or predisposition is

1 found admissible there is an understandable
2 emotional impact by the victim. Victim legal
3 counsel often hear why is this about me all of a
4 sudden or I feel like I'm on trial.

5 My personal opinion is that I have not
6 observed a case where the exclusion of M.R.E. 412
7 evidence has a negative effect on the defense,
8 however, when M.R.E. 412 evidence is admitted, it
9 has a significant impact on the trial. When
10 presented with M.R.E. 412-type evidence, the
11 members are likely to become distracted by the
12 truth or untruth of the asserted sexual history
13 of predisposition and lose focus on the ultimate
14 issue of guilt or innocence.

15 I have the highest opinion of the
16 judiciary in their handling of M.R.E. 412. By
17 and large military judges are presenting fair and
18 consistent rulings with M.R.E. 412 issues.

19 The one issue that I have run into
20 relates to the text of M.R.E. 412. M.R.E.
21 412(c)(2) allows the defense to call the victim
22 as their witness. In the vast majority of cases

1 the military judge will not call the witness
2 until the defense has articulated what their --
3 why their testimony is necessary to support their
4 M.R.E. 412 motion. However, I have experienced
5 military judges that believe that the rule allows
6 the defense to call the witness, and since they,
7 the defense, have the burden of persuasion, the
8 judge is going to allow them latitude with their
9 witness.

10 In some cases the defense has not
11 provided what testimony they seek to elicit in
12 their written motion or use any expected
13 testimony in their legal analysis of the written
14 motion. They have simply wrote that they intend
15 to call the witness and then call the victim at
16 the stand.

17 I think M.R.E. 412 could be
18 strengthened by adding language that requires the
19 defense to articulate what they seek to elicit
20 from the victim, why it is necessary to their 412
21 motion, and why they are unable to obtain that
22 evidence from another source.

1 Turning to M.R.E. 513 evidence. In
2 about 70 percent of cases the defense has sought
3 production of mental health records via an in
4 camera review. There are instances when they
5 have been successful, specifically when the
6 victim has waived the privilege either
7 intelligently with the advice of counsel or in
8 some cases during the investigation process prior
9 to obtaining VLC services.

10 In cases where the privilege has been
11 waived, the judge usually orders discovery. It's
12 important to note that this is not an M.R.E. 513
13 motion, but is a motion to compel discovery since
14 the records are already in possession of the
15 government. The privilege has been waived at
16 that point.

17 In light of the elimination of the
18 constitutional exception in recent case law
19 military judges are no longer conducting in
20 camera reviews in my experience. There's simply
21 no mechanism to conduct the *in camera* review.
22 With the elimination of the constitutional

1 exception the state of the law is that they have
2 removed the constitutional exception as a
3 mechanism to allow *in camera* review for an
4 enumerated privilege that exists. And we've
5 identified a societal interest in why we've
6 extended this privilege to victims' mental health
7 records.

8 It's important -- as the parties to
9 the courts-martial talk, it's important to note
10 not to confuse the standard which they perceive
11 as being -- of some evidence as being perceived
12 to be lifted to an artificial level. It's not.
13 Most often it's the judge saying I understand
14 what -- some evidence you presented. What
15 standard enumerated exception are you looking to?
16 And that's where they can't point to the
17 constitution anymore.

18 My perception is that military judges
19 are adequately trained to address this issue and
20 are producing fair and consistent decisions.
21 This consistency is welcome to many of the
22 clients who desperately desire and seek mental

1 health services. Being able to provide clear
2 guidance as to the mental health privilege is
3 critical as a VLC because many of our clients
4 desperately do need mental health services as a
5 result of the crime that's been committed against
6 them.

7 In closing I'll state that I would
8 like to see greater right to inspect the
9 admission of evidence at the Article 32 and would
10 like to -- and that would enable the VLC the
11 ability to seek protective orders. In many cases
12 the protective order is not just about privacy;
13 they are about the victim's safety because they
14 disclose current location and other identifying
15 features such as family members.

16 I also believe that the victim should
17 have the right to the Article 32 report after it
18 is produced to allow the victim's legal counsel
19 to determine whether the process was done
20 correctly and whether their rights were afforded
21 to them.

22 Furthermore, I would welcome the

1 changes to M.R.E. 412 that I discussed where the
2 defense has to articulate why they are calling
3 the victim to the stand.

4 The Panel earlier discussed the nature
5 of Article 32, and I will say that in my
6 anecdotal experience I'm not seeing more cases go
7 to trial at Camp Pendleton or in the region, and
8 I believe this coincides with the Marine Corps'
9 implementation of the Prosecution Merits Memo.
10 The Prosecution Merits Memo is where the trial
11 counsel with possession of all the evidence
12 writes a complete and informed opinion as to the
13 likelihood of the case and whether they want to
14 take it to trial, also considering their staffing
15 issues. That is presented to the SJA and the
16 convening authority.

17 So it is my position that the
18 convening authority is receiving adequate
19 information to make their convening authority
20 decisions and the referral decision, and the
21 changes to the Article 32 where the victim does
22 not have to take the stand are not really

1 affecting that in any way.

2 I will say that I don't concur when
3 the defense says that there's a real benefit to
4 the victim going through the Article 32 process
5 as well, that there's nothing -- they're finished
6 and there's nothing necessary to my counseling of
7 a victim that I need that they'd have to take the
8 stand for me to be able to provide them. It's
9 traumatic and it's unnecessary and it slows the
10 process down.

11 In general, I think the Article 32 is
12 akin a little bit to like the appendix organ. We
13 know it was useful at one point; it might still
14 do something, but it's starting to become a
15 little bit vague of what the purpose of the
16 Article 32 is.

17 With those changes in mind, I'll say
18 that I believe the law is in a good place right
19 now and the rulings and motions we are seeing are
20 becoming increasingly consistent.

21 Thank you, Madam Chair and Members of
22 the Panel, for the opportunity to discuss these

1 issues with you.

2 CHAIR HOLTZMAN: Thank you very much,
3 major.

4 Our next presenter is Lieutenant
5 Commander Elizabeth Hutton, U.S. Coast Guard,
6 Specials' Victim Counsel.

7 Commander, welcome and we look forward
8 to your testimony.

9 LCDR HUTTON: Thank you. Good
10 afternoon, Madam Chair and esteemed Members of
11 the Panel.

12 I've been acting as a Coast Guard SVC
13 since June of 2015. My other prior experience as
14 relevant for this Panel would be I served as a
15 prosecutor imbedded with the Navy at the Region
16 Legal Service Office in Norfolk. And I also
17 served as a prosecutor and prosecuted cases for
18 the Coast Guard. So though we are not DoD and
19 we're different from DoD, I've had a little bit
20 of that experience.

21 As requested, the information I'm
22 going to provide to you are my own personal

1 experiences and don't reflect that of the Coast
2 Guard, and the same for my opinions.

