GENERAL COURT-MARTIAL
EASTERN JUDICIAL CIRCUIT
UNITED STATES MARINE CORPS

U N I T E D S T A T E S v. Lieutenant/O-3 U.S. Navy	))))))))))	Government Response to Victim Motion "For Materials Necessary to Exercise Substantive Legal Rights on Behalf of Victim H.S." 11 December 2013

1. **Relief Requested**: The Government respectfully moves the court to deny LT H.S.'s motion in its entirety.

2. **Summary of Facts**:

The accused is charged with violations of Articles 120, 133, and 134 UCMJ, related to his sexual assault of LT H.S., another dentist at a Halloween party in October 2012.

3. **Discussion**

Rules for Courts-Martial (R.C.M) 701 and 703 provide the statutory guidance for the management of disclosure and production of evidence by the Government. However, the rules only govern disclosures to the *defense* and production of items requested by the *defense*. It should be noted that these rules do not make reference to "all parties," instead they specifically refer to "the prosecution and the defense"[1] or "the *trial counsel* shall provide . . . to *the defense*."[2]

In *LRM v. Kastenberg* the Court of Appeals for the Armed Forces (C.A.A.F) specifically addressed the question of whether certain Military Rules of Evidence

[1] R.C.M. 703(a)
[2] R.C.M. 701(a)

(M.R.E.) require that a victim be allowed to make certain arguments before the court, through a counsel. 72 M.J. 364 (C.A.A.F. 2013). C.A.A.F. looked at M.R.E.s 412 and 513 and the actual language that was used addressed the victim's rights. Specifically, C.A.A.F. focused on the M.R.E.s' references to the victim being afforded an opportunity to be "heard." *Id*. at 369-370. C.A.A.F.'s decision said nothing about rights to documents, such as statements, charge sheets, or investigations, beyond the filings that implicate rights under those M.R.E.s.

LT H.S.'s argument regarding Due Process is also misplaced. The Fifth Amendment states, in the relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law." While a criminal defendant has a readily cognizable claim that in a criminal prosecution one faces the potential depravation of all three, a crime victim cannot make the same claim.

LT H.S., through her VLC, has been able to properly exercise her rights without the requested documentation. She has been provided copies of both defense motions which implicate her rights under M.R.E. 412 and 513. She has filed responses to both of those motions. Through her counsel she has been able to confer with the Government counsel about the progression of the case. She, along with her VLC, are scheduled to appear via VTC at the 39(a) on 16 December.

The potential danger of the disclosure of the requested documents is significant. LT H.S.'s request is for "copies of her statements, a copy of the charge sheet, and other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime." VLC Motion at 11-12. Provision to a witness of copies of their own statements, the charge sheet, or other investigatory documents

threatens to taint the judicial proceeding. While it is certainly not improper for a witness to review their statement prior to testifying, or even while having his/her recollection refreshed, being provided copies to take home is another matter. The charge sheet presents additional concerns related to potential violations of the accused's privacy. A victim in possession of a charge sheet could also create the appearance of impropriety, as a member of the public may believe that this would potentially taint a victim's testimony. The final request dealing with "investigatory documents" is so broad and vague as to render it meaningless. A request so lacking in specificity can hardly be responded to. It is sufficient to say that LT H.S. has failed to specifically articulate *what* she is looking for, *where* she believes it to be located, *how* it will assist her in the exercise of her rights, and *why* she is unable to exercise her rights without it. There is a significant risk of danger if a witness were to be provided copies of an investigation which detailed the statements, or summaries of statements, of other witnesses.

4. **Burden of Proof**: The Government specifically disagrees with LT H.S.'s assertion that the burden is on the Government. LT H.S. has provided no case, statute, or authority for that proposition. Under R.C.M. 905(c)(2), LT H.S., as the moving party, has the burden of proof. Under R.C.M. 905(c)(1), the burden of proof for this motion is by a preponderance of the evidence.

5. **Evidence**: The Government offers no additional evidence for this motion.

6. **Argument**: The Government requests oral argument.

Captain, U.S. Marine Corps
Trial Counsel

I hereby certify that a copy of the above motion was served upon defense counsel and the Court by electronic means on 11 December 2013.

