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

9:10 a.m.

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

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

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

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

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

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

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

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

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

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

website.

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

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

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

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

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

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

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

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

Ms. Gupta, can you please provide the

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

MS. GUPTA: Good morning, Panel Members.

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

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

The JSC's proposal --

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

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

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

MS. GUPTA: Tab 11.

CHAIR HOLTZMAN: Thank you. Sorry.

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

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

review by the military appellate courts.

The draft public comment is available at Tab 12.

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

The draft comment is at Tab 12.

MS. GUPTA: Tab 12.

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

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

CHAIR HOLTZMAN: Yes, Professor.

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

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

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

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

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

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

HON. JONES: May I speak?

CHAIR HOLTZMAN: Judge Jones.

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

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

VADM TRACEY: I agree.

CHAIR HOLTZMAN: Mr. Stone?

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

I mean I think that we might have some

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

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

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

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

CAPT TIDESWELL: No, ma'am.

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

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

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

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

CHAIR HOLTZMAN: Right.

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

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

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

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

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

CAPT TIDESWELL: Yes.

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

CAPT TIDESWELL: That is correct.

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

PROF. TAYLOR: Oh, I understand.

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

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

Is there anything --

CAPT TIDESWELL: No, ma'am.

CHAIR HOLTZMAN: What you said was accurate.

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

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

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

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

CAPT TIDESWELL: Yes, ma'am.

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

CAPT TIDESWELL: Yes, ma'am.

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

We are going to be --

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

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

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

Ladies and gentlemen, would you come up, please?

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

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

Ms. Sherman, welcome and please proceed.

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

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

proceedings and in courts-martial.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you for your time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I think that most judges out there do

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lieutenant Colonel Elizabeth Harvey,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIR HOLTZMAN: Thank you very much for your presentation.

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

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

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

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

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

function.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subject to your questions, I will pause here.

CHAIR HOLTZMAN: Thank you very much Commander.

We will start with Mr. Taylor.

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

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

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

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

Sir?

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

addressing that, and they are skating over it.

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

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

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

PROF. TAYLOR: That is exactly what,

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

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

LTC FAULKNER: I think that is an

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

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

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

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

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

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

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

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

So with that, Madam Chair, thank you.

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

HON. JONES: No questions.

CHAIR HOLTZMAN: Admiral Tracey?

VADM TRACEY: No questions.

CHAIR HOLTZMAN: Mr. Stone?

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

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

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

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

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

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

MR. STONE: Okay, then my question

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

CDR LUKEN: Not to me.

LTCOL HARVEY: Not that I am aware of.

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

the other judges you worked with?

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

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

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

MR. STONE: Thank you.

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

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

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

CDR LUKEN: Not as to resources, no.

CDR KITCHEN: Not as to resources.

LTCOL HARVEY: No.

LTC FAULKNER: No.

LT COL SHERMAN: No, sir.

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

defendant was denied due process.

CDR KITCHEN: No, sir.

CDR LUKEN: Correct.

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

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

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

When I said in my statement that it is

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

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

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

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

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

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

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

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

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

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

LTCOL HARVEY: No.

CDR KITCHEN: No.

LT COL SHERMAN: No, sir.

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

CHAIR HOLTZMAN: Thanks very much.

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

CDR LUKEN: Yes, ma'am.

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

CDR LUKEN: Yes, ma'am.

CHAIR HOLTZMAN: So, please assist me in that.

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

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

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

CHAIR HOLTZMAN: Okay.

LTC FAULKNER: If I could echo that.

CHAIR HOLTZMAN: Yes.

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

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

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

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

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

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

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

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

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

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

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

But those are the more difficult issues.

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

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

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

CHAIR HOLTZMAN: Okay.

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

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

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

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

LT COL SHERMAN: Not quite that direct but --

CHAIR HOLTZMAN: Close.

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

CHAIR HOLTZMAN: I see. Okay.

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

Shall we take a five-minute break?

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

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

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

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

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

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

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

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

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

CHAIR HOLTZMAN: Thank you.

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

Lieutenant Commander.

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

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

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

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

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

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

back to the Article 32 proceeding.

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

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

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

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

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

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

officers?

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

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

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

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

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

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

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

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

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

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

And it is anecdotal but it also is in

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

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

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

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

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

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

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

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

CHAIR HOLTZMAN: Thank you very much for your presentation.

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

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

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

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

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

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

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

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

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

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

officers that we have had have been qualified. Otherwise, I am doing a terrible job.

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

Additionally, here in D.C. they have stood up a Reserve unit that is made up of a number of 0-6s, who are Reserve officers, Reserve Judge Advocates. And their sole job as Reservists is to serve as preliminary hearing officers.

I will tell you what. It is very nice to go in and to have an 0-6 who is extremely experienced in military law but also in civilian

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

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

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

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

CHAIR HOLTZMAN: Thank you very much, Commander.

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

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

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

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

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

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

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

Whether or not the defense tries to

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

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

incapacitation issues.

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

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

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

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

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

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

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

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

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

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

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

where a case was overturned because of a 412 issue.

If evidence is admitted under the constitutional exception, in my experience, it is most often admitted to prove capacity. Incapacitation cases oftentimes this would go in hand-in-hand with a mistake of fact defense. For example, if the victim is engaged in voluntary sexual activity with somebody other than the accused during the same early morning hours as an allegation of incapacitation, then the defense would seek to show that because the victim was capable of consenting during the former sex, he or she would be capable of consenting during the latter sex.

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

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

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

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

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

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

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

issue, if they are aware of it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIR HOLTZMAN: Please tell us now.

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

CHAIR HOLTZMAN: Don't keep us in suspense.

CPT DIXON: Okay. The first

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

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

So, my recommendation is add an

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

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

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

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

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

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

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

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

because they are a child.

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

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

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

CPT DIXON: Understood, ma'am.

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

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

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

We will start now. Mr. Stone.

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

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

Have you ever thought about that kind

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

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

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

MR. STONE: Which folks?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So do you think it is unlikely, even

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

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

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

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

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

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

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

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

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

CPT DIXON: Absolutely not, sir.

MR. STONE: Okay.

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

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

CPT DIXON: Sure. Yes, sir.

MR. STONE: Okay, thank you.

CHAIR HOLTZMAN: Thanks very much. Admiral.

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

CHAIR HOLTZMAN: Judge Jones.

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

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

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

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

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

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

HON. JONES: Right.

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

HON. JONES: Well maybe I just misunderstood.

MAJ REED: Yes, ma'am.

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

MAJ REED: No, ma'am.

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

HON. JONES: I see.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HON. JONES: To assist.

CPT DIXON: Yes, ma'am.

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

CHAIR HOLTZMAN: Okay. Thank you.

Mr. Taylor.

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

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

is too much trouble to continue.

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

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

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

PROF. TAYLOR: I see.

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

PROF. TAYLOR: I see. Thank you.

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

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

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

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

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

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

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

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

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

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

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

PROF. TAYLOR: Major Reed?

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

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

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

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

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

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

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

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

LCDR ROBERTSON: I went first last time.

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

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

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

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

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

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

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

PROF. TAYLOR: Would anyone else like to comment?

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

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

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

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

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

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

CHAIR HOLTZMAN: Did you remember your question?

HON. JONES: No, but I have one.

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

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

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

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

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

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

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

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

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

HON. JONES: Okay, thank you.

CHAIR HOLTZMAN: Just a couple of questions.

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

MAJ REED: Yes, ma'am.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

yes, ma'am.

CHAIR HOLTZMAN: Okay, so those three. Anybody have any disagreement with that?

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

CHAIR HOLTZMAN: Okay.

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

MR. STONE: Which investigative

service are you talking about, so we know?

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

MAJ WORKMAN: That is my experience as well.

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

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

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

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

done.

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

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

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

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

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

You're right it is --

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

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

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

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

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

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

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

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

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

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

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

these types of scenarios.

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

LCDR ROBERTSON: No, ma'am.

CHAIR HOLTZMAN: So what were you trying to suggest?

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

--

CHAIR HOLTZMAN: You mean the SJA.

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

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

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

maintenance of good order and discipline in that command.

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

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

I guess we will take a break for lunch.

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

(1:02 p.m.)

CHAIR HOLTZMAN: Good afternoon everyone.

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

Thank the members of the panel who are

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

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

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

MAJ HENLEY: Thank you, ma'am.

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

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

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

In these capacities, I've tried over

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

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

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

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

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

As a result of that, I believe that

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

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

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

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

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

defense to investigate a case.

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

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

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

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

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

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

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

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

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

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

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

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

32 hearings has really remained unchanged.

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

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

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

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

Now, trial, as a defense counsel, in

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

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

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

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

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

further bolster their allegations.

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

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

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

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

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

And, the reason that that's important

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

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

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

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

CHAIR HOLTZMAN: Thank you very much, Major.

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

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

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

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

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

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

18 months.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So, this limit on a complaining

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Major, and welcome.

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

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

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

rights of those who safeguard our nation.

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

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

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

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

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

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

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

No witness is entitled to a false aura of veracity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And, when you do get some open source

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

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

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

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

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

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

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

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

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

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

records.

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

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

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

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

witness knew of these emotional outbursts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And, the only way that we're going to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

investigate the case at that point.

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

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

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

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

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

the commander referred the charges to trial.

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

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

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

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

Thank you.

CHAIR HOLTZMAN: Thank you very much. We appreciate the presentation.

Our final panel presenter will be

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

Commander, welcome and we look forward to your testimony.

LCDR TREST: Thank you, ma'am. Madam Chair and distinguished Panel Members, thank you for the opportunity to speak today.

I've been a Navy Judge Advocate for 13 years. Like, I think, the majority of the Panel Members, I've spent most of my career as a prosecutor.

I have been a staff judge advocate for two years on an aircraft carrier where we dealt with a lot of sexual assault cases.

And, I am, the last 18 months, been the Senior Defense Counsel for Defense Service Office North and we cover the U.S. Naval Academy, the Washington, D.C. area, Pax River, Groton, Connecticut, Great Lakes, Illinois where Recruit Training Command is located.

And, we also assist with Europe and our office in Bahrain. And, we also cover a lot

of the defense for the Coast Guard.

And, I understand that, today, you have a difficult, but important, responsibility in finding the balance between exercising victims' rights and protecting the constitutional rights of the accused to ensure a fair trial.

And, my comments, again, are not attributed to the Navy. However, I have consulted with my fellow Senior Defense Counsel, our Appellate Defense leadership and our Defense Counsel Assistance Program.

And, the consensus is that, we are concerned more, now than ever before, that innocent people are being wrongly accused, investigated and on trial for sexual assault.

The result is an unprecedented increase and the chance of convicting an innocent Servicemember of sexual assault.

This is primarily because of the change in the way sexual assaults are reported, investigated and the process to courts-martial has become, essentially, a one-way ratchet to

referral.

New policies have been implemented by the Navy that incentivize making unrestricted sexual assault reports. NCIS has changed their investigative process. And, VLCs often impact the investigation which skews the outcome in favor of what the victim wants to happen despite evidence to the contrary.

The Article 32 has been stripped of its investigatory function and no longer functions to truly assist the convening authority in exercising prosecutorial discretion.

This is especially concerning when you consider that almost every sexual assault case involves acquaintances, often with prior consensual sexual history and alcohol, which often skews perception and memory of consensual sexual conduct.

Once the case has been referred and is at trial, the members, after the recent years of SAPRO training, we have found are predisposed to believe victims and misinterpret the legal

definition of consent and mistake of fact as to consent.

The lack of a thorough pre-trial investigation and prosecutorial discretion combined with the nature of acquaintance sexual assaults and the new incentives to fabricate are a recipe for wrongful convictions.

Now, more than ever, the accused needs to exercise his or her constitutional rights to due process in confrontation at trial to ensure a fair and just outcome.

The exceptions to M.R.E. 412, especially the consent exception and the constitutionally required exceptions are vital to exercising these rights.

Additionally, mental health records are increasingly important because military cases deal with a population that has a high rate of PTSD just from the nature of their jobs.

But, we also know from the data collected by DSAID, or the Defense Sexual Assault Incident Database, that there is also a

population that enters the military, that have been survivors of prior sexual trauma and are receiving mental health services through the military.

The possibility of memory contamination or perception issues are dispositive to many of these cases.

Also, the age and the relationships that these victims often have with the accused and the VA benefits Servicemembers can now receive for military sexual trauma call into question the victim's motives for making the report, their perceptions and mental health at the time of the alleged event and the consistency of their statements to law enforcement.

This constitutional exception and in camera review process is more important now than ever before. And, we would recommend it be added back to M.R.E. 513.

In spite of these changes, we have had success in obtaining acquittals, which is evident by the low conviction rate in the Navy.

The high acquittal rate, however, demonstrates that cases that should not be at courts-martial are being pushed through the system.

Although many of these accused are later exonerated, there is a real cost to the accused life, reputation, family and career.

Finally, anecdotally, we are seeing an increase in the number of concerning convictions or cases where experienced judge advocates are shocked that members found the government proved their case beyond a reasonable doubt because the facts, as presented at trial, that was observed just were not there.

These cases validate the Defense Bar's concerns that the playing field has shifted too far in favor of the victims' rights and it's now at the expense of the freedom and constitutional rights of our Servicemen and women.