3 To address specifically M.R.E. 412
4 evidence at 32 hearings, in my personal
5 experience the defense has attempted to introduce
6 evidence under this rule at all Article 32
7 hearings involving my adult clients. I believe
8 this is consistent with other Coast Guard SVCs
9 and would estimate across the board that about 90
10 percent of the time 412 evidence is attempted to
11 be admitted at these hearings. Typically the
12 evidence deals with other sexual behavior by the
13 client, most notably with the accused, which is I
14 think what we've -- consistent with what we've
15 heard today.

16 I have also had evidence in three of
17 my last four adult victims of a prior sexual
18 assault attempted to be admitted even though the
19 constitutional exception doesn't apply, as well
20 as evidence of sexual predisposition. An example
21 of that was 100-plus pages of Facebook messages
22 between my client and the accused where they

1 talked about essentially sexually charged topics.
2 So I've kind of seen the gamut attempted to be
3 admitted at 32 hearings.

4 To date, fortunately for me, the PHOs
5 I've had the experience of working with have
6 adhered to the procedures outlined in 412 at the
7 32 hearings with the exception of the fact that
8 most of the time, if not all the time, notice is
9 not being provided at all, or in a five day
10 window, and the evidence is kind of sprung mid-
11 hearing. The PHOs have been diligent in
12 listening to us asking for the hearing to be
13 closed, to take the testimony, to make an
14 admission decision and then to hopefully seal the
15 record following the 32 hearing. So I have been
16 fortunate in that experience in the Coast Guard.

17 I think that they have a conservative
18 approach when admitting 412 evidence, especially
19 when the notice requirements are not being met.
20 I think they're admitting evidence that probably
21 has a high likelihood of coming in: prior sexual
22 relationship with the accused and the victim, but

1 things that are sort of outside that scope or
2 outside that box, I think they're being more
3 conservative and not letting that information
4 come in.

5 That being said, the fact that this
6 evidence is being introduced, that some of it is
7 being attempted to be introduced under the
8 constitutional exception just highlights the fact
9 that we do need PHOs that have -- and again --
10 preliminary hearing officers; I apologize for the
11 acronym, that have significant military justice
12 experience and also training to do that. I know
13 right now we don't have judges doing these types
14 of hearings. I think some sort of threshold
15 would be necessary just because of the high
16 stakes and sensitivity of the information.

17 As far as writs, again I haven't had
18 the opportunity to or need to file a writ due to
19 a 32 ruling. Again, I've had a pretty good
20 experience with the 32s. But I also think that
21 filing a writ when a decision, if it came down to
22 it -- there's a concern of delay and there's also

1 the idea that it's not binding on the trial.
2 Just because the 412 evidence has come in at the
3 32, doesn't mean that it's going to come in at
4 the trial. And so now I'm better prepared to
5 file a motion in limine or respond to a defense
6 motion when the time comes moving forward.

7 To specifically kind of address a
8 question I saw that -- regarding the Fiscal Year
9 14 changes to 32 hearings, I think the changes
10 have been incredibly positive from a victim
11 perspective, and I don't think they've had that
12 much impact.

13 When I was a prosecutor under the old
14 way, I -- defense counsel used to keep victims on
15 the stands for three or more hours, just as a
16 rule. Not because they really had any
17 information that they really wanted to get from
18 them, but they wanted to make them feel
19 uncomfortable and sit up there and answer
20 questions. And some of the questions had no
21 relevance. And yes, you can object, but the
22 Rules of Evidence don't apply to 32. So we got

1 into this weird place where it was seemingly an
2 abusive environment for them and under the guise
3 of the purpose of discovery.

4 I think not having clients testify at
5 32 has been incredibly helpful for them. It
6 doesn't inhibit my advice to them as to whether
7 it's a good case or not moving forward.
8 Obviously, those are conversations we're having
9 as their counsel. Do they want to proceed?
10 What's it like to testify? They don't need to
11 feel that at a 32 to understand what they're
12 getting themselves into moving forward.

13 And I will note that all but one of my
14 clients has agreed to actually meet with defense
15 counsel. So even though they didn't testify at
16 the 32 hearing, when they have been asked to --
17 had a request to meet with defense counsel, we'd
18 talk about that and they made the decision to
19 meet with them. And they've talked to them and
20 answered their questions, and we've left.

21 The one client who chose not to
22 testified in an Article 39a session for three

1 hours and she felt that she didn't really have
2 much else to say to that person. And so she's
3 the only person I've had so far that has declined
4 that invitation to meet with them.

5 The other issue at 32 hearings is
6 again clarifying probable cause. I think that
7 different hearing officers are applying different
8 standards. I'm not sure if they're very clear on
9 what probable cause is all the time. Again, I
10 think some clarity in that respect without going
11 too further there would be helpful.

12 In addressing M.R.E. 412 at courts-
13 martial, similar to my experience at 32 hearings,
14 90 percent or more of my cases we're having 412
15 evidence tried to be introduced at the courts-
16 martial proceedings. Again, the majority of that
17 is other sexual behavior, but the same sexual
18 predisposition-type things apply: the Facebook
19 messages. I've had nude photos of my clients
20 tried to be admitted by evidence. And in almost
21 every case sometimes that evidence is highly
22 unlikely or most certainly will not be admitted,

1 but is attempted to be admitted anyway.

2 And to kind of use my co-counsel's
3 point here about having victims testify, at a 39a
4 session for a 412 hearing I had an experience
5 where a client was subject to three hours at that
6 hearing of questioning that discussed previous
7 sexual relationships with other men, the 100
8 pages of Facebook messages that counsel tried to
9 go into every line of messaging that she had
10 made, which was highly irrelevant. Despite
11 objections from myself and the prosecutor that
12 the questions were degrading, which was against
13 the M.R.E.s, and that they were completely
14 irrelevant, he gave the defense counsel wide
15 latitude to go into these matters with my client.

16 And she didn't understand it. I had
17 a hard time explaining to her why she had to
18 answer those questions in that setting. And
19 there was no proffer as to why -- what they were
20 trying to get at by having her testify ahead of
21 time. There was no discussion ahead of time of
22 where we were going with this before her taking

1 the stand.

2 And having her testify in those
3 incidents were -- it kind of circumvented the
4 purpose of 412, which is one of our arguments,
5 right, which is to protect the victim of the
6 emotional trauma of being questioned about their
7 sexual history while on the stand. And that's
8 exactly what happened in that case.

9 Ultimately the majority of the
10 evidence was ruled inadmissible as it didn't fall
11 within an exception, so it did not come in in
12 front of the finders of fact in that case, but my
13 client was emotional. She was exhausted. Even
14 though she agreed to continue and testify at the
15 courts-martial, I think that could be a deterrent
16 for people going forward.