A. M. L[redacted]
Captain, U.S. Marine Corps
Trial Counsel

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

HS, Lieutenant (O-3) Dental Corps, U.S. Navy Petitioner	)	PETITION FOR EXTRAORDINARY RELIEF IN THE FORM OF A WRIT OF MANDAMUS
v.	)	Case No. _____
N[redacted] H[redacted], Lieutenant Colonel (O-5) U.S. Marine Corps, In her official capacity as Military Judge Respondent	)	
and	)	
B[redacted] E[redacted], Lieutenant (O-3) Dental Corps, U.S. Navy Real Party in Interest	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

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A. “Navy Creates Victims’ Legal Counsel,” Defense Media Activity-Navy, dated August 9, 2013.

B. VLC Notice of Representation of October 31, 2013.

C. VLC Notice of Appearance of November 4, 2013.

D. VLC email requesting information of November 4, 2013.

E. Defense Motion under Mil. R. Evid. 412 of November 8, 2013.

F. Defense Motion under Mil. R. Evid. 513 of November 8, 2013.

G. LT HS FOIA and PA request of November 14, 2013.

H. VLC Amended Request for Continuance of Article 39(a) of November 15, 2013.

I. Military Judge Ruling on VLC Request for Continuance dtd November 21, 2013.

J. VLC Response to Defense Motion under Mil. R. Evid. 412 of November 21, 2013.

K. VLC Response to Defense Motion under Mil. R. Evid. 513 of November 21, 2013.

L. Government Response to Defense Motion under Mil. R. Evid. 412 of November 22, 2013.

M. Government Response to Defense Motion under Mil. R. Evid. 513 of November 22, 2013.

N. VLC email requesting decision on FOIA/PA request of December 2, 2013.

O. Commander, 2d MLG response to LT HS FOIA/PA request of December 4, 2013.

P. VLC Motion for Materials Necessary to Exercise Rights of December 6, 2013.

Q. Government Response to VLC Motion for Materials Necessary to Exercise Rights of December 11, 2013.

R. Cleansed Charge Sheet.

S. Defense attachment – Mil. R. Evid. 513 Motion.

T. Military Judge email regarding written rulings of December 16, 2013.

U. VLC Motion for Delay of Review of Mental Health Records of December 26, 2013.

V. Military Judge email responding to VLC Motion for Delay of Review of Mental Health Records of December 27, 2013.

W. Military Judge Order to Conduct *Ex Parte* 39(a) of December 30, 2013.

Preamble

Lieutenant HS, Dental Corps, United States Navy, respectfully requests that this Court instruct the Trial Court to provide LT HS with meaningful notice and afford her a meaningful opportunity "to be heard" prior to public disclosure of intimate details of her private sexual history and confidential mental health communications. To enforce her right to receive meaningful notice and to be afforded a meaningful opportunity "to be heard" under Military Rules of Evidence (Mil. R. Evid.) 412 and 513, LT HS asks this Court to issue a stay of the trial proceedings in the general court-martial of *United States v. E*[redacted], to set aside the Trial Court's rulings of December 16, 2013, made under Mil. R. Evid. 412 and 513, and to direct the Trial Court to provide LT HS investigative materials relevant to the motions and responses made by the Parties under Mil. R. Evid. 412 and 513.

LT HS is not seeking "discovery" as a matter of right simply because her name appears on the charge sheet or access to all investigative materials in the case. However, when the Parties intend to publicly disclose intimate details of her private sexual history and seek to produce confidential mental health communications, the Mil. R. Evid., constitutional due process, and the right to be treated with fairness and respect for dignity and privacy require that she receive meaningful

notice and be afforded a meaningful opportunity “to be heard” at an evidentiary hearing prior to such disclosure. An alleged victim or patient is deprived of these rights when he or she is unable, because of a lack of investigative materials, to make an informed decision as to whether to exercise the opportunity “to be heard” and, if necessary, to prepare to and actually exercise that right by presenting facts and legal argument.

LT HS asks this Court to provide her more than the bare notice and hollow opportunity “to be heard” that she was given by the Trial Court. This Court should find that the right to receive notice and to be afforded an opportunity “to be heard” includes the right to an even playing field where all participants at the Mil. R. Evid. 412 and 513 evidentiary hearing have access to the relevant investigative materials.

History of the Case

The Government preferred charges against LT E[redacted] on an unknown date alleging violations of Articles 120 and 134, Uniform Code of Military Justice (UCMJ). The Government preferred an Additional Charge alleging a violation of Article 133, UCMJ, on an unknown date. The Charges and Additional Charge name LT HS as the victim.