Now, I would like to end on a bright spot. And, that's that the Navy has actually implemented the Defense Litigation Specialist,

and that's basically a defense investigator.

It's new to the Navy and we have ten of them. And, I have one that I've been working with since May of 2016. He has a prior law enforcement background and his impact has been monumental in making up some of the differences that have been lost in the investigative process from the Article 32.

He also is vital to gathering evidence when we're looking to have 39A sessions for 412 motions and for 513 hearings. And, he is vital at trial and he has been vital.

And, we have had acquittals because of his assistance to our office.

And, so, we would like to, as I know the other Services are in envy of our position, but one of the issues that has come up is the lack of investigative process and the speed now in which these cases are being pushed through and are going to trial.

And, although a Defense Litigation Specialist is helpful and we would recommend that

the other Services benefit and we would want more, frankly, if we could, because that is the one caveat is, only one person can take so many cases.

But, we would encourage that, not only for 513, that the constitutional exception be added back in and at 412, we would ask that the constitutional exception be added back in at Article 32 hearings.

We would hope that you recognize the value of the DLSS and that it is a tool that is in need now more than ever for the Defense Bar.

And, I look forward to your questions. Thank you.

CHAIR HOLTZMAN: Thank you very much. Appreciate your presentation.

Admiral?

VADM TRACEY: I'll try to ask this question without sounding accusatory, but, how has your view of the effects of these changes changed as you've changed roles?

LCDR TREST: Yes.

Ma'am, well, what's interesting is, I actually was a Senior Trial Counsel in Lieutenant Commander Robertson's position. But, I left that in 2012.

So, when I, now looking at it from the defense perspective, a lot has changed since I was a Senior Trial Counsel.

What has changed are some of these incentives that victims now have. And, this is to include expedited transfers that are offered and this is really significant, to be on the ship, that we were actually in the yards, which is also not a fun period for Sailors when I was a staff judge advocate.

But we do see people, expedited transfers coming in to request to go be in certain specific positions, not just to remove themselves from the command, but actually go certain ways, certain areas. And those are being honored.

The other thing has been the Sexual Assault Management Meeting which is a SACMG. And

that, I think, all the Services have something similar.

But victims are actually meeting with their commanding officers once a month once they make an unrestricted report and the commanding officer's job is to check on the well-being of the victim.

But, at these meetings that happen, if you have NCIS there, you have mental health providers there, a chaplain. You have the CO of the victim and you usually have sometimes a victim legal counsel, but often times, a victim advocate. The victim's not there.

But they meet and they talk about -- they're not supposed to talk about the case. Having sat in them through my role as Staff Judge Advocate, other information is talked about other than just how's she or he doing? Good.

And, so, there's communications going on about the case. And then you have a debrief that the commanding officer then debriefs that victim on the status.

And what's concerning especially as a defense attorney is when the victim and the accused are at the same command. And, is that same commanding officer that is making disposition determinations on where the case should go.

And the Naval Academy is a prime example where this is happening. And, that's concerning.

Ma'am, also, the victims now have a different separation authority. So, to be separated from the military, it's no longer the local command, it is elevated to the Navy Personnel Command.

And, so, where this received play, let's say there's a, what we call PFA failure, basically, they're out of standards where other Servicemembers may be separated, victims are funneled in a different way and they're not immediately separated because they'll have this pending sexual assault case or they've made a new allegation and then it halts everything.

And then, again, survivors of military sexual assault, the military sexual trauma, we have, and I have personally, as a defense attorney, seen a 513 -- so, I went through their 513 records.

I've seen mental health records. In my specific case that is ongoing, I can just say that we didn't have a 513 hearing because there had been a waiver. So, we, although the judge did look at that, the analysis was under 510 because the victim had actually affirmatively waived all his records for the purpose of NCIS to obtain these mental health and physical health records.

The mental health records were not provided to us. That's why we went to the judge and the judge found that, once the victim had waived the privilege, they cannot now re-exert the privilege.

So, and he did an *in camera* review, the judge did an *in camera* review, reviewed those mental health records and did disclose to us what

we believe is relevant.

Now, that trial hasn't taken place, so I can't tell you what the impact will be, but in reviewing them myself, I think there are motives to fabricate that we can significantly see now more than without having those records.

And, so, my point is that I think these victim incentives are new and also the law enforcement investigations have changed.

Working with NCIS closely as a prosecutor and now as a defense attorney, they use the FETI technique which has been implemented. And, the FETI technique is a Forensic Experimental Trauma Interview.

And what NCIS is doing is, when they talk to victims, they ask, you know, how do you feel? And it is supposed to build rapport, build trust to get victims to disclose things, which is fine.

But then what happens is, they don't get a full story of what happened. And, now, they have a VLC because, again, NCIS can't talk

to them unless they have a legal counsel.

And then there'll be information, say through forensics or whatnot, that is extracted that directly contradicts what the victim told law enforcement.

Well, some law enforcement won't even call them back in because they've been told not to confront the victim, we're just going to move this case forward and let the prosecutor deal with it.

Some law enforcement try to call them back in. But, of course, the VLC sees it's not in their client's interest to have this additional interview. And, so, we're stuck.

And this is where the investigative process has faltered and is different than when I was the Senior Trial Counsel.

And, again, to echo my colleagues, the fact that we're going to 32s, and, in some cases, when I go to a 32, I don't put on new evidence, but I'll use the government's evidence that they have discovered to me to point out to the PHO

that there is no probable cause.

And it's not every case, but there are cases recently that we have had and the PHO who actually -- we had a Reservist who had been a military judge, was a senior Navy Captain, is a practitioner in the civilian sector, a partner at a litigation firm, so, very clear about the roles, said not only is there no probable cause, but you will not secure a conviction at trial. The evidence is just not there. Still, this case was referred to trial.

Now, we got an acquittal, but this was an expense to the accused, his training, and you still never know what's going to happen with members.

And, so, I guess those are some of the examples, ma'am, that have changed my focus and why I am more concerned now than ever before of the status of where we are.

VADM TRACEY: So, are there things -- has anybody actually served as a trial counsel under these rules?

MAJ ARGENTINA: Yes, ma'am. So, I was a senior trial counsel just two years ago, so I was supervising and actually had some cases myself that wound up not going to trial.

VADM TRACEY: So, are there things that you see the trial counsel could do differently to offset some of these effects?

MAJ ARGENTINA: I don't think that the trial counsel can do anything differently to affect the motives or the facts of the case.

What they are able to do under this rule as compared to the old rules is a lot more limited because of the access to the complaining witnesses is often limited or chaperoned interviews as opposed to when I, you know, was interviewing them myself and was acting as their, you know, quasi-representative.

Because it was my responsibility at that point to assert any victims rights or anything else because that was a mandate that we had. We kind of had, you know, dual hats.

So, I don't think that trial counsel

can be doing anything different as far as that.

But I do think that they, and we've seen where we've run into quandaries about we, you know, you can tell that, you know, not all cases, because a lot of the cases that we have, we have -- a high majority of our cases do plead out and all, and not just sexual assault cases.

But when you're dealing with a lot of these incentives or the interplay between, you know, other relationships and all that, and you know, as a trial counsel, that it's going to be a low probability or a zero probability of winning at trial and you write your prosecutorial merit memo which says, hey, we don't recommend you go forward because here are all the issues.

And then the preliminary hearing officer comes back and says no probable cause. And then the convening authority sends it to trial and it becomes an acquittal, it's very demoralizing to your trial counsel who, and as a supervisor, because it should not have been a case that went to trial.

It was clear to everyone except that the pressure on the system is so high, because no General wants to, in my opinion, have, you know, put the one case that should have gone forward but the trial counsel maybe, you know, missed something or new information comes out later on.

So, at the cost of, you know, that very rare particular kind of case that could then pop up later and say, hey, this was, you know, an actual one that you should have gone forward with, they go on the side of caution and just let the system play itself out completely.

VADM TRACEY: I have one more question.

CHAIR HOLTZMAN: Okay, sure.

VADM TRACEY: I think it was you, Major Argentina, who said that it is how the rule is being applied that is broken.

Could you just be a little bit clearer about how would you change the way the rule is being applied?

MAJ ARGENTINA: The standard is

obviously higher than it was before. But, it seems to be, you know -- so, in one of the more recent cases, again, this was an acquittal case, so it's not ever going to be reviewed, and then, the other case that I had cited that was my case, it was wind up being a plea for adultery because, ultimately, it was a consensual act. Because we were getting close to getting the record, which I believe someone said before, yes, there's a fear of they don't want to go forward anymore.

Well, a part of that fear, there's two sides to the fear coin. The other side is that they had made a false allegation and it's going to be exposed in their mental health records.

You know, the other fear is that, you know, there's going to be private details and that's a legitimate concern. But the way that it's being applied, what I meant by that was, is the sum evidence standard, the preponderance standard seems to be a clear and convincing standard that you use, and you have to get over this high, high hurdle of providing information.

And even in the face of providing multiple witnesses where disclosures were made that they had, you know, this anxiety disorder or this personality disorder. And, in that case, an *in camera* review was granted but the access to the records were limited. And, again, it was a sanitized version of what was allowed to be presented at trial.

They were only allowed to call it emotional outbursts. And because they were having panic, you know, panic attacks, but when the evidence came out, the complaining witness had panic attacks because they had something wrong in their uniform and were corrected and would have the same reaction.

So, that was an issue that they were not allowed to fully develop and were, you know, sanitized to emotional outbursts.

In the other case where we didn't get the records, we presented Facebook messages, you know, suicide attempts, other disclosures about the types of medication we found in the same

exam, the types of medication that were being used and the types that were prescribed and were not being used.

And even in the face of all that evidence of 513 *in camera* review was not ordered. You know, the judge didn't want to do an M.R.E. 513 *in camera* review. It seems to be way too high when you have that much information presented to the court.

And, in that case, we were asked, well, what enumerated exception are you using? I said, Your Honor, take a look at our motion. We're using the constitutional required exception, the compulsory process clause, the due process clause, that's what we're using for this. And the judge said, well, that's not one of the enumerated exceptions.

And, so, I think because it's not written in there, it's being placed at such a high standard and I think Mr. Taylor pointed out, none of those exceptions even really apply in the cases.

Those exceptions in there are for, you know, exceptions for when people may be in trouble in the future or to make sure that there's care. It's not -- they are not designed to find any of the type of information that will, you know, go after credibility or perception or the ability to recall and be an accurate historian.

CHAIR HOLTZMAN: Thank you.

Judge Jones?

HON. JONES: I'm interested in the Article 32. I understand, or at least I think what I'm hearing is, when you had full-blown Article 32s, much more information went to the convening authority and fewer cases were referred.

Why are defense counsel now either -- well, why are there waivers? Why would a defense counsel simply waive? You get nothing if you don't waive and go ahead?

I mean, you don't have to present -- yet, they still don't have -- the government or,

you know, still doesn't have to present the victim at the 32. But, is there nothing you can get and so you decide to waive?

I just don't quite understand what happens at a 32 now that makes it -- well, you still hear them, but I hear that it's like 50 percent waivers.

LCDR TREST: And, I can't speak to -- I have not waived them, but I have talked to my colleagues who have.

So, the 32, you're looking at is there probable cause? Is there jurisdiction? The charges and then the disposition recommendation.

And it's regarding sort of the charging. I think a lot of people have looked at as, I don't want to have a 32 because this judge advocate who's the preliminary hearing officer may catch errors that the government made and that gives them a chance to now perfect the government's case.

Or, they may see errors that the trial counsel is not picking up on that I'm seeing as

defense counsel, and I don't want them to have a chance to perfect it before arraignment when they can't make any changes.

So, strategically, there has been that issue where we don't want this defense in that specific case. There's nothing that you're going to present. The evidence is pretty strong but maybe their charging through is incorrect or their missing something.

We don't want to aid the government in giving them more time and another pair of eyes to look at that and perfect the case forward when we think we can maybe exploit something that they missed. That's one thing I've seen.

MAJ ARGENTINA: And it's been our general practice across the Marine Corps, we have a shared network, a SharePoint that we -- across the Marine Corps share, you know, what's going on throughout, you know, throughout the world.

We generally don't waive the Article 32 because we haven't seen any case law that says yet that, you know, that potentially the Article

32, the way that it is, which was originally CAAF's concern, is a speed bump on the way to trial.

Until that gets clarified that the statutory framework is proper, you know, waiver is only in certain instances, as was pointed out, if you have a tactical reason, we're not waiving. Because, again, if you waive then you lose any rights or benefits that would flow from that.

So, generally speaking, we're not waiving. We may, just like you said, ma'am, go and let the government put on their case.

You know, even in some cases, we've started with a sexual assault case, have gotten no probable cause and come out on the other end with an aggravated assault charge.

So, you know, a really good job at the Article 32 and then you come out with a different charge, which is okay. You know, that's what the, you know, what the defense counsel was trying to prevent, but you do run that risk if you do, you know, present now because, you know,

quite honestly, it is a speed bump on the way to trial.

So, if you do anything to highlight any problems with the case, you may be looking at added charges or possibly getting the charged fixed.

HON. JONES: You don't want to reveal?

MAJ ARGENTINA: Yes, ma'am. So, you like the best practice that you're not doing it just to sit and do nothing.

MAJ REYES-STEWARD: And there's certainly no blanket opinion that all 32s should be waived because the idea that it's a speed bump. And the reason that my counterparts echoed for waiving a 32 are certainly reasons for it.