17 That particular client in her
18 sentencing said that she thought this process, in
19 reporting her sexual assault -- because she had
20 heard of other possible victims; in this case
21 there was another possible victim -- there was
22 another victim, sorry -- that she was doing the

1 right thing, that she would feel relief from
2 coming forward. And instead she said this
3 process was relentless. Relentless was the word
4 that she used. That's what she told me and
5 that's what she told the jury. And I think that
6 was really impactful for that case, but also very
7 telling of -- that this process is still not easy
8 for victims and that their privacy rights are
9 still at stake.

10 As far as Writs of Mandamus we haven't
11 had any in the Coast Guard as far as I know for
12 412 issues, but I -- so far we've had judges that
13 I think are -- know how to follow the law when
14 they're filing or supplying their orders and
15 keeping the appropriate materials out and letting
16 the appropriate 412 materials in. 412 is
17 admitted in almost every case I've had as well,
18 and they're doing a good job of also tailoring it
19 down. So yes, you can talk about the fact that
20 maybe they sent sexually charged messages to each
21 other, but you're not going to bring in every
22 single message that they sent to each other. So

1 things of that nature.

2 To move onto M.R.E. 513 quickly, at 32
3 hearings we're not seeing it at all. I think a
4 lot of that has to do with -- starting with law
5 enforcement people are being more protective of
6 mental health records from the get-go, not --
7 making sure they're not part of the investigatory
8 file, making sure they're not being discovered as
9 part of discovery and understanding that there
10 are greater protections afforded to those
11 records, and reminding people, especially from
12 the SVC perspective of the laws that apply to
13 protect those records and that there's a process
14 in order to get them.

15 When they exist, defense is most
16 certainly trying to get them. I have an upcoming
17 case where that's going to be an issue. We
18 haven't litigated that yet, but as we've already
19 discussed, in the Coast Guard we've had one case,
20 which is the *HV v. Kitchen*, where a writ was
21 filed, and that was dealing with what does mental
22 health records cover?

1 So to that point the only other thing
2 I would add about 513 records are maybe defining
3 what's included in mental health records, maybe
4 something to look at in the future as opposed to
5 leaving the interpretation up to the courts.

6 So subject to your questions that's
7 all I have and thank you very much for your time.

8 CHAIR HOLTZMAN: Thank you very much,
9 commander.

10 We'll next hear from Commander James
11 Toohey, U.S. Navy, Victims' Legal Counsel.

12 Commander, welcome.

13 LCDR TOOHEY: Thank you, Madam Chair
14 and distinguished Members of the Panel.

15 My name is James Toohey. I'm a
16 victims' legal counsel now for about two-and-a-
17 half years. I am -- I currently supervise eight
18 Navy victims' legal counsel on the West Coast and
19 have had about approximately 100 clients since
20 I've started.

21 To start off with Military Rule of
22 Evidence 412, I think generally speaking the

1 practice as it relates to 412 that we see most
2 frequently are the exceptions under (b)(1)(B) and
3 (b)(1)(C) for consent and for the
4 constitutionally required exception. We do not
5 see, unlike Major Walsh, as often the alternate
6 source of semen or injury. Although it's hard to
7 say what impact the elimination of (C), the
8 constitutionally required exception at Article
9 32s has had on the admission of evidence, I have
10 seen evidence excluded specifically on that
11 basis, but also I have not seen particularly the
12 attempted admission of 412 evidence either on
13 that basis or on mistake of fact or consent
14 basis, often because I think defense counsel is
15 not going to show their hand on that for
16 strategic reasons at a 32. So it's hard to say
17 what impact that has in terms of the removal of
18 that, but I have seen less of it at 32s.

19 Also, because victims frequently do
20 not appear at Article 32 hearings, as we already
21 discussed in this -- in front of this Panel
22 today, there's less incentive often for the

1 defense to raise it because they're not going to
2 be able to address it with the person that it
3 most impacts.

4 Just to go back to the point of the
5 change in Article 32s, I have had several clients
6 who have voluntarily testified despite having --
7 not having to testify, and they went through that
8 process. Their cases were still referred. It
9 went through the normal rigors of that process.
10 And so, in terms of being able to differentiate
11 an effect of victim participation, I have not
12 seen any in my cases that have been referred or
13 not referred.

14 I would say that I'm running at about
15 an 85 percent no referral rate among my clients.
16 I think among my 100 clients I've probably had
17 roughly 15 end up at a court of some type. So in
18 terms of over-prosecution that's not particularly
19 high.

20 I have not personally observed any 412
21 hearings at Article 32s, so I can't comment on
22 the quality of the analysis. I suspect it's

1 going to depend in large measure on the quality
2 of the military justice experience of that
3 particular PHO. I'm not aware of any specialized
4 training that those individuals are receiving on
5 these issues.

6 For courts-martial themselves the 412
7 motion rate is actually what I've seen
8 anecdotally quite a bit lower actually than what
9 I've heard from other members. And I don't know
10 -- certainly the success rate is higher than the
11 corresponding 513 rate. So there's probably a
12 comparable rate of 513 and 412 motions being
13 filed, although the success rate of the 412
14 motions is higher.

15 I think that's a consequence of the
16 rule is better understood. Defense counsel are
17 filing motions that they know are going to be
18 successful, at least in some capacity. And in
19 513 they're kind of just taking the shotgun
20 approach on certain cases because they're just
21 not clear what the parameters are and they're not
22 being successful.

1 Frequently because of the nature; and
2 just to distinguish, as I know the Panel is aware
3 -- I mean, 412 is an exclusionary Rule of
4 Evidence and 513 is an actual privilege, so the
5 information that's at stake is considerably
6 different and usually the 412 information is
7 already well known to the parties. All we're
8 doing is fighting about whether or not it's
9 coming into court.

10 So when victims go through 412 -- and
11 there have been obviously exceptions where there
12 have been some pretty trying hearings, but when
13 information is admitted pursuant to 412, victims
14 are often not overly concerned with the admission
15 of that evidence. In many cases the victims are
16 the ones who brought that up originally to
17 investigators.

18 To distinguish that from 513, which is
19 a completely different animal, which I'll address
20 in a bit. Often, when admitted, military judges
21 often limit or modify the way in which that
22 information is admitted, even when they do rule

1 in favor of the moving party under 412.

2 I have not personally encountered a
3 writ yet filed on 412, on a 412 issue. I think
4 that's a combination of factors. As I already
5 said, sometimes victims are -- we're kind of
6 expecting that that information was going to be
7 at trial. They don't want to delay the trial if
8 it were -- if that's going to result from them
9 filing a writ.

10 And particularly if they believe based
11 on their counsel's advice that they think their
12 chances of success, even if they were to file a
13 writ, is going to be low, then they're unlikely
14 to probably pursue that remedy. Obviously, while
15 Article 6b provides a jurisdictional basis for us
16 to appeal, we still have to meet the very high
17 Writ of Mandamus standard to get that clear and
18 indisputable relief, which is challenging.