An Article 32, UCMJ, investigation was held in July 2013, and LT HS testified as a witness. The Charges and Additional Charge were referred for trial by general court-martial at an

unknown date. Arraignment in the case of *United States v. E*[redacted] was held on an unknown date. An Article 39(a) session was held on December 16, 2013, to address pretrial motions, and trial on the merits is scheduled to commence on January 26, 2013.

Jurisdictional Statement

This Court has jurisdiction to issue all writs necessary or appropriate in aid of its existing statutory jurisdiction. 28 U.S.C. § 1651(a) (2006); *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999); *Loving v. United States*, 62 M.J. 235, 239 (C.A.A.F. 2005). The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

Specific Relief Sought

Petitioner seeks a Stay until this Court rules on this Petition and Petitioner seeks a Writ of Mandamus setting aside the Trial Court's rulings of December 16, 2013, under Mil. R. Evid. 412 and 513, and directing the Military Judge to order the United States to provide LT HS investigative materials that are relevant to the motions made under Mil. R. Evid. 412 and 513.

Issue Presented

WHETHER THE MILITARY JUDGE ERRED BY DENYING LT HS'S REQUEST FOR INVESTIGATIVE MATERIALS THAT ARE RELEVANT TO MOTIONS MADE UNDER MIL. R. EVID. 412 AND 513 THEREBY DEPRIVING LT HS OF HER RIGHT TO RECEIVE MEANINGFUL NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD UNDER THE MILITARY RULES OF EVIDENCE.

Statement of Facts

LT HS made an unrestricted report of sexual assault to authorities on or about October 28, 2012. LT HS reported that Lieutenant B[redacted] D. E[redacted], Dental Corps, United States Navy, sexually assaulted her in his vehicle outside a Halloween party at the home of another Naval officer at or near Jacksonville, North Carolina in the early morning hours of October 28, 2012. The Naval Criminal Investigative Service (NCIS) assumed investigative jurisdiction of the case and conducted an extensive investigation into the allegations made by LT HS.

An investigation pursuant to Article 32, UCMJ, was held in July 2013. LT HS testified at the investigation, but she was not present for the testimony of any other witnesses, including LT E[redacted], who testified under oath.

In October 2013, the United States Navy, at the direction of the Secretary of Defense, created the Victims' Legal Counsel Program to provide legal representation, advice, and assistance to eligible victims of sexual assault. (Appendix A.) Lieutenant Commander P[redacted]K. K[redacted], JAGC, USN, was detailed

as Victims' Legal Counsel (hereinafter "VLC") for LT HS on October 31, 2013. VLC provided notice of representation to the United States and Civilian Defense Counsel that same day. (Appendix B.) Trial Counsel informed VLC that the case was pending trial by general court-martial in the Eastern Judicial Circuit, Navy-Marine Corps Trial Judiciary. On November 4, 2013, VLC entered a notice of appearance in the case of *United States v. E*[redacted]. (Appendix C.) On November 4, 2013, VLC requested via email that Trial Counsel provide him copies of a redacted charge sheet and any statements made by his client. (Appendix D.) Trial Counsel never responded to this request in writing but indicated orally to VLC on several occasions that he was waiting to receive guidance from his superiors as to what, if any, materials could be provided to a VLC.

On or about November 8, 2013, Trial Counsel informed VLC that an Article 39(a), UCMJ, session was scheduled for December 10, 2013, at Camp Lejeune to hear pretrial motions. The next day, Trial Counsel forwarded copies of the Defense motions filed under Mil. R. Evid. 412 (Appendix E) and 513 (Appendix F) to VLC. The Defense motion under Mil. R. 412 included three redacted pages from a NCIS report of investigation as an attachment. The Defense motion under Mil. R. Evid. 513 did not include any attachments. On November 14, 2013, LT HS made a request to the General Court-Martial Convening Authority for investigative

materials in the case of *United States v. E*[redacted] under the Privacy Act, 5 U.S.C. § 552a, and Freedom of Information Act (FOIA), 5 U.S.C. § 552. (Appendix G.)