But, you know, despite there being overwhelming evidence, you know, we know probable cause is going to be met. But, it's a good opportunity to kind of give our client that second opinion, you know, hey, look at the facts here. Let's talk about a guilty plea, you know.

And, so, in that case, the Article 32

does serve a purpose, you know, for us as defense counsel to --

HON. JONES: To counsel your client?

MAJ REYES-STEWARD: Exactly, ma'am, yes.

MAJ HENLEY: We very seldom, in my region, very seldom do we waive Article 32 hearings.

They provide extremely valuable opportunity for face time with your client just like my cohort here said.

But in addition to that, it exposes the alleged victim to the process, too. And, in the process of doing that, sometimes that contributes to whether or not they support an alternate disposition or whether or not they decide not to go forward.

So, it's not just for the accused, although it's the accused that is the one that benefits mostly from it.

You know, personally, I would like to see the government pursue Article 32 hearings

more vigorously by putting more evidence in.

When I was a senior trial counsel, I preferred that because by the time we got to trial, I had a -- by the time I got -- saw the case, four other experienced individuals had kind of gone through it and pointed out problems. And we could fix the problems or we could dismiss the cases that should be dismissed.

Unfortunately, with the lowered threshold of probable cause, we're ending up at trial where both the accused has to suffer through the circumstances and the alleged victims have to suffer through the circumstances of cases that just don't stand a chance at trial.

HON. JONES: So, the notion of probable cause is a very interesting one. And, if the victim testifies that X, Y, Z happened and I did not consent, credibility doesn't come into that for probable cause.

So, it seemed to me, or at least that's what happens in grand juries, that's enough.

I think what I'm hearing is the military had an extraordinary way to vet an entire case. But the commander wasn't making a probable cause decision in most instances. He was making a decision with a lot of information, much more than he has now, that actually went to I guess two things.

Do I believe it? One. Or, two, even if I believe it, is there any -- is the evidence strong enough?

And, so, you know, it's -- I just find it every interesting because you don't get that vetting in the civil system and it sounds like you're on your way to not getting that vetting or are there already, here.

MAJ HENLEY: Well, and, ma'am, granted, if somebody takes the stand and says that, I completely understand. But, a lot of our cases aren't that clear.

A lot of our cases are Air Force Form 1168 to written statements made by alleged victims and those statements basically say, I

remember drinking with these individuals. I remember -- the next thing I remember is waking up in bed with this individual and he claims that we had sex. And that's it.

And, so, probable cause is not necessarily that clear in a lot of our cases. And, that's why having a more vetted process can potentially benefit. Because some of the charges that we have in the Air Force are not -- or in the military are not the same charges that are available to civilian authorities.

MAJ ARGENTINA: And, ma'am, if I may, obviously you know the difference between the civilian and the military justice system is you have professional prosecutors at the highest level have been doing 20, 30, 40 years making those decision for their prosecutors.

So, it's much different when I was a Special Assistant U.S. Attorney bringing cases to the grand jury. We had the discretion there at the office to say, hey, we're going to bring this forward or we're not going to bring this forward.

And I had a civilian supervisor who, you know, had 20-plus years of experience.

So, that's different in -- and I think the purpose of the old Article 32 was to provide that commander the assurances and guarantees that this was a valid, you know, process because he doesn't have any experience.

And even the SJAs, at that level, may not have been in the court room for 10, you know, or 15 years. So, they have never seen these rules before. So, they only know the application of these rules based on what they're hearing from trial counsel. Because everything that they've done was different back then. So, it's a whole new ball game and now, they're trying to advise the commander.

So, what you end up with is when you're doing your risk assessment, I believe as a commander, if you don't have enough information or you have less information than you had before, then it's obvious that you're going to, you know, be cautious about your decision.

If you have more information, you can be certain that you'll be, when someone looks at your decision and with all that information, that they're probably going to come out the same way you are.

But, now, with lack of information and what's being put out at Article 32, it really leaves no choice for the commander but to refer the case.

HON. JONES: Well, with a basic, and I understand your point, Major Henley, but with a basic PC standard with nothing else, I agree with you.

MAJ HENLEY: Ma'am, if I may add just a little bit? We, in addition to the probable cause that comes out of an Article 32 hearing, we have the pre-trial hearing officer has to make a recommendation as to disposition.

And, so, it's not just necessarily a probable cause hearing to determine, you know, does it meet probable cause? That's one of the four thresholds that they have to meet.

HON. JONES: So, disposition is, I find probable cause of a sexual assault here, but I would dispose of it this way as opposed to a general courts-martial? Is that what you're talking about?

MAJ HENLEY: Yes, ma'am. I find probable cause, so it meets that threshold. But, in addition to that, I recommend disposition at general courts-martial, special courts-martial, summary court --

HON. JONES: Of the non-judicial punishments?

MAJ HENLEY: Yes, ma'am.

HON. JONES: Okay. Thank you.

CHAIR HOLTZMAN: Mr. Taylor?

PROF. TAYLOR: Yes, thank you.

First of all, thanks, again, for your perspectives from the frontlines because that's certainly what you're bringing to us, and for your service as well.

Major Henley, you talked about, in your initial statement, that the changes to the

Article 32 proceedings have certainly caused it to be less robust, I think, was your terminology.

MAJ HENLEY: Yes, sir.

PROF. TAYLOR: And, then, you talked about the fact that you can no longer really use the Article 32s for discovery and you've elaborated on them a little bit.

But other than the 412 issue involving, again, whether or not the victim has to appear, were there other changes involving 412 and 513 that affects your judgment in that regard? Changes that have been made that in any way affects your views of Article 32 or military courts-martial proceedings?

MAJ HENLEY: Well, sir, obviously, if we could -- as a defense counsel, we would like to be able to get into the entire array at the Article 32 hearing of 412 and 513 evidence.

You know, I understand the concept that we don't want to revictimize the victim multiple times and I appreciate that.

But, at the end of the day, if a case

with the 412 or 513 evidence is less likely to win at trial, it would be beneficial for the alleged victim to know that on the front end to determine whether or not she wants to go, or he wants to go forward at that point.

And, so, I appreciate the idea of not victimizing and not exposing their privacy before large groups of people, but we do use the same standards at the Article 32 hearing when it comes to protecting an alleged victim's privacy.

PROF. TAYLOR: Right.

MAJ HENLEY: We close those hearings. We limit the amount of information that's allowed outside of those hearings. And, obviously, we seal the records.

PROF. TAYLOR: Right. Would anyone else like to comment on that?

MAJ REYES-STEWARD: Well, to just more specifically is the constitutionally required exception, you know, that the hearing officers are not allowed to consider when making their determinations, specifically, their

recommendation for a disposition. Because you may very well have probable cause, but to get to that beyond a reasonable doubt standard, it's clear that it's just not going to come.

And, so, you kind of -- you prohibit the hearing officer from truly assessing all the evidence that's available or out there to make a good recommendation for the GCMC.

PROF. TAYLOR: Okay. But, if you know about 513, if you have a suspicion that there's 513 type evidence out there, then you have the right to at least explore it at that point to see what will happen, right?

MAJ ARGENTINA: At the stage of the Article 32, sir?

PROF. TAYLOR: Yes.

MAJ ARGENTINA: No, because there's no way to access those records to know.

PROF. TAYLOR: Well, I said if you knew that there was something out there, you could at least raise it, but that hasn't happened for the most part, I gather.

LCDR TREST: Well, one thing that has been related to me was that -- so, another popular -- a lot of cases that we have are marital cases actually that people are married and then report sexual assault and, oh by the way, a lot of times divorce proceedings happen to be going on in the civilian sector.

And, recently, one of the senior defense counsel's reported to me that they had a public record from a divorce case and there were mental health records in that public record because it was part of the trial.

And then she had simultaneously filed a sexual assault claim against him for actions during the marriage.

And at the 32, the defense counsel tried to produce this, because they did have access to it. But, the PHO wouldn't consider it because they were so afraid of just the word mental health --

PROF. TAYLOR: I see.

LCDR TREST: -- as being misapplied

and considered 513. And, so, I'm not even going to consider it.

And, so, that is information that now the convening authority does not have to make an informed decision about the proper disposition.

PROF. TAYLOR: Well, that's the kind of example I was thinking --

LCDR TREST: Yes, sir, so it is happening.

PROF. TAYLOR: -- on experience. Thank you.

So, back to a comment that you made, Major Argentina, and thank you for picking up on my question this morning on this point, if you look at the enumerated exceptions in 513 and then look at the examples that you cited regarding possible PTSD, medication, lack of medication, not taking medications, have you, as a defense counsel, found it very difficult to fit that within any one of the exceptions anyway which sort of moves you to the default position of some sort of constitutional requirement?

MAJ ARGENTINA: Yes, sir, none of those fit the exception. Any of the enumerated exceptions, you are correct and none of the normal aspects of when you're looking at perception and reliability, credibility fall under any of the enumerated exceptions.

PROF. TAYLOR: So, has anyone here at the panel had any luck in finding an exception that worked for some information that you were trying to get at? Any of the exemptions?

LCDR TREST: No, sir. And, I think that's been since 513 has been changed, that's been the specific issue. In fact, that --

PROF. TAYLOR: Yes, that's what I thought.

LCDR TREST: Yes.

PROF. TAYLOR: Okay.

And, I guess the final question, to be fair, is the same question I asked the trial counsel panel this morning. And, that is, this trend toward paper Article 32s, particularly in sexual assault cases, overall, a cause for

concern in terms of the fairness of the system.

And as part of that, I guess, one question would be, is it a better policy to have more cases tried, even if they end up in more acquittals, or is it better for the system to have fewer cases tried based on more stringent Article 32s given the impact of good order and discipline as part of the equation?

MAJ REYES-STEWARD: And I think your question encompasses the answer, sir. Because our, you know, in the military context, we need to process efficiently.

And, so, to the extent that the Article 32 can act as that gateway, yes, that's what we prefer. It's better for everyone.

You have an accused who has this hanging over their head, they're in limbo. They don't know what the end result is going to be. The same for the alleged victim.

And, so, the sooner we can get an accurate and honest assessment of the evidence, the better for everyone involved.

PROF. TAYLOR: Anyone else like to comment on that?

MAJ HENLEY: It really depends on how much money you want to spend because these cases are very expensive to litigate.

And I understand that we don't put a number of a cost on justice, but realistically, when you start talking about, you know, asking for more money from Congress, there is a limit to the price.

So, in addition to the emotional and the human aspect of it, of putting people through a trial when they would never necessarily get a conviction, you've got financial costs to it also.

MAJ ARGENTINA: And I think that we are running the risk right now of these paper 32s of putting too many people through the process that don't belong being put through the process.

It should be hard for the government to restrict someone's life and liberty. That's what the Constitution requires.

But now it's much easier to do that because there is no real -- there's nobody in the government's way to bring this person to trial. There's nothing.

And, at least before, when you had a little bit more confrontation rights at the Article 32 and the vetting process was more steep, you could affect good order and discipline, sir, to answer your question, better, I think.

We have cases that are lingering, and not just from the beginning of trial or when the defense gets the case all the way to the end of trial, but from the initial allegation, sometimes two years down the road.

You've put an 18, 19, 20-year-old kid's life on hold for two years. Not just the accused, but the victim as well.

So, is there value in having a harsher vetting process at the beginning so, you know, that they can move on, both can move on with their life and get the services they need and not

have to worry about 513 or anything else.

Yes, maybe there is, because, at the expense of the, you know, the rights of the accused, the right to a speedy trial, due process, I think, my opinion is, it's been eroded.

LCDR TREST: And I would just agree that everything is at stake at the courts-martial.

And that is not where these, you know, basic baseline floor, probable cause determinations should be going.

We should have standards in place to make sure that we're at the correct forum, that the resources are there and that it's fair and just. Because, otherwise, innocent people can be convicted.

And I will say that -- and I mentioned earlier in my comments that the SAPRO training, I mean, it's good that we have seen a shift in education. But there is a consequence to that shift as well.

And especially as a defense counsel who services the Naval Academy and also Recruit Training Command, where SAPRO sexual assault education is out there in full force from the minute you're into boot camp or you're into the Naval Academy, you are getting it over your head, which is important.

Except that, there are consequences when it comes to consent because people are making it, I don't want to say dumbing it down, but they're trying to say, if you're drinking, you can't consent. We know that's not the law, but that is what is being put out.

Now, we have voir dire and we use voir dire. But, it's just not getting -- and we're not being able to vet these biases that people are being trained on.

And, so, when you're leaving it to members at a courts-martial to determine the evidence in front of them, and a lot of them think, well -- and we ask this question in voir dire, do you believe just because we're at a

courts-martial that, you know, this person is, you know, not innocent until proven guilty? Oh no.

But, they think that. I mean, you get that impression. I've debriefed members as an SJA after their experience. It's concerning.

We have a job and a duty to ensure that justice is not just at the courts-martial process, but every step to get there. And I feel that the changes have just -- the sands have shifted in favor of the victim at the expense of the accused.

CHAIR HOLTZMAN: Thank you.

Mr. Stone?

MR. STONE: Yes. I guess I want to ask about the comment that was just made. You said, Lieutenant Commander Trest, that innocent people can be convicted.