19 Moving onto Military Rule of Evidence
20 513, at Article 32 preliminary hearings -- and I
21 know we've talked about this and I think Mr.
22 Taylor was bringing up the issue of -- because

1 513 -- because preliminary hearing officers have
2 no production powers, really you would have to
3 have the stuff coming into the hearing for there
4 to be a question of whether you could admit it.
5 And very frequently nobody has their hands on
6 that information pre-32, or even pretrial because
7 it hasn't gone through the process. So I have
8 not seen the attempted admission of any 513
9 information at a preliminary hearing and I
10 certainly haven't seen anything attempting to
11 produce that information.

12 In courts-martial I would say that the
13 defense has sought production for mental health
14 records. At a comparable rate to my 412 motions
15 it's probably about 40 to 50 percent of cases.
16 The military judges that I have practiced in
17 front of have rigorously applied the 513
18 standard. The initial issue during litigation is
19 typically the scope of the rule and what is
20 privileged and what is not privileged. And that
21 certainly is an area of uncertainty right now
22 based on the fact that the confidential

1 communication is rather undefined.

2 The defense continues to argue the now
3 eliminated (d)(8) exception for constitutional
4 required as the basis for admission and the basis
5 for production and *in camera* review. The only
6 other exception that I've seen argued is for a
7 crime of fraud, (d)(5), which is -- I saw it only
8 one time and it was not an effective argument.
9 But the military judges in front of whom I've
10 practiced and who have held these hearings under
11 M.R.E. 513 were all sufficiently trained and
12 experienced to handle the issues and properly
13 dispose of them.

14 I have not yet personally encountered
15 a pure 513 motion that resulted in a military
16 judge ordering production for *in camera* review.
17 The defense motions typically provide little in
18 the way of a specific factual basis. And if the
19 rule as recently amended is faithfully applied,
20 that being with (d)(8) removed, it is exceedingly
21 difficult for the defense to meet that burden and
22 -- or any moving party to satisfy the procedural

1 requirements.

2 And just as we're talking about M.R.E.
3 513 I think it's just a useful note to address
4 the fact that this is a rule for any patient. It
5 is not just for sexual assault victims. So we've
6 talked a lot about that fact, that sexual assault
7 victims are benefitting from it. But this is a
8 rule of privilege that applies to anyone whose
9 mental health records are at stake.

10 Now I mentioned a pure 513 motion
11 because what I consider to be an issue that has
12 arisen and was mentioned earlier is the
13 relationship between the Integrated Disability
14 Evaluation System, which the VA and the fitness-
15 for-duty standard go together. And it's a common
16 issue because many of our victims are going
17 through what's called the IDES process
18 simultaneously with their courts-martial, and
19 their mental health records may have been
20 accessed during that VA process.

21 And so it's a way in which defense
22 counsel have started to address potential motives

1 to fabricate, as was mentioned earlier, the
2 ability to ultimately get a VA disability rating
3 for military sexual trauma and kind of back door
4 some of the things that they might not be able to
5 get through a 513, a pure 513 motion. So that's
6 potentially an issue that I believe we'll
7 probably see more of.

8 Ultimately the release of records,
9 even in those cases, has been limited in scope
10 subject to a qualified protective order. And in
11 my experience the victim had not been concerned
12 sufficiently with what had been released to
13 pursue any type of appellate action.

14 I've spoken to multiple VLCs who were
15 preparing for adverse rulings and getting ready
16 for the potential to file writs. Ultimately
17 those cases were either resolved in their
18 client's favor or their clients decided that they
19 didn't want to go forward with the appellate
20 process.

21 Under Military Rule of Evidence 513 I
22 think as a proposal the -- currently the scope of

1 the rule's privilege is uncertain. One of the
2 most critical parts about the privilege is that
3 we want to be able to have certainty for victims
4 that when they walk in the door with their
5 psychotherapist and we tell them that everything
6 you tell your psychotherapist is protected
7 because you're here in distress and you need my
8 help that we can actually back that up.

9 And when we look back at *Jaffe v.*
10 *Redmond* and what it talks about, that case
11 specifically addresses the idea that there is a
12 cost in the system when you recognize a
13 privilege. There is a cost to not being able to
14 utilize what they always refer to as every man's
15 evidence in this pursuit of truth finding. And
16 that cost is that we are going to protect these
17 records and make sure that we can guarantee on
18 the front end to be able to make sure that this
19 victim is able to access care and not be subject
20 to the whims of some military judge's ruling
21 later.

22 And so being more succinct and being

1 more specific about what it means to be covered
2 by the privilege and then being protected and not
3 having this vague notion of constitutionally
4 required exception is going to give them that
5 certainty that ultimately they need to be able to
6 access this care. Because there have been
7 concerns relayed to -- as has been mentioned
8 earlier I think during the Trial Counsel Panel,
9 there have been concerns relayed about victims
10 delaying or rejecting treatment because they are
11 specifically concerned about someone looking at
12 their records later. And that is a legitimate
13 concern and it is an important consideration.

14 Overall, and this probably not
15 surprising to the Panel, I believe that the
16 existence of the VLC Program has been very
17 positive to the development of our motions
18 practice under Military Rule of Evidence 412 and
19 513. I think that very frequently trial counsel
20 look to us to provide substantive expertise in
21 those areas when motions are filed. And
22 occasionally, although not frequently, when our

1 interests verge we are there to ensure that the
2 court has every perspective to consider.

3 I just wanted to comment on one recent
4 case that had been mentioned earlier, but it was
5 a Petition for a Writ of Mandamus from a victim
6 in the Army courts. The case is *DB v. Lippert*.
7 It's often referred to as *Duckworth*. And that
8 case has really profoundly impacted I think the
9 way that we have been able to evaluate M.R.E. 513
10 and has been significantly relied upon, even in
11 the Navy courts in front of judges I practice in
12 front of, for its analysis and the expertise that
13 it provides. And that's from February of last
14 year.

15 I thank you for your time today. I
16 appreciate the opportunity to talk to you about
17 this important topic.

18 CHAIR HOLTZMAN: Thank you very much,
19 commander.

20 We'll next hear from Captain September
21 Foy, U.S. Air Force, Special Victims' Counsel.

22 Captain, thank you very much for being

1 here and we look forward to your testimony.

2 Capt FOY: Thank you very much. Good
3 afternoon, Madam Chair and distinguished Panel
4 Members. Thank you for the opportunity to speak
5 with you today.