On November 15, 2013, VLC requested a continuance of the Article 39(a) session because of planned OCONUS leave. (Appendix H.) The then-assigned Military Judge granted VLC's request for a continuance on November 21, 2013, and the Article 39(a) was re-scheduled for December 16, 2013. (Appendix I.) On November 21, 2013, LT HS, through VLC, filed responses to the defense motions under Mil. R. Evid. 412 (Appendix J) and Mil. R. Evid. 513 (Appendix K). VLC indicated in a footnote that LT HS and he were disadvantaged in responding to the motions because the United States had refused to provide copies of requested investigative materials and a copy of the charge sheet. On November 22, 2013, the United States filed its responses to the defense motions under Mil. R. Evid. 412 (Appendix L) and Mil. R. Evid. 513 (Appendix M). VLC was provided copies of these responses. The responses did not include any supporting evidentiary documents.

On December 2, 2013, having received no response to his repeated requests for investigative materials, VLC sent an email to Trial Counsel indicating that if VLC did not receive a response to LT HS's Privacy Act and FOIA request within 48 hours, LT HS may seek other avenues of redress, including contacting

her congressional representatives. (Appendix N.) On December 4, 2013, the General Court-Martial Convening Authority responded to LT HS's request: he released a copy of the standing general court-martial convening order and denied the remainder of the request. (Appendix O.)

On December 6, 2013, LT HS, through counsel, filed a motion to compel the United States to provide LT HS investigative material necessary for her to exercise the legal rights afforded to her as an alleged victim and patient in the military justice system under Mil. R. Evid. 412 and 513. (Appendix P.) On December 11, 2013, the United States filed a motion asking the court to deny the VLC motion. (Appendix Q.) The defense did not file a pleading in response to this VLC motion.

On December 16, 2013, LT HS and VLC appeared via video teleconferencing at the Article 39(a) session in the case of *United States v. E*[redacted] from Naval Station Mayport, Florida. The parties and the Military Judge were in a military courtroom on-board Camp Lejeune, North Carolina. Lieutenant Colonel N[redacted] K. H[redacted], United States Marine Corps, was detailed as the new military judge.

The Military Judge first heard LT HS's motion to compel the United States to provide material necessary for her to exercise her legal rights under Mil. R. Evid. 412 and 513. The Military Judge asked VLC to present evidence on the motion. VLC

responded that the precise issue was that the United States had refused to provide any investigative materials to LT HS and, therefore, he had no evidence. The Military Judge ruled from the bench that LT HS, as the moving party, had the burden of proof on the motion. After hearing argument, the Military Judge ruled from the bench and denied the motion because LT HS had failed to demonstrate "necessity." The Military Judge stated that she saw "no harm" in providing LT HS a copy of the cleansed charge sheet and ordered the United States to do so. The charge sheet was provided to VLC by Trial Counsel the following day. (Appendix R.)

The next motion addressed by the Military Judge was the defense motion under Mil. R. Evid. 412. Neither the United States nor the defense presented any evidence to the court, other than the three (3) pages of investigative materials attached to the Defense motion. LT HS chose to testify regarding specific sexual behavior alleged by the Defense in its motion; the Defense alleged that LT E[redacted] and LT HS had a "flirtatious interaction" on the front porch of the house where the Halloween party took place prior to the alleged sexual assault. LT HS testified under oath that no such interaction on the front porch took place. The materials attached to the defense motion did not address this specific sexual behavior.

The Military Judge and the parties alluded that this proffered interaction had been discussed previously at a prior Article 39(a) session or Rule for Courts-Martial (R.C.M.) 802 conference—LT SH was not present for this session—and that she would accept the proffers of the parties. LT HS has never received any investigative materials that would support a basis to believe that this alleged flirtatious interaction took place. After argument by the parties and VLC on behalf of LT HS, who opposed admitting such evidence, the Military Judge ruled from the bench that evidence of the proffered "flirtatious interaction" was admissible at trial. The Military Judge made additional rulings from the bench pertaining to other evidence of LT HS's sexual predisposition and prior sexual behavior that the Defense sought to admit.

The next motion addressed by the Military Judge was the defense motion to under Mil. R. Evid. 513 to compel production of LT HS's mental health records. The defense introduced a document (Appendix S)[1] at the hearing that listed prescription drugs filled by LT HS; the Military Judge ordered the United States to forward the document to VLC during a recess. After argument by the Parties and VLC on behalf of LT HS, who opposed production, the Military Judge, from the bench, ordered production of LT HS's mental health records in the possession of

[1] This document was not redacted when received by VLC.

a civilian provider for an *in camera* review. The records were to be provided to the Military Judge by December 27, 2013.