But we know that the rules right now at the appellate level is that appellate defense counsel, just upon asking, gets the entire sealed provision, even if the trial court judge didn't

want to look at it.

And I heard Major Argentina worry about Brady problems. But, the other panels this morning couldn't tell me about any reversals they knew on Brady grounds based on the sealed material.

Do you guys have citations to those cases that we could look at?

LCDR TREST: Well, sir, I can tell you that part of the issue -- and I did pulse our Appellate Defense Bar for this -- and they have cited that there are three 412 cases currently pending at the appellate level and also three 513 cases regarding constitutional requirement at the appellate level.

So, the things is, I don't think we've had any decisions yet because this has been a new change and it takes time to get through the system, have everybody debriefed.

And, so, I think we're going to see some information or decisions come out, hopefully, that will indicate if there has been a

miscarriage of justice.

MR. STONE: Okay. But, we don't have any now?

LCDR TREST: We don't have any now at this point.

MR. STONE: Okay, that's what I wanted to know.

MAJ ARGENTINA: And, sir, to address your point, if I may?

We also heard from the panel and, you know, the trial counsel and the judicial panel that it's basically nonexistent to do an in camera review at this point. So, at least for 513.

So, what you're getting is anything that is, you know, getting to the appellate level with a conviction, you don't have the records to begin with.

So, what we've seen, like I said, I have one case in the last year where the judge actually did an *in camera* review. All of the other cases out of the, you know, 80 percent that

we filed 513 motions, they're not there.

In addition, the high acquittal rate is actually, I think, masking some of the issues, you know, the rulings that are not, you know, you know, that would have been looked at because we're getting the evidence in some other way, maybe not in 513, but we're able to present it through other witnesses or something else.

So, you're not actually, you know, maybe providing the diagnosis to them or an expert testimony to be more useful to the members, but you're using, you know, friends or, you know, Facebook posts or other things that are actually showing and then the members kind of sense, hey, there's something wrong here.

So, I think that it's also a little bit premature that we don't have those, but also that there's no records for there to be a reversal in 513.

MR. STONE: When you don't get 513 evidence and the judge says, no, I'm not going to review it, don't you ask them to seal it so it

becomes part of the record so that, on appeal, it can be there?

MAJ ARGENTINA: The judge doesn't even get the record, sir. That's what I'm saying, they're not even -- we're not getting past the in camera review threshold. They're not even receiving or giving the military judges orders to get the records.

MR. STONE: So, then, an issue on appeal, though, can be that you think you made the threshold and he didn't even get the record? So that is tested on appeal?

MAJ ARGENTINA: Yes, sir.

MR. STONE: Okay.

MAJ ARGENTINA: And, like I'm saying, the cases that I know of, we --

MR. STONE: Right. So, where you feel that maybe you didn't have the constitutional exception or something, you're able to test that part, it's just waiting to be decided?

MAJ ARGENTINA: Yes, sir. And, actually, the cases that I have specifically

either have ended in acquittals or a plea to an alternate charge in like the one case it was adultery or an Article 128, so they've -- there's a large portion of waiver when they're pleading out to some of these cases, too.

MR. STONE: I have a question for Major Henley. You mentioned that you thought this was a useful process so that the victim can decide earlier that they don't want to go forward if there was a more robust Article 32 proceeding.

MAJ HENLEY: Yes, sir.

MR. STONE: I guess that suggests to me that you don't think that the SVCs are doing their job the way they should because that's really their decision, just like, I mean, they get to talk in a privileged manner with their client just like you do and, if they're doing their job, then presumably, I mean, I can't imagine why not, they're advising their client of exactly all the things -- many more things than that would come out at a public Article 32.

So, I mean, it seems to me, isn't that

what the SVCs are for?

MAJ HENLEY: Sure, absolutely. However, just the same as I like my client to sit through an Article 32 hearing and to experience the process itself, they value -- the alleged victim can gain value that way also by seeing that this is in a public forum.

That, by walking into the court room and sometimes that's the first time they've ever seen a court room and sometimes, it's the first time they've ever seen a witness stand.

And, so, by getting them in the court room and in that area, and I understand, you know, the concept is that SVCs will disclose to them everything in the record, they may not know about everything in the record just because an SVC -- an alleged victim has an SVC, that SVC doesn't necessarily get unfettered access to the investigatory -- the government's investigatory file.

MR. STONE: That's true, but they do get unfettered access to their client, don't

they?

MAJ HENLEY: They do, absolutely.

MR. STONE: I would presume that when your defendants talk to you, they can talk to you about stuff that nobody else at the hearing knows and that's exactly the same circumstance for the SVC.

MAJ HENLEY: Absolutely.

MR. STONE: I was wondering whether, since this panel doesn't really, for the most part, we are concerned with the Military Rules of Evidence and the military articles, but not statutes that Congress decides, some of which have changed some of those rules.

What occurred to me while I was hearing your testimony is whether if -- whether the defense counsel, as a remedy that we could recommend for some of these things that you don't like, would like at any point to be able to say to the military system, excuse me, Your Honor, I have a motion. My client would like to remove this case to state or federal court?

I don't like the way the balance has been set here in the military courts, we'd like to remove it. They'll get a civilian jury. They'll get all the things that the state or the federal government provides in that other forum. Because this clearly, that's something that could be done, we heard at the outset, that it's based on an MOU that these cases are tried in the military and not in federal civilian court.

And then you'll get everything everybody else gets without -- including a civilian jury without worrying about this, without worrying about the standard also.

So, I wonder if any of you have a thought about that, whether that's something we should consider recommending?

MAJ REYES-STEWARD: I'm not sure what the value in transferring jurisdiction would be for our clients.

MR. STONE: Well, part of that was because I had mentioned because Major Argentina said he'd like to see -- he was a Special

Assistant U.S. Attorney and he thought in that office they won't go forward without somebody with maybe 20 years' experience looking at it and saying, yes, this should go forward.

So, by removing it to there, you'll get these more experienced people on all sides of the case, judges, public defenders, everybody.

LCDR TREST: Just some thought, sir, just having been a staff judge advocate and a prosecutor that's worked with civilian authorities, they don't want these cases. I mean, they wouldn't take them.

Just flat out, when even as an SJA, if you had Virginia Beach respond to a case and NCIS, they're like, you can have it. It's a sex assault he said, she said, drinking, I don't want it. And I don't know, you know, that -- so, one, you know, there is that issue.

But, two, is I'm not licensed in any of the, you know, I'm licensed in Illinois. I work at Washington, D.C. I don't know what the local -- I could never inform my client what the

local jurisdiction would do and be able to make that determination because I'm not even licensed in that area to understand specifically what that local jurisdiction would do or who would even take it.

So, I don't think that is a realistic possibility. What I would like to see is our prosecutors or the convening authority exercise more prosecutorial discretion similar to what the state and federals do and actually push cases forward that can have evidence that can secure a conviction at trial, not the baseline probable cause where a victim's accusations meet the elements of a crime. Okay, let's push it forward.

And, actual looking at the case and what the success rate will be and can we get a conviction beyond reasonable doubt.

MR. STONE: Well, the legal standard is going to be the same as yours, it's going to baseline probable cause in state and federal proceedings.

But if you're correct that the local prosecutors would never take these cases, then it seems to me would benefit your clients because you'd come back to the military and say, okay, legal prosecution of this guy has been declined, you can do no more at this point on this sexual assault crime than -- I mean, maybe you might have some administrative thing that in the barracks or something for some other lower violation, but the crime that you wanted to charge has been declined. It's done and you get the professional determination that you might like.

It seems to me you avoid all these problems of people without enough experience, a convening authority who's not used to these cases, all the issues you mentioned. And, I just wonder if an opt out provision is something you may want to even get back to us and recommend. Because I certainly have an open mind towards that.

If anybody has any other thoughts,

that's my recommendation.

CHAIR HOLTZMAN: Okay, thanks very much for your testimony.

I guess I just want to express my concern about what you call the incentives for fraud. And you mentioned -- I was participating in a number of site visits around the country with the Subcommittee of this Panel, so I'm familiar with some of the points you've -- many of the points you've made.

But the expedited transfers is one of those and what are the other incentives for fraud?

LCDR TREST: Yes, ma'am, the Sexual Assault Management Meetings --

CHAIR HOLTZMAN: Why do those create an incentive for fraud?

LCDR TREST: Because what is giving in the -- is the victim now makes an allegation that it has to be unrestricted, obviously, so they want to be identified.

CHAIR HOLTZMAN: Right.

LCDR TREST: And now they have basically the ear of the commanding -- their commanding officer.

CHAIR HOLTZMAN: So, they're likely to get -- are you saying they're likely to give preferential treatment in the barracks and assignments and is that what you're saying?

LCDR TREST: Yes, ma'am. I would say that --

CHAIR HOLTZMAN: And, is there evidence of that, that that happened?

LCDR TREST: I would say anecdotally the majority, I would say, don't abuse it. However, as a staff judge advocate, I saw a specific victim whose case leader was determined to have no merit but had to be worked up, use the opportunity to ask for special request chits to get in touch with the commanding officer.

Now, as SJA, I was able to, you know, insert myself there. But not every commanding officer has a staff judge advocate or that are savvy with the courts-martial process and how

those implications can affect the courts-martial.

And, I've heard anecdotally, although I haven't been witness to, and haven't done a full investigation of, but at the Naval Academy, the Commandant of -- I'm sorry, the Superintendent of the Naval Academy sits on these meetings and more times than not, we are having accused and victims who are both students at the Naval Academy.

And that's concerning because, yes, victims are going to have real consequences, and we're not trying to say there might not be legitimate policy reasons when they have slips of grades and things from being traumatized.

But one of the effects of having a policy are the consequences that are created. And, that's what we're trying to acknowledge is that there are real consequences to these policy initiatives where commanding officers are now meeting face to face with these victims. They're putting names with faces.

CHAIR HOLTZMAN: So, this is creating

a possibility for influence?

LCDR TREST: Yes.

CHAIR HOLTZMAN: Command influence?

LCDR TREST: And it's hard to articulate. I mean, it is hard to articulate this in a motions practice. But, it's there and it's still developed would be my thought, ma'am.

MAJ ARGENTINA: And I think it goes to the -- what really, and I, you know, tried to litigate this as it really it comes down to a Giglio issue.

That, you know, are they -- do they have some type of incentive that they are promised before a sexual assault happens and then execute it when something goes wrong?

Because I've seen cases where they get in trouble for something minor, let's say disrespect or under-aged drinking. When they get confronted about that, well, I was sexually assaulted.

Now, that other misconduct may get taken care of at NJP or something else, but they

know that they are going to get preferential treatment from that.

I have one specific case when I was senior trial counsel where the complaining witness actually got out through military, you know, PTSD and also a back injury.

But she had alleged sexual assault, a gang rape of eight individuals at a party. She then changed her story to five, and then it went down to two. And, then, ultimately, it was found through the investigation through NCIS that it was all a lie and they had one specific piece of evidence and DNA evidence that didn't quite match up.

It was a consensual activity between her and another person trying to mask that from her boyfriend and so created this allegation of gang rape. But she got out with full disability benefits, more than 30 percent and has a medical retirement and everything else.

So, that's a real incentive when you know the process. And, I agree, that it's not --

I don't think this is a widespread thing, but it did put eight Marines' lives on hold for a period of time, and ultimately no one was charged.

I was the senior trial counsel at that point and did all the PMMs recommending not going forward.

CHAIR HOLTZMAN: Okay. I just want to go back to the constitutional exception and your plea that that be restored.

Why isn't it sufficient just to have this Constitution out there? Why does it have to be written into every Statute?

I mean, we have, I don't know, how many laws, federal and state laws in the United States? I mean, we probably have maybe a million of them if you added them all up.

And I can't think of any others aside from these two that had the constitutional, by the way, this law has to comply with the U.S. Constitution.

And, somehow, judges and lawyers and the Supreme Court manage to construe these

Statutes in light of the Constitution.

So, why is that such a big problem here?

MAJ REYES-STEWARD: Well, at the 32, ma'am, the constitutional protection of the right to confrontational -- first of all, those don't apply at the 32. It only applies at trial. And, so, it does create the necessity for a rule to be written in that the evidence be assessed under the same rules that the evidence is going to be assessed at trial.

And, so, from my perspective, anyway, that's why I believe that that constitutional exception be reinstated into the 32.

CHAIR HOLTZMAN: But, the theory on which you're operating is not necessarily the theory that I was raising earlier.

I mean, the fact of the matter is, the courts can always find that the Statute violates the Constitution, whether in its writing or in its application. There's nothing that stops -- there's nothing to stop any military judge or any

other judge from making such a conclusion.

So, I still don't --

LCDR TREST: And, ma'am, if I may? When we leave it to the courts, which is what's been pending, what we're getting is inconsistent application.

And when we have an inconsistent application by each judge because there's this ambiguity, it was here, now it's not here. What's the intent?

Now, we're causing more litigation and an uncertainty in the system for both the victims on securing that conviction and also the accused.

And, now, we're at a place where cases are likely to be flipped and now we're going back to where we started and where's the justice if we could, in that process for anybody?

If we could be clear, and military likes rules that are clear, then I think that would take out the unnecessary litigation that will be pending after trial and trying to resolve this issue.

And, so, I think that's where it would be helpful, ma'am.

CHAIR HOLTZMAN: Okay. I guess my final point is that, I think some of the -- many of the issues you've raised we've heard and I've heard, and I think they're very concerning.