6 My name is Captain September Foy. I'm
7 currently serving as an Air Force special
8 victims' counsel. I'm stationed at Robins Air
9 Force Base in Georgia. In my first assignment
10 with the Air Force -- I was the Chief of Military
11 Justice and a prosecutor at Andersen Air Force
12 Base in Guam. Two-and-a-half years after that I
13 moved to Robins Air Force Base where I spent two
14 years as the defense counsel there before moving
15 to my current position as a special victims'
16 counsel in July of 2015. In my time in the Air
17 Force I've prosecuted, defended or advocated for
18 victims in over 30 courts-martial, represented
19 over 500 defense clients and over 40 special
20 victims clients.

21 As an initial matter I would like to
22 state that I can only speak from my own personal

1 experience. I am not speaking for the Air Force
2 as a whole.

3 I would first like to address the
4 Article 32 hearing and specifically M.R.E. 412
5 and 513, how it is playing out in those hearings.

6 I would first like to state that the
7 Article 32 hearing in my experience is not a
8 rubber stamp hearing. I was a defense counsel
9 when the law regarding the Article 32 hearings
10 changed, and initially the feeling on the ground
11 was that there was no point for the hearing and
12 that it would all just be these paper cases we've
13 been talking about with no opportunity for
14 discovery or advocacy.

15 However, I have come to see that that
16 viewpoint was wrong. The defense counsel
17 community in the Air Force especially is pushing
18 back and they are quite frankly doing a very good
19 job on behalf of their clients in Article 32
20 hearings.

21 I've participated in 14 Article 32
22 hearings either as a defense or special victims'

1 counsel since the rules have changed. And as an
2 SVC I have actually had three victims testify at
3 Article 32 hearings because this was just what
4 they wanted to do, this was in their best
5 interest for their case and just the unique
6 circumstances allowed for that. I've had
7 additionally four clients attend Article 32
8 hearings as an SVC, but they chose not to
9 testify.

10 As an SVC I have had great success in
11 advocating for my clients specifically regarding
12 M.R.E. 412 and 513 at Article 32 hearings. I
13 would say that in almost every Article 32 hearing
14 that I have had, M.R.E. 412 has been an issue or
15 come up or been a part of the evidence in some
16 way, shape or form.

17 M.R.E. 513 actually does come up quite
18 frequently, although I've only had one Article 32
19 hearing as an SVC where defense counsel has
20 actually tried to get at my client's mental
21 health records. And as a PHO has no power to
22 compel those records, they were unsuccessful at

1 that juncture, but they did sort of ask for that
2 and we spent about a good hour talking about that
3 issue at an Article 32 hearing.

4 Practically how this is playing out,
5 at least in Air Force courts, as we've heard,
6 most of our preliminary hearing officers are
7 military judges. Those that are not tend to be
8 Reservists with a great amount of experience or
9 staff judge advocates from another base, or
10 something of that nature.

11 I have been allowed to stand and
12 object especially if my client -- if it's one of
13 the situations where my client is on the stand,
14 I've been allowed to stand and object pretty much
15 during not only my client's testimony, but other
16 witnesses that may be testifying. So my ability
17 to advocate in the Article 32 setting -- at least
18 in my experience I've been allowed great latitude
19 to basically stand up and argue my point.

20 And I have been listened to. I almost
21 always, if there's an issue that comes up, file a
22 written objection later. I am mostly successful

1 on the M.R.E. 412 objections because the
2 constitutional evidence is not allowed. And I've
3 been very successful in 513 at the Article 32
4 stage.

5 There was some concern earlier that
6 the convening authorities or the decision making
7 authorities may not have a lot of evidence being
8 presented to them. I can say, ladies and
9 gentlemen, that the most common practice in the
10 Article 32s since the rules have changed; and
11 this was even the case before that, is for the
12 government to introduce as an exhibit the
13 recorded interview of my client by law
14 enforcement. At least in Air Force our OSI is
15 recording the initial interview with my client.

16 Those interviews typically run between
17 two to three hours. So the PHO is getting two to
18 three hours essentially of my client talking in
19 an interview setting. So there was discussion
20 before, there may be a case where you might just
21 have a statement, a written statement from a
22 client. It is almost always the case now where

1 they are getting that big giant interview from my
2 client. And again, that is two to three hours.

3 In almost every Article 32 hearing
4 since I came into the Air Force the PHO has
5 granted defense and government counsel the chance
6 to present argument actually at the end of the
7 hearing. And defense counsel has been very --
8 doing a very good job of using the evidence that
9 the government has introduced to basically
10 present a closing argument and poke holes in the
11 testimony. So they are taking advantage of these
12 opportunities and they are doing very well at it,
13 as is the government, of course.

14 Defense still has the ability to
15 request other witnesses to testify at Article 32
16 hearings, and they are doing this. And they are
17 using that to great effect.

18 Recently, I would say probably in the
19 past five or six Article 32s I've had, the
20 government is trending more towards introducing
21 more evidence and actually calling witnesses of
22 their own. So now, just as a practical matter,

1 when I'm booking travel to attend a Article 32
2 hearing, I'm not assuming that these are just
3 going to be over in an hour anymore. I make sure
4 I am there for the day ahead of time and I
5 certainly do not book a plane ticket out that
6 same day. I have -- far too often the hearings
7 have gone all day, well into the afternoon hour.

8 In the Air Force I have been
9 successful in actually getting the PHO reports on
10 the back end, although they're -- this is just
11 more of a matter of policy. There's not a rule
12 anywhere, but I have been successful in getting
13 those reports. And access to those reports is
14 extremely crucial especially if a PHO is
15 recommending not proceeding on the case, which
16 has been happening.

17 In fact, I have actually had four
18 cases where the PHO has recommended proceeding --
19 not proceeding on one or more of the charges, and
20 I've had two cases where the PHO has recommended
21 dismissing the case altogether. So this goes
22 back to my point that; at least what I've seen in

1 the Air Force, they are not simply just rubber
2 stamping these hearings. They are putting a lot
3 of thought and analysis into it, and they are
4 actually recommending that some not proceed.

5 In those cases where they have
6 recommended them not proceed those cases have not
7 proceeded. But it is very helpful for me if I
8 have access to the PHO report to be able to
9 explain to my client exactly why this is not
10 proceeding. It's a much easier conversation to
11 have. Especially if they were at the Article 32
12 hearing they got to see for themselves how the
13 evidence was presented and how it came out. If
14 they were not at the Article 32 hearing, I have
15 access to the recording and I can go back over it
16 with them. So having access to that PHO report
17 is very crucial especially if a case has not
18 proceeded.

19 My clients have generally been happy
20 with the Article 32 process especially now that
21 is essentially their choice whether or not they
22 want to testify. On the cases where my clients

1 have attended the Article 32 hearings they feel
2 very comfortable with my ability to actually
3 advocate and protect their rights at Article 32
4 hearings. It gives them a sense that they
5 actually have a voice and someone is listening to
6 them.