On December 16, 2013, VLC requested copies of the Military Judge's written rulings relating to the VLC motion for investigative materials, the Mil. R. Evid. 412 motion, and the Mil. R. Evid. 513 motion; the Military Judge responded that she would not be drafting written rulings. (Appendix T.)

On December 26, 2013, VLC made a motion to delay the production of LT HS's mental health records to the Military Judge for an *in camera* review. (Appendix U.) The Military Judge responded that she had already reviewed the material. (Appendix V.) On December 30, 2013, the Military Judge ordered an *ex parte* Article 39(a) for Monday January 6, 2014. (Appendix W.) The Military Judge further noted that she had already decided that parts of the records were admissible and will be turned over to the defense counsel, but she would allow LT SH and her VLC to make argument on whether the Military Judge should disclose additional parts of the privileged records.

Reasons Why the Writ Should Issue

A WRIT OF MANDAMUS IS APPROPRIATE BECAUSE THE MILITARY JUDGE DENIED LT HS THE ABILITY TO EXERCISE HER RIGHTS IN A MEANINGFUL WAY—CONTRARY TO THE RULES, *KASTENBERG*, DUE PROCESS, AND FAIRNESS—WHEN THE MILITARY JUDGE REFUSED TO ORDER THE DISCLOSURE OF RELEVANT INVESTIGATIVE MATERIALS.

A. This Court has jurisdiction over this writ because it is "in aid of" the Court's jurisdiction and the harm alleged has the potential to affect the findings and sentence.

The petitioner must meet two conditions before this court may provide extraordinary relief in the form of a writ of mandamus: (1) the writ must be "in aid of" the court's existing jurisdiction; and (2) the writ must be "necessary and appropriate." *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008); *see also Cheney v. United States Dist. Court*, 542 U.S. 367, 380-81 (2004). As the Court of Appeals for the Armed Forces (CAAF) noted in *Denedo*, "in aid of" includes cases where a petitioner seeks to "modify an action that was taken within the subject matter jurisdiction of the military justice system." *Denedo*, 66 M.J. at 120.

This includes interlocutory matters where no finding or sentence has been entered. *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013); *see also Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012). The harm alleged must have the "potential to affect the findings and sentence." *Ctr. For Constitutional Rights v.*

United States (CCR), 72 M.J. 126, 129 (C.A.A.F. 2013) (citation omitted).

CAAF recently considered a similar question of whether a court of criminal appeals had jurisdiction to hear an alleged victim's interlocutory appeal from the military judge's ruling that limited the right to be heard under Mil. R. Evid. 412 and 513. *Kastenberg*, 72 M.J. at 368. The court held that the court of criminal appeals did have jurisdiction because the victim was "seeking to protect the rights granted to her by the President in duly promulgated rules of evidence, namely to a claim of privilege under M.R.E. 513 and a right to a reasonable opportunity to be heard under M.R.E. 412(c)(2) and 513(e)(2)." *Id.* Further, the military judge's ruling would affect the very foundation of the finding and sentence:

> The military judge's ruling has a direct bearing on the information that will be considered by the military judge when determining the admissibility of evidence, and thereafter the evidence considered by the court-martial on the issues of guilt or innocence ....

Id. Thus, CAAF concluded that the "CCA erred by holding that it lacked jurisdiction." *Id.* (citation omitted).

Similarly here, LT HS is seeking to protect the rights granted to her by the President in Mil. R. Evid. 412 and 513. The Military Judge's ruling limits her right to be heard and affects the very foundation of the findings and sentence in this

case. As with the court of criminal appeals in *Kastenberg*, this Court has jurisdiction because LT HS's petition is "in aid of" the court's jurisdiction and the harm alleged has the potential to affect the findings and sentence. LT HS is not a "stranger[] to the court-martial," *CCR*, 72 M.J. at 129, and she should not be treated as one.

B. LT HS has standing to protect the rights afforded to her, and the issue is ripe since the injury is taking place and will continue unless this Court issues a writ.

The holder of a privilege has a right to contest and protect the privilege, even where the holder is a nonparty to the court-martial. *Kastenburg*, 72 M.J. at 368 (citing "long-standing precedent" in the military justice system). Similarly, federal courts "have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to material already so disclosed." *Id.* at 369 (quoting *United States v. Hubbard*, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980) (citations omitted)).