Investigation resources is vital. Right to expert testimony and all of that, I think are very legitimate concerns.

What troubled me very much about the testimony here today, and I guess I had never really been aware of it before, I should have probably, but is that the Article 32 was as much a vehicle for the convening authority as for the parties in the process.

And that when you abbreviate that or you minimize that or you make it, you know, just a puny little model of what it used to be, and you still have the framework of the convening authority making this determination about prosecution, what are the consequences of that?

I mean, it's very different, the

system in the civilian world because the prosecutor makes that decision. And, here, you could have trial counsel saying, we're not going to proceed because there's no possibility of a conviction or a remote.

You can have the hearing officers say, this shouldn't go forward, but you're still having convening authority making a different decision.

But based from what you're saying now, the evidence or the material or the information that's going to be part of that decision making process by the convening authority is really abbreviated.

And if we're relying on the model of -- it's not a prosecutorial-centric system, this is a convening authority-centric system, then have we somehow left tools that were out of the convening authority's toolbox here?

And is that one of the reasons, and I don't know that, I mean, maybe you have an answer for it, although none of you is a convening

authority.

But, I mean, I'm just very concerned that by trying to address this part of the system here and this part of the system here, and that part of the system here, that, I mean, everybody's acting out of the best of motives and intentions to try to make the system fair to the victim, which it wasn't, no question about that.

But all the -- leaving out the tools that the key -- a key component that the system needs and I'm just very concerned that that's been overlooked in this process.

LCDR TREST: And, ma'am, if I may? And, the only person a convening authority has to listen to is the victim. That being said --

CHAIR HOLTZMAN: Well, the SJA, too.

LCDR TREST: Well the -- yes, on that authority for advice, you're right.

But what the victims say is so monumental in this because if the victim doesn't want to go forward, then it's our policy, DoD, that it goes away.

And there are times that we have had cases where the prosecutor has said, there is evidence and the victims didn't want to go forward, and the convening authority drops the case.

But the same way there has been times where the prosecutors say it shouldn't go forward and the PHO says it should go forward, but the victim wants to have her or his day in court, it goes forward.

CHAIR HOLTZMAN: Right, but that's not the policy yet.

LCDR TREST: Yet, no, but that's --

CHAIR HOLTZMAN: Of the Department of Defense, it has a policy with regard to if the victim says no. And I'm just concerned that, when we're giving the commander, and I believe justifiably so, the discretion to make this decision, we should be giving the convening authority as much information as they need to do that.

And maybe that's just a concern that

I have just as a result of your testimony here today. I don't have any further questions or comments.

Thank you very, very much for sharing your experience and expertise with us.

I guess we'll -- maybe we should take a five minutes -- really five minutes because now we're late. So, really do five minutes, and we'll hear from our next panel.

(Whereupon, the above-entitled matter went off the record at 2:47 p.m. at 2:57 p.m.)

HON. HOLTZMAN: Okay. Are we ready to proceed? I think we're ready to proceed. Please, members of the audience, take your seats. Go outside if you need to converse. Thank you. We want to start, and finish, if we can.

Our next panel, I want to thank all the members for being here, deals with perspectives of Special Victims' Counsel and Victims' Legal Counsel on the application of M.R.E. 412 and M.R.E. 513 at Article 32 Hearings and Courts-Martial. We will begin with Major

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

Major, thank you and welcome.

MAJ WALSH: Thank you, ma'am.

Good afternoon, Madam Chair, Members of the Panel. Thank you for having me here today.

Since July of 2016 I have served as the Marine Corps' Regional Victims' Legal Counsel for the Western Region of the United States. Prior to assuming that position I served as the Victims' Legal Counsel for Marine Corps Base Hawaii for approximately a year. Prior to that position I served as the defense counsel on Marine Corps Base Hawaii where I defended Servicemembers against sexual assault allegations in numerous cases.

In developing my comments for today I've drawn upon my personal experience in representing approximately 50 victims of rape, sexual assault and domestic violence. While I believe that my sample size was insufficient to

provide adequate comments, I have expanded my considerations to the region which I supervise, which currently provides over 150 victims of legal services.

I'll begin my testimony by discussing my perception of the new Article 32 hearing as amended by recent case law and recent change to the law. And as this has been stated earlier, but an important trend to consider is the victim's right to decline to testify at that hearing how the defense has responded to that.

In both my time in Hawaii and as a supervising attorney in the Western Region I have observed that the majority of Article 32 hearings are now what is referred to as a paper 32. This is where parties essentially attend the hearing and submit written documentation, provide comments and then close the hearing. Very little, if any, testimonial evidence is elicited and documentation evidence is usually submitted at large just in a bulk submission.

Considering this, I would approximate

that about 70 percent of Article 32 hearings, the defense offers little to no evidence in the matter except to show up at the hearing and object to the forum and the rule changes as a unconstitutional change to the law.

This paper nature to the hearing creates its own challenges to victim representation as well, specifically notice and transparency as to what is being admitted into evidence. We have dealt with issues where the hearing officer has failed to adhere to the procedural requirements of Military Rule of Evidence 412. The hearing officer seems disinclined to consider 412, however, in responding to this they tend to admit the evidence but then state that they did not consider it. Then the VLC is left to after the fact move to have it sealed in accordance with the procedure and then articulate the objection that the procedural notice wasn't adhered to.

Now, we have not seen a writ in this situation, but this is an area that I could

envision a writ being filed. But, as is often the case, the victim usually wants to proceed forward and does not want to redo anything.

My personal interpretation of Article 32, as well as my guidance to the VLCs in my region, is that the rule, the RCM for the Article 32, imports not only the exclusionary rule of 412, but also the procedural requirements and the notice requirement of five days for the victim. However, absent having a meaningful right to inspect the evidence that's being submitted in documentation form and a right to the Article 32 report after it is completed, the VLC, and therefore the victim, is hampered in their ability to ensure that M.R.E. 412 evidence is not being admitted.

Moving to M.R.E. 513 evidence at the Article 32. I'll start by stating that I do not believe copies of these documents and evidence of this nature should be provided to the defense at this base. That said, no hearing officer has attempted to order production of M.R.E. 513

evidence and I have not seen a defense counsel who has sought to enter it or have it produced at this base, the Article 32.

My position on the discovery prior to arraignment is found in my attempt to advance the practice of victim legal representation to inform more closely with federal jurisdictions with respect to discovery of sensitive information and then also the victim's ability to obtain a protective order, a judicial protective order, where it's necessary.

I feel strongly that such evidence such as mental health records, victim contact information, sexual assault forensic examination photos and the like should not be copied and provided to the defense until the victim legal counsel has reviewed them and had the opportunity to seek a protective order from the judge. And in our system, as you know, the judge doesn't really exist until the convening authority and the referral.

There are mechanisms in the Rules for

Courts-Martial that allow for sealing of exhibits and control, but I appreciate the power of a court order a little bit more than those mechanisms, especially when dealing with civilian counsel and defendants who may leave the military and not be subject to military orders, but would still be subject a court order if they violated it.

I'll turn next to the topic of Military Rules of Evidence 412 during the course of a courts-martial. In my experience the defense always seeks to admit M.R.E. 412-type evidence in a contested courts-martial dealing with an Article 120 violation.

As M.R.E. 412 is a rule of relevancy, the 412 closed session essentially provides the parties with a ruling of admissibility in advance of the trial on the merits. As such, the defense has begun offering to admit a laundry list of M.R.E. 412-type evidence because they'll be essentially told what's admissible and what's not admissible in advance. Some of this evidence

sometimes, as we've heard before, is quite possibly not 412, but in an abundance of caution the Defense Bar presents at the 412 hearing.

I find that in approximately 20 to 30 percent of the cases the defense offers evidence of an alternate source of semen, injury or physical evidence. This type of evidence is often found admissible and accounts for a significant portion of the evidence admitted pursuant to an exception to M.R.E. 412.

Evidence of consent or mistake of -- as to consent is almost always offered at a 412 hearing by the defense. I would estimate it is offered in excess of more than 80 percent of the cases. However, military judges tend to subject this offered evidence to a high level of scrutiny and many of the written opinions and analyses are of a high quality from the bench. I would estimate that 50 to 70 percent of the offered consent evidence is admitted, however, the judge usually narrowly tailors this evidence and limits its use at trial.

Finally, we have struggled with offers of M.R.E. 412 evidence pursuant to the constitutionally required exception. Here the theory of admissibility often takes an amorphic pseudo-scientific psychological theory. Theories such as transference of the offender's identity or cognitive inability to perceive the nature of reality are often presented by the defense.

These theories have an extremely low chance of admission, however, and unfortunately, these theories also tend to involve the most personal of M.R.E. 412-type evidence such as past childhood sexual abuse, past sexual trauma or gender orientation identity issues. I cannot overstate the importance of the implementation of a closed and sealed session for the M.R.E. 412.

The privacy offered by the closed session offers immeasurable comfort when advising a client who is usually confused, outraged, hurt or any combination of the above by the fact that this is even being discussed. In cases where evidence of sexual history or predisposition is

found admissible there is an understandable emotional impact by the victim. Victim legal counsel often hear why is this about me all of a sudden or I feel like I'm on trial.

My personal opinion is that I have not observed a case where the exclusion of M.R.E. 412 evidence has a negative effect on the defense, however, when M.R.E. 412 evidence is admitted, it has a significant impact on the trial. When presented with M.R.E. 412-type evidence, the members are likely to become distracted by the truth or untruth of the asserted sexual history of predisposition and lose focus on the ultimate issue of guilt or innocence.

I have the highest opinion of the judiciary in their handling of M.R.E. 412. By and large military judges are presenting fair and consistent rulings with M.R.E. 412 issues.

The one issue that I have run into relates to the text of M.R.E. 412. M.R.E. 412(c)(2) allows the defense to call the victim as their witness. In the vast majority of cases

the military judge will not call the witness until the defense has articulated what their -- why their testimony is necessary to support their M.R.E. 412 motion. However, I have experienced military judges that believe that the rule allows the defense to call the witness, and since they, the defense, have the burden of persuasion, the judge is going to allow them latitude with their witness.

In some cases the defense has not provided what testimony they seek to elicit in their written motion or use any expected testimony in their legal analysis of the written motion. They have simply wrote that they intend to call the witness and then call the victim at the stand.

I think M.R.E. 412 could be strengthened by adding language that requires the defense to articulate what they seek to elicit from the victim, why it is necessary to their 412 motion, and why they are unable to obtain that evidence from another source.

Turning to M.R.E. 513 evidence. In about 70 percent of cases the defense has sought production of mental health records via an in camera review. There are instances when they have been successful, specifically when the victim has waived the privilege either intelligently with the advice of counsel or in some cases during the investigation process prior to obtaining VLC services.

In cases where the privilege has been waived, the judge usually orders discovery. It's important to note that this is not an M.R.E. 513 motion, but is a motion to compel discovery since the records are already in possession of the government. The privilege has been waived at that point.

In light of the elimination of the constitutional exception in recent case law military judges are no longer conducting in camera reviews in my experience. There's simply no mechanism to conduct the *in camera* review. With the elimination of the constitutional

exception the state of the law is that they have removed the constitutional exception as a mechanism to allow *in camera* review for an enumerated privilege that exists. And we've identified a societal interest in why we've extended this privilege to victims' mental health records.

It's important -- as the parties to the courts-martial talk, it's important to note not to confuse the standard which they perceive as being -- of some evidence as being perceived to be lifted to an artificial level. It's not. Most often it's the judge saying I understand what -- some evidence you presented. What standard enumerated exception are you looking to? And that's where they can't point to the constitution anymore.

My perception is that military judges are adequately trained to address this issue and are producing fair and consistent decisions. This consistency is welcome to many of the clients who desperately desire and seek mental

health services. Being able to provide clear guidance as to the mental health privilege is critical as a VLC because many of our clients desperately do need mental health services as a result of the crime that's been committed against them.

In closing I'll state that I would like to see greater right to inspect the admission of evidence at the Article 32 and would like to -- and that would enable the VLC the ability to seek protective orders. In many cases the protective order is not just about privacy; they are about the victim's safety because they disclose current location and other identifying features such as family members.

I also believe that the victim should have the right to the Article 32 report after it is produced to allow the victim's legal counsel to determine whether the process was done correctly and whether their rights were afforded to them.

Furthermore, I would welcome the

changes to M.R.E. 412 that I discussed where the defense has to articulate why they are calling the victim to the stand.

The Panel earlier discussed the nature of Article 32, and I will say that in my anecdotal experience I'm not seeing more cases go to trial at Camp Pendleton or in the region, and I believe this coincides with the Marine Corps' implementation of the Prosecution Merits Memo. The Prosecution Merits Memo is where the trial counsel with possession of all the evidence writes a complete and informed opinion as to the likelihood of the case and whether they want to take it to trial, also considering their staffing issues. That is presented to the SJA and the convening authority.

So it is my position that the convening authority is receiving adequate information to make their convening authority decisions and the referral decision, and the changes to the Article 32 where the victim does not have to take the stand are not really

affecting that in any way.

I will say that I don't concur when the defense says that there's a real benefit to the victim going through the Article 32 process as well, that there's nothing -- they're finished and there's nothing necessary to my counseling of a victim that I need that they'd have to take the stand for me to be able to provide them. It's traumatic and it's unnecessary and it slows the process down.