7 The Article 32 process does seem to be
8 working from my perspective and especially with
9 M.R.E. 412 and 513. I would say what is
10 typically happening in the application of both of
11 those rules is the notice is usually not
12 happening. A lot of times we may have junior
13 government counsel that is doing exactly what I
14 mentioned and introducing that two, three-hour
15 interview of my client. There may be some 412
16 material that came out in there and there may be
17 412 and there may be some 513 material in some of
18 the other exhibits that they are introducing and
19 they don't catch it.

20 Fortunately, in the Air Force I've
21 been very fortunate to get the exhibits ahead of
22 time. So whereas I do object on notice grounds,

1 I don't hang my hat on that. I have --
2 especially with 513 though when it has come up in
3 a -- and I have had that one case I alluded to, I
4 have had it come up at the Article 32 where the
5 PHO did not appreciate that there was no notice
6 given. So that actually was a strong point
7 there. But I don't hang my hat on notice, but
8 only because I have been able to get these
9 exhibits ahead of time am I able to fully
10 advocate for my clients.

11 If I did not have that, it would be a
12 situation where I would be sitting there
13 literally trying to pop up if I see something
14 happen, which could very well happen. And
15 Article 32 hearings are open proceedings. So I
16 would say we need to basically write in notice
17 requirement for Article 32s.

18 Turning now towards trial, I would
19 assert that victims' counsel need the --

20 CHAIR HOLTZMAN: I hate to interrupt,
21 but we're getting close to witching hour.

22 Capt FOY: Yes, ma'am.

1 CHAIR HOLTZMAN: So can you try to
2 condense, speed up? And I'm sorry to have to ask
3 you that as well because some of us are going to
4 have to leave. So we want to hear your
5 testimony.

6 LCDR TOOHEY: Yes, ma'am.

7 CHAIR HOLTZMAN: Thank you.

8 LCDR TOOHEY: Turning specifically
9 towards trial, I would simply say in contrast to
10 the Article 32 ability for -- that I have to
11 stand up and object, currently; and I know this
12 is an Air Force Rules of Court situation, if a
13 412 or 513 issue does happen in the midst of
14 trial, currently right now I cannot stand and say
15 the word "objection." I have to stand and wait
16 to be recognized, and oftentimes that is too
17 late. So I would suggest changing that, just the
18 simple ability to stand and say the word
19 "objection" would remedy that.

20 Specifically on M.R.E. 513 as it
21 applies to trial, one of the issues that I have
22 had come up in at least three cases now has been

1 actually an issue of waiver of the privilege.
2 And it has been a situation where it has been a
3 client that did not have an SVC yet that was
4 talking with law enforcement.

5 To give an example, I had one client
6 actually bring in her medication and talk to them
7 about her diagnoses and some of the things she
8 talked about with her counselor, which she was
9 fine with, but she did not understand that when
10 it came time to trial that blew the door wide
11 open for her records basically to come in. And
12 that's where she had the hang up is, well, I
13 didn't know anybody was going to see the records.

14 I would assert that if we had a
15 knowing waiver requirement -- especially if law
16 enforcement is talking to an individual that does
17 not have an SVC yet -- we have a knowing
18 requirement to waive the M.R.E. 513 privilege,
19 this would remedy a lot. In the cases I have had
20 where defense has gotten past the threshold of
21 getting a motion to the judge to conduct an in
22 camera hearing; and I have actually had that

1 occur, it has been in a situation where my
2 clients did not even have a clue that they had a
3 privilege.

4 And my military clients that have
5 waived the privilege, it comes down to -- we're
6 talking about Airmen that are in treatment and
7 you may have a concerned commander, a concerned
8 first sergeant talking to them about how they're
9 doing in treatment. And it comes out and they
10 feel the need to talk about that because they
11 don't know that they can't and they don't know
12 that it's privileged. At trial this creates a
13 lot of issues.

14 And I have had three clients back out
15 of trials right on the eve of trial after motions
16 practice because it was a situation where I was
17 not going to be able to protect some of their
18 mental health sensitive information from coming
19 out. And it was information that they did not
20 want the entire base to know.

21 The ability of victims of sexual
22 assault to receive mental health treatment is

1 paramount. For Airmen the road to recovery can
2 be difficult. A sexual assault can truly impact
3 an entire squadron, unit, base. The institution
4 of a knowing waiver would go far in allowing our
5 Airmen to seek this treatment and not worry about
6 whether the notes and records of their privileged
7 counseling sessions would be revealed in a public
8 courts-martial.

9 And that concludes my presentation,
10 Madam Chair. Thank you very much.

11 CHAIR HOLTZMAN: Thank you, captain.

12 Our next and last presenter is Captain
13 Christopher Donlin, U.S. Army, Special Victims'
14 Counsel.

15 Thank you very much, captain, for
16 coming and we look forward to your testimony.

17 CPT DONLIN: Madam Chair,
18 distinguished Panel Members, thank you for
19 allowing me to address this Panel today. I have
20 approximately two-and-a-half years of experience
21 representing SVC clients and in that time I've
22 represented about 70 clients.

1 Just as the previous speakers have
2 stated, I want to clarify these statements are my
3 own and not the official position of the Army or
4 the Special Victims' Counsel Program.

5 The impact of the changes to Article
6 32 hearings allowing victims to choose not to
7 appear and limiting the scope of the hearing has
8 been a great comfort to many victims. SVC
9 clients are almost universally averse to
10 discussing the details of their assault in a
11 public setting and respond favorably to learning
12 they will not be required to endure cross-
13 examination until trial. However, in my opinion
14 the importance of the preliminary hearing is
15 greatly diminished with the changes. Now one
16 thing I wanted to note is I find fault with the
17 logic that the increased number of acquittals
18 necessarily means that more cases that shouldn't
19 be tried are being tried.

20 Regarding M.R.E. 412 evidence, in
21 about half the courts-martial that I have
22 participated in or observed the military judge

1 allowed M.R.E. 412 evidence to be admitted under
2 the constitutional exception most often because
3 the defense successfully argued that the evidence
4 supported a motive on the part of the victim to
5 fabricate the allegations.

6 However, in many cases the TC or the
7 SVC has been able to successfully argue for a
8 narrowly *Terry* ruling to minimize the impact on
9 the victim. Defense counsel often argues in
10 separate motions that they do not believe certain
11 evidence is 412 evidence, but their motion is
12 being submitted in an abundance of caution.

13 The victim's response when the M.R.E.
14 412 evidence is admitted is widely varied and
15 most reply prior to the ruling when we're
16 discussing the request that's been made by the
17 defense and the surrounding facts that the
18 evidence is irrelevant. If we're going to ask
19 about their past, why can't we ask about the past
20 experiences of the accused?