Standing also requires a showing of injury-in-fact: "an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l. USA*, 133 S. Ct. 1138, 1147 (2013) (discussing standing in Article III courts).

That is, the issue must be ripe, which can be evidenced by a concrete ruling by the military judge in an adversarial setting. *United States v. Chisholm*, 59 M.J. 151, 153 (C.A.A.F. 2003).

Though she is a nonparty, the President provided LT HS rights and privileges in this court-martial in Mil. R. Evid. 412 and 513. She sought to exercise her rights at the court-martial, but the Military Judge's ruling denied LT HS access to the relevant investigative materials necessary to exercise these rights and privileges. In addition, since this ruling, the Military Judge has received the privileged records, and she has ruled that portions of the records will be turned over to the defense imminently.

LT HS is attempting to enforce her rights and protect her interests by preventing disclosure of privileged records and in preventing further public disclosure of the records already reviewed by the Military Judge. LT HS has standing to challenge the Military Judge's ruling—which denied her access to relevant investigative materials—and the issue is ripe since the injury is taking place and will continue unless this court issues a writ. *See Clapper*, 133 S. Ct. at 1147.

C. <u>The President afforded LT HS the right to receive notice and to be afforded the opportunity to be heard under Mil. R. Evid. 412 and 513</u>.

Mil. R. Evid. 412 is a rule of exclusion. Mil. R. Evid. 412(b) prescribes certain exceptions, however, that make

evidence of an alleged victim's prior sexual behavior and sexual predisposition admissible in a court-martial. A "party intending to offer evidence" under Mil. R. Evid. 412(b) must "file a written motion ... describing the evidence and stating the purpose for which it is offered" and "notify the alleged victim." Mil. R. Evid. 412(c)(1). Before admitting this evidence, the military judge must conduct a hearing and the "alleged victim must be afforded a reasonable opportunity to attend and be heard." Mil. R. Evid. 412(c)(2).

Mil. R. Evid. 513 affords similar rights to patients with respect to confidential mental health communications. The President prescribed that "a patient has a privilege to refuse to disclose and prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist." Mil. R. Evid. 513(a). Before a military judge pierces the psychotherapist-patient privilege and orders production or admits confidential psychotherapist-patient communications, the moving party must "notify the patient" and the patient "shall be afforded a reasonable opportunity to attend the hearing and be heard ...." Mil. Evid. 513(e)(1-2). In *Kastenberg*, CAAF considered these Rules and held that a "reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented through counsel be heard through

counsel." 72 M.J. at 370. The victim or patient's right, therefore, is not merely as a fact witness; instead, the right to be heard "includes through counsel on legal issues." *Id.* As the court noted, this is supported by statutory construction, military case law, and federal precedent. *Id*.

D. Mil. R. Evid. 412 and 513, *Kastenberg*, due process, and crime victim rights logically dictate that the right to receive notice and to be afforded the opportunity "to be heard" must include the right to be informed of the relevant facts and evidence and the positions of the parties.

LT HS, through counsel, is asking to receive meaningful notice and the meaningful opportunity "to be heard" on evidentiary issues impacting her privacy in this court-martial. But the Military Judge deprived LT HS of these rights when she denied LT HS's request for investigative materials that were relevant to motions made under Mil. R. Evid. 412 and 513. This violates the logical mandate of the Rules, *Kastenberg*, constitutional due process, and crime victim rights laws that require treating a victim with fairness and with respect for dignity and privacy.

1. The Rules logically require that the alleged victim or patient be informed of the relevant facts and evidence and legal positions of the parties to be able to meaningfully exercise his or her rights.

Mil. R. Evid. 412 and 513 are designed to protect an alleged victim's and a patient's privacy in the military justice system. Mil. R. Evid. 412 protects an alleged sexual assault

victim from unwarranted public intrusion into the victim's private life and thereby protects the alleged victim from embarrassment, humiliation, and further trauma. *See, e.g., United States v. Sanchez*, 44 M.J. 174, 177 (C.A.A.F. 1996).

Mil. R. Evid. 513 establishes a qualified patient-psychotherapist privilege in courts-martial to promote individual and social interests related to successful mental healthcare treatment. *See* Analysis of Mil. R. Evid. 513, Appendix 22, Manual for Courts-Martial (2012); *see also Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (examining analogous federal rule) ("[T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.").