In general, I think the Article 32 is akin a little bit to like the appendix organ. We know it was useful at one point; it might still do something, but it's starting to become a little bit vague of what the purpose of the Article 32 is.

With those changes in mind, I'll say that I believe the law is in a good place right now and the rulings and motions we are seeing are becoming increasingly consistent.

Thank you, Madam Chair and Members of the Panel, for the opportunity to discuss these

issues with you.

CHAIR HOLTZMAN: Thank you very much, major.

Our next presenter is Lieutenant Commander Elizabeth Hutton, U.S. Coast Guard, Specials' Victim Counsel.

Commander, welcome and we look forward to your testimony.

LCDR HUTTON: Thank you. Good afternoon, Madam Chair and esteemed Members of the Panel.

I've been acting as a Coast Guard SVC since June of 2015. My other prior experience as relevant for this Panel would be I served as a prosecutor imbedded with the Navy at the Region Legal Service Office in Norfolk. And I also served as a prosecutor and prosecuted cases for the Coast Guard. So though we are not DoD and we're different from DoD, I've had a little bit of that experience.

As requested, the information I'm going to provide to you are my own personal

experiences and don't reflect that of the Coast Guard, and the same for my opinions.

To address specifically M.R.E. 412 evidence at 32 hearings, in my personal experience the defense has attempted to introduce evidence under this rule at all Article 32 hearings involving my adult clients. I believe this is consistent with other Coast Guard SVCs and would estimate across the board that about 90 percent of the time 412 evidence is attempted to be admitted at these hearings. Typically the evidence deals with other sexual behavior by the client, most notably with the accused, which is I think what we've -- consistent with what we've heard today.

I have also had evidence in three of my last four adult victims of a prior sexual assault attempted to be admitted even though the constitutional exception doesn't apply, as well as evidence of sexual predisposition. An example of that was 100-plus pages of Facebook messages between my client and the accused where they

talked about essentially sexually charged topics. So I've kind of seen the gamut attempted to be admitted at 32 hearings.

To date, fortunately for me, the PHOs I've had the experience of working with have adhered to the procedures outlined in 412 at the 32 hearings with the exception of the fact that most of the time, if not all the time, notice is not being provided at all, or in a five day window, and the evidence is kind of sprung mid-hearing. The PHOs have been diligent in listening to us asking for the hearing to be closed, to take the testimony, to make an admission decision and then to hopefully seal the record following the 32 hearing. So I have been fortunate in that experience in the Coast Guard.

I think that they have a conservative approach when admitting 412 evidence, especially when the notice requirements are not being met. I think they're admitting evidence that probably has a high likelihood of coming in: prior sexual relationship with the accused and the victim, but

things that are sort of outside that scope or outside that box, I think they're being more conservative and not letting that information come in.

That being said, the fact that this evidence is being introduced, that some of it is being attempted to be introduced under the constitutional exception just highlights the fact that we do need PHOs that have -- and again -- preliminary hearing officers; I apologize for the acronym, that have significant military justice experience and also training to do that. I know right now we don't have judges doing these types of hearings. I think some sort of threshold would be necessary just because of the high stakes and sensitivity of the information.

As far as writs, again I haven't had the opportunity to or need to file a writ due to a 32 ruling. Again, I've had a pretty good experience with the 32s. But I also think that filing a writ when a decision, if it came down to it -- there's a concern of delay and there's also

the idea that it's not binding on the trial. Just because the 412 evidence has come in at the 32, doesn't mean that it's going to come in at the trial. And so now I'm better prepared to file a motion in limine or respond to a defense motion when the time comes moving forward.

To specifically kind of address a question I saw that -- regarding the Fiscal Year 14 changes to 32 hearings, I think the changes have been incredibly positive from a victim perspective, and I don't think they've had that much impact.

When I was a prosecutor under the old way, I -- defense counsel used to keep victims on the stands for three or more hours, just as a rule. Not because they really had any information that they really wanted to get from them, but they wanted to make them feel uncomfortable and sit up there and answer questions. And some of the questions had no relevance. And yes, you can object, but the Rules of Evidence don't apply to 32. So we got

into this weird place where it was seemingly an abusive environment for them and under the guise of the purpose of discovery.

I think not having clients testify at 32 has been incredibly helpful for them. It doesn't inhibit my advice to them as to whether it's a good case or not moving forward. Obviously, those are conversations we're having as their counsel. Do they want to proceed? What's it like to testify? They don't need to feel that at a 32 to understand what they're getting themselves into moving forward.

And I will note that all but one of my clients has agreed to actually meet with defense counsel. So even though they didn't testify at the 32 hearing, when they have been asked to -- had a request to meet with defense counsel, we'd talk about that and they made the decision to meet with them. And they've talked to them and answered their questions, and we've left.

The one client who chose not to testified in an Article 39a session for three

hours and she felt that she didn't really have much else to say to that person. And so she's the only person I've had so far that has declined that invitation to meet with them.

The other issue at 32 hearings is again clarifying probable cause. I think that different hearing officers are applying different standards. I'm not sure if they're very clear on what probable cause is all the time. Again, I think some clarity in that respect without going too further there would be helpful.

In addressing M.R.E. 412 at courts-martial, similar to my experience at 32 hearings, 90 percent or more of my cases we're having 412 evidence tried to be introduced at the courts-martial proceedings. Again, the majority of that is other sexual behavior, but the same sexual predisposition-type things apply: the Facebook messages. I've had nude photos of my clients tried to be admitted by evidence. And in almost every case sometimes that evidence is highly unlikely or most certainly will not be admitted,

but is attempted to be admitted anyway.

And to kind of use my co-counsel's point here about having victims testify, at a 39a session for a 412 hearing I had an experience where a client was subject to three hours at that hearing of questioning that discussed previous sexual relationships with other men, the 100 pages of Facebook messages that counsel tried to go into every line of messaging that she had made, which was highly irrelevant. Despite objections from myself and the prosecutor that the questions were degrading, which was against the M.R.E.s, and that they were completely irrelevant, he gave the defense counsel wide latitude to go into these matters with my client.

And she didn't understand it. I had a hard time explaining to her why she had to answer those questions in that setting. And there was no proffer as to why -- what they were trying to get at by having her testify ahead of time. There was no discussion ahead of time of where we were going with this before her taking

the stand.

And having her testify in those incidents were -- it kind of circumvented the purpose of 412, which is one of our arguments, right, which is to protect the victim of the emotional trauma of being questioned about their sexual history while on the stand. And that's exactly what happened in that case.

Ultimately the majority of the evidence was ruled inadmissible as it didn't fall within an exception, so it did not come in in front of the finders of fact in that case, but my client was emotional. She was exhausted. Even though she agreed to continue and testify at the courts-martial, I think that could be a deterrent for people going forward.

That particular client in her sentencing said that she thought this process, in reporting her sexual assault -- because she had heard of other possible victims; in this case there was another possible victim -- there was another victim, sorry -- that she was doing the

right thing, that she would feel relief from coming forward. And instead she said this process was relentless. Relentless was the word that she used. That's what she told me and that's what she told the jury. And I think that was really impactful for that case, but also very telling of -- that this process is still not easy for victims and that their privacy rights are still at stake.

As far as Writs of Mandamus we haven't had any in the Coast Guard as far as I know for 412 issues, but I -- so far we've had judges that I think are -- know how to follow the law when they're filing or supplying their orders and keeping the appropriate materials out and letting the appropriate 412 materials in. 412 is admitted in almost every case I've had as well, and they're doing a good job of also tailoring it down. So yes, you can talk about the fact that maybe they sent sexually charged messages to each other, but you're not going to bring in every single message that they sent to each other. So

things of that nature.

To move onto M.R.E. 513 quickly, at 32 hearings we're not seeing it at all. I think a lot of that has to do with -- starting with law enforcement people are being more protective of mental health records from the get-go, not -- making sure they're not part of the investigatory file, making sure they're not being discovered as part of discovery and understanding that there are greater protections afforded to those records, and reminding people, especially from the SVC perspective of the laws that apply to protect those records and that there's a process in order to get them.

When they exist, defense is most certainly trying to get them. I have an upcoming case where that's going to be an issue. We haven't litigated that yet, but as we've already discussed, in the Coast Guard we've had one case, which is the ***HV v. Kitchen***, where a writ was filed, and that was dealing with what does mental health records cover?

So to that point the only other thing I would add about 513 records are maybe defining what's included in mental health records, maybe something to look at in the future as opposed to leaving the interpretation up to the courts.

So subject to your questions that's all I have and thank you very much for your time.

CHAIR HOLTZMAN: Thank you very much, commander.

We'll next hear from Commander James Toohey, U.S. Navy, Victims' Legal Counsel.

Commander, welcome.

LCDR TOOHEY: Thank you, Madam Chair and distinguished Members of the Panel.

My name is James Toohey. I'm a victims' legal counsel now for about two-and-a-half years. I am -- I currently supervise eight Navy victims' legal counsel on the West Coast and have had about approximately 100 clients since I've started.

To start off with Military Rule of Evidence 412, I think generally speaking the

practice as it relates to 412 that we see most frequently are the exceptions under (b)(1)(B) and (b)(1)(C) for consent and for the constitutionally required exception. We do not see, unlike Major Walsh, as often the alternate source of semen or injury. Although it's hard to say what impact the elimination of (C), the constitutionally required exception at Article 32s has had on the admission of evidence, I have seen evidence excluded specifically on that basis, but also I have not seen particularly the attempted admission of 412 evidence either on that basis or on mistake of fact or consent basis, often because I think defense counsel is not going to show their hand on that for strategic reasons at a 32. So it's hard to say what impact that has in terms of the removal of that, but I have seen less of it at 32s.

Also, because victims frequently do not appear at Article 32 hearings, as we already discussed in this -- in front of this Panel today, there's less incentive often for the

defense to raise it because they're not going to be able to address it with the person that it most impacts.

Just to go back to the point of the change in Article 32s, I have had several clients who have voluntarily testified despite having -- not having to testify, and they went through that process. Their cases were still referred. It went through the normal rigors of that process. And so, in terms of being able to differentiate an effect of victim participation, I have not seen any in my cases that have been referred or not referred.

I would say that I'm running at about an 85 percent no preferral rate among my clients. I think among my 100 clients I've probably had roughly 15 end up at a court of some type. So in terms of over-prosecution that's not particularly high.

I have not personally observed any 412 hearings at Article 32s, so I can't comment on the quality of the analysis. I suspect it's

going to depend in large measure on the quality of the military justice experience of that particular PHO. I'm not aware of any specialized training that those individuals are receiving on these issues.

For courts-martial themselves the 412 motion rate is actually what I've seen anecdotally quite a bit lower actually than what I've heard from other members. And I don't know -- certainly the success rate is higher than the corresponding 513 rate. So there's probably a comparable rate of 513 and 412 motions being filed, although the success rate of the 412 motions is higher.

I think that's a consequence of the rule is better understood. Defense counsel are filing motions that they know are going to be successful, at least in some capacity. And in 513 they're kind of just taking the shotgun approach on certain cases because they're just not clear what the parameters are and they're not being successful.

Frequently because of the nature; and just to distinguish, as I know the Panel is aware -- I mean, 412 is an exclusionary Rule of Evidence and 513 is an actual privilege, so the information that's at stake is considerably different and usually the 412 information is already well known to the parties. All we're doing is fighting about whether or not it's coming into court.

So when victims go through 412 -- and there have been obviously exceptions where there have been some pretty trying hearings, but when information is admitted pursuant to 412, victims are often not overly concerned with the admission of that evidence. In many cases the victims are the ones who brought that up originally to investigators.

To distinguish that from 513, which is a completely different animal, which I'll address in a bit. Often, when admitted, military judges often limit or modify the way in which that information is admitted, even when they do rule

in favor of the moving party under 412.

I have not personally encountered a writ yet filed on 412, on a 412 issue. I think that's a combination of factors. As I already said, sometimes victims are -- we're kind of expecting that that information was going to be at trial. They don't want to delay the trial if it were -- if that's going to result from them filing a writ.

And particularly if they believe based on their counsel's advice that they think their chances of success, even if they were to file a writ, is going to be low, then they're unlikely to probably pursue that remedy. Obviously, while Article 6b provides a jurisdictional basis for us to appeal, we still have to meet the very high Writ of Mandamus standard to get that clear and indisputable relief, which is challenging.

Moving onto Military Rule of Evidence 513, at Article 32 preliminary hearings -- and I know we've talked about this and I think Mr. Taylor was bringing up the issue of -- because

513 -- because preliminary hearing officers have no production powers, really you would have to have the stuff coming into the hearing for there to be a question of whether you could admit it. And very frequently nobody has their hands on that information pre-32, or even pretrial because it hasn't gone through the process. So I have not seen the attempted admission of any 513 information at a preliminary hearing and I certainly haven't seen anything attempting to produce that information.

In courts-martial I would say that the defense has sought production for mental health records. At a comparable rate to my 412 motions it's probably about 40 to 50 percent of cases. The military judges that I have practiced in front of have rigorously applied the 513 standard. The initial issue during litigation is typically the scope of the rule and what is privileged and what is not privileged. And that certainly is an area of uncertainty right now based on the fact that the confidential

communication is rather undefined.

