

January 28, 2017

The Honorable Elizabeth Holtzman, Chair  
The Judicial Proceedings Panel  
One Liberty Center  
875 N. Randolph St., Suite 150  
Arlington, Virginia

Madame Chair and Panel Members:

At the public hearing on January 6, 2017, I provided testimony regarding the changes to MRE 412 and 513 from a defense counsel perspective. In preparation for my testimony I consulted with Senior Defense Counsel from various Navy defense commands, the Defense Counsel Assistance Program, and Appellate Defense. I would like to supplement my testimony with the following comments and recommendations which are my own and do not reflect the views of the United States Navy.

**First**, while the Convening Authority (CA) is charged with making decisions regarding case disposition, the changes to Article 32 have limited the CA's access to relevant information. Prior to the change in the Article 32 hearing, defense counsel routinely used MRE 412(b)(1)(C) to test the alleged victim's credibility, most often by confronting the alleged victim with prior inconsistent statements to law enforcement or friends and family. Such evidence is important to a full and fair consideration of the totality of the circumstances when making a probable cause determination, and may also inform the Preliminary Hearing Officer's (PHO) recommendation as to the proper forum and disposition of the case. The rule changes keeping MRE 513 and MRE 412(b)(1)(C) evidence out of Article 32 hearings systemically deprives the CA of information relevant to the effective exercise of their prosecutorial discretion, and has the net effect of referral decisions being made where there is a low probability of obtaining or sustaining a conviction based upon the evidence admissible at trial. This information is usually known by the defense as part of the initial investigation, and almost certainly known by trial counsel. These rules changes were not necessary to protect the victim's privacy rights because just as before, Article 32 hearings may be closed and sealed for purposes of considering this information. The only real effect of the rule change is to prevent the CA, PHO, and Staff Judge Advocate (SJA) from viewing the MRE 412(b)(1)(C) and MRE 513 information. Defense attorneys are reporting that they are unsuccessful in getting PHOs to consider MRE 412 (b)(1)(C) and MRE 513 evidence at Article 32 hearings or as part of their reports. This is akin to keeping relevant exculpatory information from a civilian prosecutor responsible for making charging decisions, since in the military justice system the CA, not the prosecutor, exercises prosecutorial discretion. The net result is that CAs are making referral decisions without full information, resulting in a high acquittal rate and subjecting both victims and accused to the strains, costs and dangers of a trial where a conviction is not likely.

**Recommendation:** Revise R.C.M. 405(h) to restore the authority for admission and consideration of MRE 412(b)(1)(C) and MRE 513 materials to the Article 32 proceeding in a closed and sealed format. This will enable the PHO and the SJA to make more informed disposition recommendations to the CA, and enhance the CA's ability to effectively exercise

their prosecutorial discretion based upon the evidence that will be admissible at trial, and it will reduce the likelihood of unsupported charges advancing to trial. Should the panel require more information in support of this recommendation, I suggest a review of the acquittal rate for contested adult sexual assault trials.

**Second**, there is a lack of guidance for CA's to follow when deciding the proper disposition of a case. The President recently signed into law the National Defense Authorization Act Fiscal Year 2017, and in section 6503 Congress requires "the establishment and maintenance of non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under the UCMJ." CAs need disposition guidance in the exercise of prosecutorial discretion similar to that found in the guidance in the principles of federal prosecution in the United States Attorney's Manual, with appropriate modifications to reflect the differences between military and civilian practice. Service members lose faith in their Commander when he or she repeatedly subjects service members to trials when the evidence clearly does not support conviction, and alleged victims lose credibility when they make accusations at court martial that prove to be unfounded. There is also a substantial impact to an accused's reputation, career, and personal life just to be investigated and taken to court martial, even if he or she is ultimately acquitted. Mr. Stone suggested allowing the accused the right to remove his or her case to a Federal civilian jurisdiction. While this idea would be welcomed by many defense attorneys as it would likely result in termination of many cases where the evidence supporting conviction is weak. I do not believe such a proposal would best serve the purposes of the military justice system to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen the national security, as detailed in the Preamble to the Manual for Courts-Martial. I believe the better solution is to strengthen and empower the military justice system, and this can be achieved by providing commanders with the appropriate information and guidance to make informed decisions in exercising their prosecutorial discretion.

**Recommendation:** The President should direct the Secretary of Defense to issue non-binding guidance regarding the factors that commanders, staff judge advocates, and judge advocates should take into account when exercising their duties. This non-binding guidance should state that the CAs should only prosecute a service member if he or she believes that the person's conduct constitutes a criminal offense under the UCMJ, that the admissible evidence will probably be sufficient to obtain and sustain a conviction, and that a substantial military interest would be served by the command, unless in the CA's judgment prosecution should be declined because the person is subject to effective prosecution in another jurisdiction or there exists an adequate non-criminal alternative to prosecution.

**Third**, MRE 513 information is often dispositive in military cases. Mental health records are increasingly important because military cases deal with a population that has a high rate of PTSD due to the nature of their jobs, and we know from the data collected by the Defense Sexual Assault Incident Database that the military population includes survivors of prior sexual trauma who are receiving mental health services through the military. The possibility of the alleged victim experiencing memory contamination or perception issues has been dispositive in many

cases. Motives for reporting sexual assault are vital to the defense of an accused given the young age of the parties and the prior consensual sexual relationships often involved in military cases. Additionally, VA benefits that service members can now receive for Military Sexual Trauma sometimes call into question the alleged 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. Mental health records are sometimes used to bolster false claims based on these incentives to report. Thus, the "Constitutionally required" exception and accessible *in camera* review process are more important now than ever before, and we would recommend it be added back to MRE 513.

**Recommendation:** Restore the "Constitutionally required" exception to MRE 513 and return to a reasonable standard that allows for *in camera* review of these records, since currently the standard is so limiting that many judges are not performing *in camera* reviews.

**Fourth**, create a defense investigator program for all Services. The Navy has successfully created a Defense Litigation Support Specialist program. Currently, the Navy employs eight investigators who have backgrounds in the military, law enforcement, prosecution, and public defense. Already they have played a key role in several acquittals by uncovering exculpatory information in those cases, and their participation has improved the quality of the defense services across the board. The Naval Criminal Investigative Service currently utilizes the Forensic Experiential Trauma Interview technique, which is not an effective means of developing a complete picture of the facts surrounding the allegation. In many cases, investigating agents have failed to follow up with alleged victims after obtaining information that calls their statements into question. Often alleged victims are not confronted with this information until trial, something that would be unthinkable in any other jurisdiction. Defense investigators have proven effective in preventing wrongful convictions and in many cases their work has led to dismissal of charges before trial. Defense counsel and military paralegals have been the primary source of defense investigative support prior to the creation of this program, but the lack of formal training and experience in this area makes that model ineffective. Having experienced civilian investigators is an essential tool to providing service members with a zealous, competent defense and should be expanded to the other Services. In addition, expansion of this program to the other services would also best serve the purposes of the military justice system to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen the national security.

**Recommendation:** Mandate that every Service have a civilian defense investigator program. These positions should start at the GS-13 level or higher.

Thank you for including the defense perspective in your deliberations. Please let me know if I can be of further assistance in your efforts.

Sincerely,

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