Even though there is no explicit language in the UCMJ, R.C.M., or Mil. R. Evid. requiring relevant investigative materials be provided to an alleged victim or patient, the plain meaning of Mil. R. Evid. 412 and 513 and use of the phrase "to be heard" in both the Mil. R. Evid. and the R.C.M. demonstrate that an alleged victim or patient must be informed of the relevant facts and evidence and legal positions of the parties.

Each and every time the phrase is used it refers to an occasion where the parties (through counsel) can provide argument to the military judge on a legal issue in which the parties are informed of the relevant facts and evidence and

legal positions. *See, e.g.*, R.C.M. 806(d), Discussion (parties have an opportunity to be heard before issues a protective order); R.C.M. 917(c) (parties have an opportunity to be heard regarding a motion for finding of not guilty); R.C.M. 920(c) (parties have an opportunity to be heard on the findings instructions); R.C.M. 920(f) (parties have an opportunity to be heard on objections to instructions); R.C.M. 1005(c) (parties have an opportunity to be heard on sentencing instructions); R.C.M. 1102(b)(2) (parties have an opportunity to be heard at post-trial 39(a) sessions); Mil. R. Evid. 201(e) (parties have an opportunity to be heard regarding judicial notice). At these discrete milestones in every trial, the parties have an opportunity "to be heard," and there is a logical and obvious requirement in law that the parties be informed of the relevant facts and evidence so as to be in a position to meaningfully exercise this right to present facts and legal argument to the court.

Like the parties to a court-martial, an alleged victim or patient with the opportunity "to be heard" must be informed of the relevant facts and evidence and legal positions of the parties to make an informed decision as to whether to exercise that right and, if necessary, to prepare to and actually exercise that right. The President promulgated Mil. R. Evid. 412 and 513 to specifically grant an alleged victim and a

patient procedural due process—the right to receive notice and to be afforded the opportunity "to be heard" at an evidentiary hearing prior to public disclosure of private and privileged information[2]; the President gave citizens like LT HS, who find themselves thrust into the military justice system, the right to present legal argument and facts because their privacy interests are at stake. This can only be accomplished—the rights only become meaningful—if the non-party with so much at stake is provided relevant information known by the parties. The Rules logically require that LT HS be provided relevant investigative materials when motions are filed under Mil. R. Evid. 412 and 513.

2. *Kastenberg* logically requires that an alleged victim or patient be informed of the relevant facts and evidence and legal positions of the parties to be able to meaningfully exercise his or her rights.

CAAF could not have imagined that an alleged victim or patient would be afforded the opportunity "to be heard" in a court-martial, especially through counsel, without the aid of a copy of the charge sheet, relevant investigative materials, and copies of the parties' pleadings. To the contrary, it necessarily and logically follows that a victim or patient must be informed of the relevant facts and evidence and legal

[2] In the case of Mil. R. Evid. 513, public disclosure occurs when mental health records or communications are made known to anyone, including the military judge, who is not the patient or psychotherapist.

positions of the parties in order to receive meaningful notice and to be afforded a meaningful opportunity "to be heard." A foundational requirement of the holding in *Kastenberg* is that an alleged victim or patient must be informed such that he or she would be able to present facts and legal argument, especially where interests were not aligned with trial counsel, at an evidentiary hearing. *See Kastenberg*, 72 M.J. at 371. This necessarily and logically requires that an alleged victim or patient be informed of the relevant facts and evidence and the legal positions of the parties under similar circumstances.

An alleged victim or patient who is provided mere notice that a party seeks to admit evidence under Mil. R. Evid. 412 or 513 but not a copy of the parties' pleadings will not know what evidence or legal arguments will be addressed at the hearing. An alleged victim or patient who is unaware of the parties' legal positions and theory of admissibility or production is unable to make it known whether his or her interests are aligned with or opposed to those of trial counsel and unable to present legal argument. An alleged victim or patient who is denied access to relevant witness statements, forensic reports, and other investigative materials known by the parties but unknown to the alleged victim or patient is unable to review the merits of a party's position, much less prepare to call witnesses and present evidence at a hearing.

It is illogical to provide an alleged victim or patient the right to receive notice and the opportunity "to be heard" on complex legal issues but fail to provide him or her with the information necessary to present facts and legal argument. Thus, an alleged victim or patient who is not informed is denied notice and the opportunity "to be heard."[3]

3. Due process logically requires that an alleged victim or patient be informed of the relevant facts and evidence and legal positions of the parties to be able to meaningfully exercise his or her rights.