The defense continues to argue the now eliminated (d)(8) exception for constitutional required as the basis for admission and the basis for production and *in camera* review. The only other exception that I've seen argued is for a crime of fraud, (d)(5), which is -- I saw it only one time and it was not an effective argument. But the military judges in front of whom I've practiced and who have held these hearings under M.R.E. 513 were all sufficiently trained and experienced to handle the issues and properly dispose of them.

I have not yet personally encountered a pure 513 motion that resulted in a military judge ordering production for *in camera* review. The defense motions typically provide little in the way of a specific factual basis. And if the rule as recently amended is faithfully applied, that being with (d)(8) removed, it is exceedingly difficult for the defense to meet that burden and -- or any moving party to satisfy the procedural

requirements.

And just as we're talking about M.R.E. 513 I think it's just a useful note to address the fact that this is a rule for any patient. It is not just for sexual assault victims. So we've talked a lot about that fact, that sexual assault victims are benefitting from it. But this is a rule of privilege that applies to anyone whose mental health records are at stake.

Now I mentioned a pure 513 motion because what I consider to be an issue that has arisen and was mentioned earlier is the relationship between the Integrated Disability Evaluation System, which the VA and the fitness-for-duty standard go together. And it's a common issue because many of our victims are going through what's called the IDES process simultaneously with their courts-martial, and their mental health records may have been accessed during that VA process.

And so it's a way in which defense counsel have started to address potential motives

to fabricate, as was mentioned earlier, the ability to ultimately get a VA disability rating for military sexual trauma and kind of back door some of the things that they might not be able to get through a 513, a pure 513 motion. So that's potentially an issue that I believe we'll probably see more of.

Ultimately the release of records, even in those cases, has been limited in scope subject to a qualified protective order. And in my experience the victim had not been concerned sufficiently with what had been released to pursue any type of appellate action.

I've spoken to multiple VLCs who were preparing for adverse rulings and getting ready for the potential to file writs. Ultimately those cases were either resolved in their client's favor or their clients decided that they didn't want to go forward with the appellate process.

Under Military Rule of Evidence 513 I think as a proposal the -- currently the scope of

the rule's privilege is uncertain. One of the most critical parts about the privilege is that we want to be able to have certainty for victims that when they walk in the door with their psychotherapist and we tell them that everything you tell your psychotherapist is protected because you're here in distress and you need my help that we can actually back that up.

And when we look back at ***Jaffe v. Redmond*** and what it talks about, that case specifically addresses the idea that there is a cost in the system when you recognize a privilege. There is a cost to not being able to utilize what they always refer to as every man's evidence in this pursuit of truth finding. And that cost is that we are going to protect these records and make sure that we can guarantee on the front end to be able to make sure that this victim is able to access care and not be subject to the whims of some military judge's ruling later.

And so being more succinct and being

more specific about what it means to be covered by the privilege and then being protected and not having this vague notion of constitutionally required exception is going to give them that certainty that ultimately they need to be able to access this care. Because there have been concerns relayed to -- as has been mentioned earlier I think during the Trial Counsel Panel, there have been concerns relayed about victims delaying or rejecting treatment because they are specifically concerned about someone looking at their records later. And that is a legitimate concern and it is an important consideration.

Overall, and this probably not surprising to the Panel, I believe that the existence of the VLC Program has been very positive to the development of our motions practice under Military Rule of Evidence 412 and 513. I think that very frequently trial counsel look to us to provide substantive expertise in those areas when motions are filed. And occasionally, although not frequently, when our

interests verge we are there to ensure that the court has every perspective to consider.

I just wanted to comment on one recent case that had been mentioned earlier, but it was a Petition for a Writ of Mandamus from a victim in the Army courts. The case is ***DB v. Lippert***. It's often referred to as ***Duckworth***. And that case has really profoundly impacted I think the way that we have been able to evaluate M.R.E. 513 and has been significantly relied upon, even in the Navy courts in front of judges I practice in front of, for its analysis and the expertise that it provides. And that's from February of last year.

I thank you for your time today. I appreciate the opportunity to talk to you about this important topic.

CHAIR HOLTZMAN: Thank you very much, commander.

We'll next hear from Captain September Foy, U.S. Air Force, Special Victims' Counsel.

Captain, thank you very much for being

here and we look forward to your testimony.

Capt FOY: Thank you very much. Good afternoon, Madam Chair and distinguished Panel Members. Thank you for the opportunity to speak with you today.

My name is Captain September Foy. I'm currently serving as an Air Force special victims' counsel. I'm stationed at Robins Air Force Base in Georgia. In my first assignment with the Air Force -- I was the Chief of Military Justice and a prosecutor at Andersen Air Force Base in Guam. Two-and-a-half years after that I moved to Robins Air Force Base where I spent two years as the defense counsel there before moving to my current position as a special victims' counsel in July of 2015. In my time in the Air Force I've prosecuted, defended or advocated for victims in over 30 courts-martial, represented over 500 defense clients and over 40 special victims clients.

As an initial matter I would like to state that I can only speak from my own personal

experience. I am not speaking for the Air Force as a whole.

I would first like to address the Article 32 hearing and specifically M.R.E. 412 and 513, how it is playing out in those hearings.

I would first like to state that the Article 32 hearing in my experience is not a rubber stamp hearing. I was a defense counsel when the law regarding the Article 32 hearings changed, and initially the feeling on the ground was that there was no point for the hearing and that it would all just be these paper cases we've been talking about with no opportunity for discovery or advocacy.

However, I have come to see that that viewpoint was wrong. The defense counsel community in the Air Force especially is pushing back and they are quite frankly doing a very good job on behalf of their clients in Article 32 hearings.

I've participated in 14 Article 32 hearings either as a defense or special victims'

counsel since the rules have changed. And as an SVC I have actually had three victims testify at Article 32 hearings because this was just what they wanted to do, this was in their best interest for their case and just the unique circumstances allowed for that. I've had additionally four clients attend Article 32 hearings as an SVC, but they chose not to testify.

As an SVC I have had great success in advocating for my clients specifically regarding M.R.E. 412 and 513 at Article 32 hearings. I would say that in almost every Article 32 hearing that I have had, M.R.E. 412 has been an issue or come up or been a part of the evidence in some way, shape or form.

M.R.E. 513 actually does come up quite frequently, although I've only had one Article 32 hearing as an SVC where defense counsel has actually tried to get at my client's mental health records. And as a PHO has no power to compel those records, they were unsuccessful at

that juncture, but they did sort of ask for that and we spent about a good hour talking about that issue at an Article 32 hearing.

Practically how this is playing out, at least in Air Force courts, as we've heard, most of our preliminary hearing officers are military judges. Those that are not tend to be Reservists with a great amount of experience or staff judge advocates from another base, or something of that nature.

I have been allowed to stand and object especially if my client -- if it's one of the situations where my client is on the stand, I've been allowed to stand and object pretty much during not only my client's testimony, but other witnesses that may be testifying. So my ability to advocate in the Article 32 setting -- at least in my experience I've been allowed great latitude to basically stand up and argue my point.

And I have been listened to. I almost always, if there's an issue that comes up, file a written objection later. I am mostly successful

on the M.R.E. 412 objections because the constitutional evidence is not allowed. And I've been very successful in 513 at the Article 32 stage.

There was some concern earlier that the convening authorities or the decision making authorities may not have a lot of evidence being presented to them. I can say, ladies and gentlemen, that the most common practice in the Article 32s since the rules have changed; and this was even the case before that, is for the government to introduce as an exhibit the recorded interview of my client by law enforcement. At least in Air Force our OSI is recording the initial interview with my client.

Those interviews typically run between two to three hours. So the PHO is getting two to three hours essentially of my client talking in an interview setting. So there was discussion before, there may be a case where you might just have a statement, a written statement from a client. It is almost always the case now where

they are getting that big giant interview from my client. And again, that is two to three hours.

In almost every Article 32 hearing since I came into the Air Force the PHO has granted defense and government counsel the chance to present argument actually at the end of the hearing. And defense counsel has been very -- doing a very good job of using the evidence that the government has introduced to basically present a closing argument and poke holes in the testimony. So they are taking advantage of these opportunities and they are doing very well at it, as is the government, of course.

Defense still has the ability to request other witnesses to testify at Article 32 hearings, and they are doing this. And they are using that to great effect.

Recently, I would say probably in the past five or six Article 32s I've had, the government is trending more towards introducing more evidence and actually calling witnesses of their own. So now, just as a practical matter,

when I'm booking travel to attend a Article 32 hearing, I'm not assuming that these are just going to be over in an hour anymore. I make sure I am there for the day ahead of time and I certainly do not book a plane ticket out that same day. I have -- far too often the hearings have gone all day, well into the afternoon hour.

In the Air Force I have been successful in actually getting the PHO reports on the back end, although they're -- this is just more of a matter of policy. There's not a rule anywhere, but I have been successful in getting those reports. And access to those reports is extremely crucial especially if a PHO is recommending not proceeding on the case, which has been happening.

In fact, I have actually had four cases where the PHO has recommended proceeding -- not proceeding on one or more of the charges, and I've had two cases where the PHO has recommended dismissing the case altogether. So this goes back to my point that; at least what I've seen in

the Air Force, they are not simply just rubber stamping these hearings. They are putting a lot of thought and analysis into it, and they are actually recommending that some not proceed.

In those cases where they have recommended them not proceed those cases have not proceeded. But it is very helpful for me if I have access to the PHO report to be able to explain to my client exactly why this is not proceeding. It's a much easier conversation to have. Especially if they were at the Article 32 hearing they got to see for themselves how the evidence was presented and how it came out. If they were not at the Article 32 hearing, I have access to the recording and I can go back over it with them. So having access to that PHO report is very crucial especially if a case has not proceeded.

My clients have generally been happy with the Article 32 process especially now that is essentially their choice whether or not they want to testify. On the cases where my clients

have attended the Article 32 hearings they feel very comfortable with my ability to actually advocate and protect their rights at Article 32 hearings. It gives them a sense that they actually have a voice and someone is listening to them.

The Article 32 process does seem to be working from my perspective and especially with M.R.E. 412 and 513. I would say what is typically happening in the application of both of those rules is the notice is usually not happening. A lot of times we may have junior government counsel that is doing exactly what I mentioned and introducing that two, three-hour interview of my client. There may be some 412 material that came out in there and there may be 412 and there may be some 513 material in some of the other exhibits that they are introducing and they don't catch it.

Fortunately, in the Air Force I've been very fortunate to get the exhibits ahead of time. So whereas I do object on notice grounds,

I don't hang my hat on that. I have -- especially with 513 though when it has come up in a -- and I have had that one case I alluded to, I have had it come up at the Article 32 where the PHO did not appreciate that there was no notice given. So that actually was a strong point there. But I don't hang my hat on notice, but only because I have been able to get these exhibits ahead of time am I able to fully advocate for my clients.

If I did not have that, it would be a situation where I would be sitting there literally trying to pop up if I see something happen, which could very well happen. And Article 32 hearings are open proceedings. So I would say we need to basically write in notice requirement for Article 32s.

Turning now towards trial, I would assert that victims' counsel need the --

CHAIR HOLTZMAN: I hate to interrupt, but we're getting close to witching hour.

Capt FOY: Yes, ma'am.

CHAIR HOLTZMAN: So can you try to condense, speed up? And I'm sorry to have to ask you that as well because some of us are going to have to leave. So we want to hear your testimony.

LCDR TOOHEY: Yes, ma'am.

CHAIR HOLTZMAN: Thank you.

LCDR TOOHEY: Turning specifically towards trial, I would simply say in contrast to the Article 32 ability for -- that I have to stand up and object, currently; and I know this is an Air Force Rules of Court situation, if a 412 or 513 issue does happen in the midst of trial, currently right now I cannot stand and say the word "objection." I have to stand and wait to be recognized, and oftentimes that is too late. So I would suggest changing that, just the simple ability to stand and say the word "objection" would remedy that.

Specifically on M.R.E. 513 as it applies to trial, one of the issues that I have had come up in at least three cases now has been

actually an issue of waiver of the privilege. And it has been a situation where it has been a client that did not have an SVC yet that was talking with law enforcement.

To give an example, I had one client actually bring in her medication and talk to them about her diagnoses and some of the things she talked about with her counselor, which she was fine with, but she did not understand that when it came time to trial that blew the door wide open for her records basically to come in. And that's where she had the hang up is, well, I didn't know anybody was going to see the records.

I would assert that if we had a knowing waiver requirement -- especially if law enforcement is talking to an individual that does not have an SVC yet -- we have a knowing requirement to waive the M.R.E. 513 privilege, this would remedy a lot. In the cases I have had where defense has gotten past the threshold of getting a motion to the judge to conduct an in camera hearing; and I have actually had that

occur, it has been in a situation where my clients did not even have a clue that they had a privilege.

And my military clients that have waived the privilege, it comes down to -- we're talking about Airmen that are in treatment and you may have a concerned commander, a concerned first sergeant talking to them about how they're doing in treatment. And it comes out and they feel the need to talk about that because they don't know that they can't and they don't know that it's privileged. At trial this creates a lot of issues.

And I have had three clients back out of trials right on the eve of trial after motions practice because it was a situation where I was not going to be able to protect some of their mental health sensitive information from coming out. And it was information that they did not want the entire base to know.