21 I concur with the request to force the
22 defense to prove or at least offer some evidence

1 as to why the client needs to testify. The
2 forcing them or allowing the defense to compel
3 the -- our clients to testify is having a similar
4 effect that the previous abuses in Article 32s
5 was having. And when I say "testify," I mean in
6 Article 39a sessions for 412 issues.

7 I concur with the previous speaker's
8 comments about attempts to introduce 412 evidence
9 at trial without providing notice. The only
10 remedy I've seen a military judge offer was
11 additional time to prepare of the government or
12 victim have required it. When this happens the
13 government and SVC are put in a position having
14 to rush the preparation of the victim to respond
15 to questions about this evidence, which is
16 obviously unsettling to the victim.

17 At times defense, without providing
18 notice, may bring up 412 issues in front of the
19 panel before the TC or the judge is able to
20 initiate a 39a. I'm not confident that a
21 curative instruction does enough to put the
22 toothpaste back in the tube, or more importantly

1 it doesn't protect the privacy rights of the
2 victim which this rule is intended for.

3 Approximately 75 percent of my cases
4 have involved M.R.E. 513 motions by defense,
5 however, I've seen a dramatic decrease in the
6 past year or so. Of those requests I estimate
7 that less than 10 percent lead to an *in camera*
8 review of mental health records. In the cases
9 which I've been involved military judges are
10 adhering strictly to the procedures required and
11 forcing defense counsel to proffer something more
12 than we have to see what we can't see because we
13 don't know what we don't know.

14 I concur with Commander Luken's
15 comment this morning that defense may argue that
16 they believe there will be sentencing testimony
17 in aggravation regarding mental health of the
18 victim, but in my experience we've been able to
19 prevent disclosure by steering clear of
20 presenting that type of evidence at all.

21 I concur with the request for a
22 requirement of a knowing waiver for the same

1 reasons mentioned before. When defense does meet
2 their burden and judges do order production for
3 *in camera* review, SVCs and/or trial counsel are
4 having success getting military judges to
5 narrowly tailor orders for production such as
6 limiting the disclosure to records within a
7 certain time period or only with a certain
8 provider.

9 Very rarely are judges ultimately
10 finding portions of the record relevant and
11 releasing them. When military judges require
12 production of mental health records, victims are
13 often upset. They're upset when they even have
14 to discuss the concept with their SVC. Similar
15 to M.R.E. 412 evidence victims often ask why,
16 quote, "we," unquote, don't get to see the mental
17 health records of the accused. They often feel
18 as though they're the one being put on trial.

19 Army counsel have filed several
20 petitions for writs in cases where they do not
21 believe the rules are being followed. We do hear
22 of cases at the Program -- at the Special

1 Victims' Counsel Program Office where victims do
2 not want to file because of fears or delay to the
3 case, but that hasn't happened too often.

4 The Army has found that the writ
5 process and decisions by appeals courts have
6 provided clear guidance to military judges and
7 counsel on the application of these rules and
8 have served to ensure protection of many victims'
9 privacy rights. Finally, it provides victims
10 with some comfort that this process has checks in
11 place to ensure to the greatest extent possible
12 the protection of their privacy rights.

13 Thank you again for the opportunity to
14 address you.

15 CHAIR HOLTZMAN: Thank you very much.

16 HON. JONES: I've got a quick one.

17 CHAIR HOLTZMAN: Okay, Barbara. Judge
18 Jones.

19 HON. JONES: Captain, do you -- I know
20 you're not a statistician and probably haven't
21 counted the number of acquittals, but it's your
22 sense that the acquittal rate is going up in the

1 Army, correct?

2 CPT DONLIN: I was referring to the
3 comments made by the defense counsel previously.
4 I don't have any statistics or numbers. In my
5 experience I have seen many more acquittals than
6 convictions. I don't know if that's a change
7 over time. In my case, having my two years as a
8 prosecutor and about two-and-a-half as an SVC,
9 many more acquittals than convictions.

10 HON. JONES: Okay. How about everyone
11 else, just quickly? Is it your sense acquittals
12 are going up?

13 CAPT FOY: No, ma'am. It's actually
14 not my sense. I would say it's probably -- in my
15 experience it's about the same rate.

16 LCDR TOOHEY: I think they might be --
17 there might be some trend upward based just
18 anecdotally on the kind of areas that I'm
19 familiar with.

20 HON. JONES: Thank you.

21 Commander Hutton?

22 LCDR HUTTON: I have had a mix of

1 convictions and acquittals. Personally I'm not
2 sure what the stats are Coast Guard-wide.

3 MAJ WALSH: Ma'am, I think I -- me
4 personally from my defense, from my VLC time I
5 think it stayed roughly --

6 HON. JONES: The same?

7 MAJ WALSH: -- about the same, which
8 is about -- which is a high acquittal rate, but
9 an important point to consider is that that
10 coincides with a massive effort to increase
11 reporting. So we have increased the number of
12 reports and the number of cases that are -- and
13 type of cases that we're handling.

14 HON. JONES: Oh, no, I agree.

15 MAJ WALSH: So --

16 HON. JONES: I wasn't talking about
17 the raw number of acquittals. Yes.

18 MAJ WALSH: Well, and it just goes to
19 the point of in some of these specifically
20 egregious type cases that used to be the only
21 ones that would get the system and be reported we
22 would usually see a high conviction rate. Now

1 we're seeing a lot, lot more of different types
2 of sexual assaults and sexual -- and I think it's
3 basically stayed baseline.

4 HON. JONES: Okay. Thanks.

5 CHAIR HOLTZMAN: Professor Taylor?

6 PROF. TAYLOR: Well, I just have one
7 question, then would ask you to submit your
8 answer for the record if it applies to you, and
9 that is whether any of you have had occasion to
10 go your own separate way from the trial counsel
11 when it comes to questions involving 412 and 513
12 during the course of the 32s and the courts-
13 martial. You could just submit that for the
14 record, please, to the Staff if it applies to
15 you.

16 Thank you, Madam Chair.

17 CHAIR HOLTZMAN: Thank you.

18 Mr. Stone?

19 MR. STONE: I just wanted to bring up
20 something because I heard it at the end that we
21 heard earlier in the day, which I found concerned
22 me greatly, and that is that victims are being

1 just chilled and discouraged from putting in
2 their mental history such as PTSD even though
3 they would like to do it at sentencing because
4 they feel they're going to open the door to their
5 privileged records at trial and therefore they
6 can't say at sentencing what they would like to.

7 Such conduct is absolutely unheard of
8 in state or federal court because there's a
9 bifurcated sentencing proceeding. It doesn't
10 happen at the end of the proceeding and it's not
11 a way to open the door. We can't -- and you
12 can't go backwards and say, oh, they want to do
13 it now. They should have done it then, et
14 cetera. What happens at sentencing is completely
15 separate.