The ability of victims of sexual assault to receive mental health treatment is

paramount. For Airmen the road to recovery can be difficult. A sexual assault can truly impact an entire squadron, unit, base. The institution of a knowing waiver would go far in allowing our Airmen to seek this treatment and not worry about whether the notes and records of their privileged counseling sessions would be revealed in a public courts-martial.

And that concludes my presentation, Madam Chair. Thank you very much.

CHAIR HOLTZMAN: Thank you, captain.

Our next and last presenter is Captain Christopher Donlin, U.S. Army, Special Victims' Counsel.

Thank you very much, captain, for coming and we look forward to your testimony.

CPT DONLIN: Madam Chair, distinguished Panel Members, thank you for allowing me to address this Panel today. I have approximately two-and-a-half years of experience representing SVC clients and in that time I've represented about 70 clients.

Just as the previous speakers have stated, I want to clarify these statements are my own and not the official position of the Army or the Special Victims' Counsel Program.

The impact of the changes to Article 32 hearings allowing victims to choose not to appear and limiting the scope of the hearing has been a great comfort to many victims. SVC clients are almost universally averse to discussing the details of their assault in a public setting and respond favorably to learning they will not be required to endure cross-examination until trial. However, in my opinion the importance of the preliminary hearing is greatly diminished with the changes. Now one thing I wanted to note is I find fault with the logic that the increased number of acquittals necessarily means that more cases that shouldn't be tried are being tried.

Regarding M.R.E. 412 evidence, in about half the courts-martial that I have participated in or observed the military judge

allowed M.R.E. 412 evidence to be admitted under the constitutional exception most often because the defense successfully argued that the evidence supported a motive on the part of the victim to fabricate the allegations.

However, in many cases the TC or the SVC has been able to successfully argue for a narrowly *Terry* ruling to minimize the impact on the victim. Defense counsel often argues in separate motions that they do not believe certain evidence is 412 evidence, but their motion is being submitted in an abundance of caution.

The victim's response when the M.R.E. 412 evidence is admitted is widely varied and most reply prior to the ruling when we're discussing the request that's been made by the defense and the surrounding facts that the evidence is irrelevant. If we're going to ask about their past, why can't we ask about the past experiences of the accused?

I concur with the request to force the defense to prove or at least offer some evidence

as to why the client needs to testify. The forcing them or allowing the defense to compel the -- our clients to testify is having a similar effect that the previous abuses in Article 32s was having. And when I say "testify," I mean in Article 39a sessions for 412 issues.

I concur with the previous speaker's comments about attempts to introduce 412 evidence at trial without providing notice. The only remedy I've seen a military judge offer was additional time to prepare of the government or victim have required it. When this happens the government and SVC are put in a position having to rush the preparation of the victim to respond to questions about this evidence, which is obviously unsettling to the victim.

At times defense, without providing notice, may bring up 412 issues in front of the panel before the TC or the judge is able to initiate a 39a. I'm not confident that a curative instruction does enough to put the toothpaste back in the tube, or more importantly

it doesn't protect the privacy rights of the victim which this rule is intended for.

Approximately 75 percent of my cases have involved M.R.E. 513 motions by defense, however, I've seen a dramatic decrease in the past year or so. Of those requests I estimate that less than 10 percent lead to an *in camera* review of mental health records. In the cases which I've been involved military judges are adhering strictly to the procedures required and forcing defense counsel to proffer something more than we have to see what we can't see because we don't know what we don't know.

I concur with Commander Luken's comment this morning that defense may argue that they believe there will be sentencing testimony in aggravation regarding mental health of the victim, but in my experience we've been able to prevent disclosure by steering clear of presenting that type of evidence at all.

I concur with the request for a requirement of a knowing waiver for the same

reasons mentioned before. When defense does meet their burden and judges do order production for *in camera* review, SVCs and/or trial counsel are having success getting military judges to narrowly tailor orders for production such as limiting the disclosure to records within a certain time period or only with a certain provider.

Very rarely are judges ultimately finding portions of the record relevant and releasing them. When military judges require production of mental health records, victims are often upset. They're upset when they even have to discuss the concept with their SVC. Similar to M.R.E. 412 evidence victims often ask why, quote, "we," unquote, don't get to see the mental health records of the accused. They often feel as though they're the one being put on trial.

Army counsel have filed several petitions for writs in cases where they do not believe the rules are being followed. We do hear of cases at the Program -- at the Special

Victims' Counsel Program Office where victims do not want to file because of fears or delay to the case, but that hasn't happened too often.

The Army has found that the writ process and decisions by appeals courts have provided clear guidance to military judges and counsel on the application of these rules and have served to ensure protection of many victims' privacy rights. Finally, it provides victims with some comfort that this process has checks in place to ensure to the greatest extent possible the protection of their privacy rights.

Thank you again for the opportunity to address you.

CHAIR HOLTZMAN: Thank you very much.

HON. JONES: I've got a quick one.

CHAIR HOLTZMAN: Okay, Barbara. Judge Jones.

HON. JONES: Captain, do you -- I know you're not a statistician and probably haven't counted the number of acquittals, but it's your sense that the acquittal rate is going up in the

Army, correct?

CPT DONLIN: I was referring to the comments made by the defense counsel previously. I don't have any statistics or numbers. In my experience I have seen many more acquittals than convictions. I don't know if that's a change over time. In my case, having my two years as a prosecutor and about two-and-a-half as an SVC, many more acquittals than convictions.

HON. JONES: Okay. How about everyone else, just quickly? Is it your sense acquittals are going up?

CAPT FOY: No, ma'am. It's actually not my sense. I would say it's probably -- in my experience it's about the same rate.

LCDR TOOHEY: I think they might be -- there might be some trend upward based just anecdotally on the kind of areas that I'm familiar with.

HON. JONES: Thank you.

Commander Hutton?

LCDR HUTTON: I have had a mix of

convictions and acquittals. Personally I'm not sure what the stats are Coast Guard-wide.

MAJ WALSH: Ma'am, I think I -- me personally from my defense, from my VLC time I think it stayed roughly --

HON. JONES: The same?

MAJ WALSH: -- about the same, which is about -- which is a high acquittal rate, but an important point to consider is that that coincides with a massive effort to increase reporting. So we have increased the number of reports and the number of cases that are -- and type of cases that we're handling.

HON. JONES: Oh, no, I agree.

MAJ WALSH: So --

HON. JONES: I wasn't talking about the raw number of acquittals. Yes.

MAJ WALSH: Well, and it just goes to the point of in some of these specifically egregious type cases that used to be the only ones that would get the system and be reported we would usually see a high conviction rate. Now

we're seeing a lot, lot more of different types of sexual assaults and sexual -- and I think it's basically stayed baseline.

HON. JONES: Okay. Thanks.

CHAIR HOLTZMAN: Professor Taylor?

PROF. TAYLOR: Well, I just have one question, then would ask you to submit your answer for the record if it applies to you, and that is whether any of you have had occasion to go your own separate way from the trial counsel when it comes to questions involving 412 and 513 during the course of the 32s and the courts-martial. You could just submit that for the record, please, to the Staff if it applies to you.

Thank you, Madam Chair.

CHAIR HOLTZMAN: Thank you.

Mr. Stone?

MR. STONE: I just wanted to bring up something because I heard it at the end that we heard earlier in the day, which I found concerned me greatly, and that is that victims are being

just chilled and discouraged from putting in their mental history such as PTSD even though they would like to do it at sentencing because they feel they're going to open the door to their privileged records at trial and therefore they can't say at sentencing what they would like to.

Such conduct is absolutely unheard of in state or federal court because there's a bifurcated sentencing proceeding. It doesn't happen at the end of the proceeding and it's not a way to open the door. We can't -- and you can't go backwards and say, oh, they want to do it now. They should have done it then, et cetera. What happens at sentencing is completely separate.

And I just wonder if that problem is one that would cause any of you to recommend that the military should have a bifurcated sentencing proceeding from the trial even if the sentencing occurs the next day after the trial is over.

MAJ WALSH: We do, sir. We have a bifurcated process. I think when that statement

was made earlier it was more focused on the scheduling of it. Unlike the federal system, we roll right into sentencing, but it is a bifurcated process.

And even if it is, there's still the issue of they put in their evidence of their mental health records to show the traumatic effect that the crime has had on them, but those records might also carry childhood sexual abuse and all other kinds of things that they very intensely want to guard and keep private. And that would open the door to at least the court examining that, and that for some clients is a bridge too far.

MR. STONE: In other words, when they make a statement at sentencing --

MAJ WALSH: If they --

MR. STONE: -- the judge -- the defense counsel would say we want to see the records that back up that PTSD claim?

MAJ WALSH: If -- well, yes, sir. I mean, if they're presenting a diagnosis, some

evidence that they suggest is a diagnosis or they're using actual evidence of a diagnosis of a condition, the defense is going to be able to challenge that that's not a pre-existing condition, that there are other things in their history that did that and that it wasn't the defendant's, or now the convicted's actions against them that caused that. So it theoretically can open the door, and that's what we need to advise our clients about.

MR. STONE: Anybody else have a comment?

CAPT FOY: Yes, sir. I could concur with everything that he said. We do roll -- in the Air Force we do roll right into sentencing, and so there is a discussion that I have with my client. If you want to introduce XYZ evidence of impact, that could quite possibly open the door for them to ask to get your mental health records. Usually there's other impacts that they would want to testify about regarding that.

I will say so, however, sir, it does

cut both ways. If you have a defendant who is trying to exert some type of mental health trauma or condition or something not rising to the level of mental responsibility, the government then tries to go after the defendant's mental health records as well in sentencing. So it does cut both ways. I have seen that happen before. But that is a discussion that I had have with my clients, and most of my clients do not want to go down that road.

CPT DONLIN: I concur, sir. I -- the example that pops into my head was actually when my client was testifying and based on a misinterpretation of what she said a third motion for her mental health records being made by the defense at that point. So it absolutely can and does happen.

MR. STONE: So do these defendants -- victims delay any proceeding they would have before the VA that was discussed before until after the trial is all over because that leads to the same thing? If they're going to get a

disability rating for the VA, they delay the whole thing?

LCDR HUTTON: I've had more than three clients delay seeing mental health professionals, including one client who's now going through the Med Board process post-trial who told me that they didn't trust the system and they were deliberately waiting until post-trial.

CPT DONLIN: I had a client say not that they delayed it, but that they wish they had.

MR. STONE: Yes, that was the main thing I wanted to cover.

CHAIR HOLTZMAN: Okay.

VADM TRACEY: Major Walsh, did I understand you to say that the Marine Corps has implemented some new Prosecution Merits Memo process? Did I understand that correctly?

MAJ WALSH: So, yes, ma'am, and I think this is probably a point for me to say that these are my opinions and not those of the Marine Corps.

(Laughter.)

MAJ WALSH: But, yes --

HON. JONES: Too late.

MAJ WALSH: Yes.

(Laughter.)

MAJ WALSH: I've waived that privilege. But in reality, yes, ma'am. And there's a practice advisory online, open source and everything about this, but the trial counsel now will draft a Prosecution Merits Memo, which is detailed. We don't see it, but it's part of their deliberative process. But that goes to the SJA. That's all considered. And in that Prosecution Merits they often, what I'm told is, consider the chances of success, the chances of an actual obtaining of a conviction.

VADM TRACEY: Do the other Services do anything similar to that?

LCDR TOOHEY: Yes, ma'am. The Navy has a robust Prosecution Merits Memo process. The Trial Counsel's Office, which is run by a captain, is the ultimate signature authority for

the Prosecution Merits Memo in the most -- in penetration cases, and then it diverts back to the senior trial counsel for contact cases. But they sign those out to convening authorities.

And in my experience as an SVC -- excuse me, as a VLC, when we sit down with trial counsel and they tell us which way their recommendation is going to go, I can't think of a case where the convening authority didn't go the same way. In my experience.

VADM TRACEY: Others, same thing?

LCDR HUTTON: Yes, we have those in the Coast Guard.

HON. JONES: So the convening authority is not hindered in your view by not having an Article 32 or by insufficient information from the prosecutor?

LCDR TOOHEY: Nor are they when we give input that my clients really want to go forward. Nor have they been swayed by that to go forward when the prosecutor is telling them that this is not a case that has a reasonable chance

to succeed at trial even if we do believe there's probable cause.

LCDR HUTTON: I had a similar example recently.

VADM TRACEY: Is this a new requirement since the Article 32 was changed, or is it something that was made more robust after the changes to the Article 32?

LCDR TOOHEY: Not since the changes to the Article 32. The Merits Memo process has been around for a few -- I mean, I was a senior trial counsel back in 2013. And so it's become more formalized and kind of I think every Region Legal Service Office in the Navy does the same type of memo and has the same signatory requirements. But in terms of writing memos expressing the merits and providing them to convening authorities, that has been consistent at least through as long as I was a prosecutor.

HON. JONES: Thank you. Anything else? Mr. Stone? No?

HON. JONES: I think that just about

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HON. JONES: All right. Thank you. Thank you all very much. Thank you for your service. We appreciate it, especially the last two who were so good at marching faster.

(Laughter.)

HON. JONES: And we're adjourned. Right, Bill?

MR. SPRANCE: Yes, ma'am. The meeting is now closed. Thank you.

(Whereupon, the above-entitled matter went off the record at 4:06 p.m.)

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C E R T I F I C A T E

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