16 And I just wonder if that problem is
17 one that would cause any of you to recommend that
18 the military should have a bifurcated sentencing
19 proceeding from the trial even if the sentencing
20 occurs the next day after the trial is over.

21 MAJ WALSH: We do, sir. We have a
22 bifurcated process. I think when that statement

1 was made earlier it was more focused on the
2 scheduling of it. Unlike the federal system, we
3 roll right into sentencing, but it is a
4 bifurcated process.

5 And even if it is, there's still the
6 issue of they put in their evidence of their
7 mental health records to show the traumatic
8 effect that the crime has had on them, but those
9 records might also carry childhood sexual abuse
10 and all other kinds of things that they very
11 intensely want to guard and keep private. And
12 that would open the door to at least the court
13 examining that, and that for some clients is a
14 bridge too far.

15 MR. STONE: In other words, when they
16 make a statement at sentencing --

17 MAJ WALSH: If they --

18 MR. STONE: -- the judge -- the
19 defense counsel would say we want to see the
20 records that back up that PTSD claim?

21 MAJ WALSH: If -- well, yes, sir. I
22 mean, if they're presenting a diagnosis, some

1 evidence that they suggest is a diagnosis or
2 they're using actual evidence of a diagnosis of a
3 condition, the defense is going to be able to
4 challenge that that's not a pre-existing
5 condition, that there are other things in their
6 history that did that and that it wasn't the
7 defendant's, or now the convicted's actions
8 against them that caused that. So it
9 theoretically can open the door, and that's what
10 we need to advise our clients about.

11 MR. STONE: Anybody else have a
12 comment?

13 CAPT FOY: Yes, sir. I could concur
14 with everything that he said. We do roll -- in
15 the Air Force we do roll right into sentencing,
16 and so there is a discussion that I have with my
17 client. If you want to introduce XYZ evidence of
18 impact, that could quite possibly open the door
19 for them to ask to get your mental health
20 records. Usually there's other impacts that they
21 would want to testify about regarding that.

22 I will say so, however, sir, it does

1 cut both ways. If you have a defendant who is
2 trying to exert some type of mental health trauma
3 or condition or something not rising to the level
4 of mental responsibility, the government then
5 tries to go after the defendant's mental health
6 records as well in sentencing. So it does cut
7 both ways. I have seen that happen before. But
8 that is a discussion that I had have with my
9 clients, and most of my clients do not want to go
10 down that road.

11 CPT DONLIN: I concur, sir. I -- the
12 example that pops into my head was actually when
13 my client was testifying and based on a
14 misinterpretation of what she said a third motion
15 for her mental health records being made by the
16 defense at that point. So it absolutely can and
17 does happen.

18 MR. STONE: So do these defendants --
19 victims delay any proceeding they would have
20 before the VA that was discussed before until
21 after the trial is all over because that leads to
22 the same thing? If they're going to get a

1 disability rating for the VA, they delay the
2 whole thing?

3 LCDR HUTTON: I've had more than three
4 clients delay seeing mental health professionals,
5 including one client who's now going through the
6 Med Board process post-trial who told me that
7 they didn't trust the system and they were
8 deliberately waiting until post-trial.

9 CPT DONLIN: I had a client say not
10 that they delayed it, but that they wish they
11 had.

12 MR. STONE: Yes, that was the main
13 thing I wanted to cover.

14 CHAIR HOLTZMAN: Okay.

15 VADM TRACEY: Major Walsh, did I
16 understand you to say that the Marine Corps has
17 implemented some new Prosecution Merits Memo
18 process? Did I understand that correctly?

19 MAJ WALSH: So, yes, ma'am, and I
20 think this is probably a point for me to say that
21 these are my opinions and not those of the Marine
22 Corps.

1 (Laughter.)

2 MAJ WALSH: But, yes --

3 HON. JONES: Too late.

4 MAJ WALSH: Yes.

5 (Laughter.)

6 MAJ WALSH: I've waived that
7 privilege. But in reality, yes, ma'am. And
8 there's a practice advisory online, open source
9 and everything about this, but the trial counsel
10 now will draft a Prosecution Merits Memo, which
11 is detailed. We don't see it, but it's part of
12 their deliberative process. But that goes to the
13 SJA. That's all considered. And in that
14 Prosecution Merits they often, what I'm told is,
15 consider the chances of success, the chances of
16 an actual obtaining of a conviction.

17 VADM TRACEY: Do the other Services do
18 anything similar to that?

19 LCDR TOOHEY: Yes, ma'am. The Navy
20 has a robust Prosecution Merits Memo process.
21 The Trial Counsel's Office, which is run by a
22 captain, is the ultimate signature authority for

1 the Prosecution Merits Memo in the most -- in
2 penetration cases, and then it diverts back to
3 the senior trial counsel for contact cases. But
4 they sign those out to convening authorities.

5 And in my experience as an SVC --
6 excuse me, as a VLC, when we sit down with trial
7 counsel and they tell us which way their
8 recommendation is going to go, I can't think of a
9 case where the convening authority didn't go the
10 same way. In my experience.

11 VADM TRACEY: Others, same thing?

12 LCDR HUTTON: Yes, we have those in
13 the Coast Guard.

14 HON. JONES: So the convening
15 authority is not hindered in your view by not
16 having an Article 32 or by insufficient
17 information from the prosecutor?

18 LCDR TOOHEY: Nor are they when we
19 give input that my clients really want to go
20 forward. Nor have they been swayed by that to go
21 forward when the prosecutor is telling them that
22 this is not a case that has a reasonable chance

1 to succeed at trial even if we do believe there's
2 probable cause.

3 LCDR HUTTON: I had a similar example
4 recently.

5 VADM TRACEY: Is this a new
6 requirement since the Article 32 was changed, or
7 is it something that was made more robust after
8 the changes to the Article 32?

9 LCDR TOOHEY: Not since the changes to
10 the Article 32. The Merits Memo process has been
11 around for a few -- I mean, I was a senior trial
12 counsel back in 2013. And so it's become more
13 formalized and kind of I think every Region Legal
14 Service Office in the Navy does the same type of
15 memo and has the same signatory requirements.
16 But in terms of writing memos expressing the
17 merits and providing them to convening
18 authorities, that has been consistent at least
19 through as long as I was a prosecutor.

20 HON. JONES: Thank you. Anything
21 else? Mr. Stone? No?

22 HON. JONES: I think that just about

1 --

2 HON. JONES: All right. Thank you.
3 Thank you all very much. Thank you for your
4 service. We appreciate it, especially the last
5 two who were so good at marching faster.

6 (Laughter.)

7 HON. JONES: And we're adjourned.
8 Right, Bill?

9 MR. SPRANCE: Yes, ma'am. The meeting
10 is now closed. Thank you.

11 (Whereupon, the above-entitled matter
12 went off the record at 4:06 p.m.)

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Before: US DOD

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