The right to receive notice and to be afforded the opportunity "to be heard" in the context of Mil. R. Evid. 412 and 513 are not intended to be hollow rights; instead, these rights, when interpreted through the lens of basic constitutional due process, are extremely meaningful. In

[3] CAAF did not order the lower court to provide investigative materials to the alleged victim in *Kastenberg*. 72 M.J. at 372 ("However, while this Court may appropriately take action at this time, a writ of mandamus is not the appropriate remedy. At the lower court, LRM petitioned for a writ of mandamus directing the military judge 'to provide an opportunity for [LRM] to be heard through counsel at hearings conducted pursuant to [M.R.E.] 412 and 513, and to receive any motions or accompanying papers reasonably related to her rights as those may be implicated in hearings under [M.R.E.] 412 and 513.' The military judge's ruling must be based on a correct view of the law. M.R.E. 412 and M.R.E. 513 create certain privileges and a right to a reasonable opportunity to be heard on factual and legal grounds, which may include the right of a victim or patient who is represented by counsel to be heard through counsel. However, these rights are subject to reasonable limitations and the military judge retains appropriate discretion under R.C.M. 801, and the law does not dictate the particular outcome that LRM requests.").

Kastenberg, CAAF addressed the opportunity "to be heard" in the context of Mil. R. Evid. 412 and 513 and found that it includes the right to "present facts and legal argument, and allows a victim or patient who is represented by counsel to be heard through counsel." 72 M.J. at 370; *see also United States v. Carlson*, 43 M.J. 401, 405 (C.A.A.F. 1995) (Ordering that sexual assault victims seeking to assert privileges "will be giving the opportunity, with the assistance of counsel if they so desire, to present evidence, arguments and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents.").

While CAAF did not conduct a due process analysis in its decision, the holding in *Kastenberg* ensured that alleged victims and patients were afforded due process by the trial court before private matters and privileged communications were publically disclosed. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) ("Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved, as well as of the private interest that has been affected by governmental action." (internal citations omitted)).

Due process requires more than bare notice and the opportunity to speak in a court-martial; due process requires that an alleged victim or patient be informed in order to

receive meaningful notice and be afforded a meaningful opportunity "to be heard." The Supreme Court routinely recognizes that legal rights afforded individuals become meaningless unless those with due process interests are adequately informed about the pending matter. *See, e.g., Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (applying constitutional due process to Texas adoption proceeding and finding "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (stating that notice must "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections," which includes the corollary requirement that notice "must be of such nature as reasonably to convey the required information.").

"For more than a century, the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified.' It is equally fundamental that *the right to notice and an opportunity to be*

heard must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. at 79, 80 (1972) (addressing Due Process Clause of Fourteenth Amendment to state action authorizing seizure of property) (emphasis added) (internal citations omitted); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citing *Armstrong*, 380 U.S. at 552). Due process requires that those with an interest be "given a meaningful opportunity to present their case." *Eldridge*, 424 U.S. at 349.

In short, the right to receive notice and to be afforded the opportunity "to be heard" provided to an alleged victim or patient under Mil. R. Evid. 412 and 513 is imbued with the requirement that alleged victim or patient be informed so as to be in a position to choose to exercise the right "to be heard" and, if necessary, to prepare to and exercise that right in a meaningful manner. To interpret the Rules otherwise would ignore the basic legal principle founded in constitutional due process that the right to receive notice and be afforded the opportunity "to be heard" be meaningful.

4. Fairness and respect for dignity and privacy require that an alleged victim be informed of the relevant facts and evidence to be able to meaningfully exercise his or her rights.

Crime victims under the UCMJ are to be treated with fairness and respect for their dignity and privacy by the military justice system. *Victim and Witness Assistance*, DoDD 1030.01 dated 23 Apr 07 (interim change); *see also* 10 U.S.C. § 806b (2013) (NDAA FY 2014) (A victim of a crime under the UCMJ has "[t]he right to be treated with fairness and respect for the dignity and privacy of the victim of an offense under this chapter."). Although "fairness" has not been specifically defined in this circumstance, it must guarantee that a victim's rights are given similar consideration to those of an accused and the government. *cf. Snyder v. Massachusetts*, 29 U.S. 97, 122 (1934) (Cardozo, J.) ("[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."), reaffirmed by *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (stating that "in the administration of criminal justice, courts may not ignore the concerns of victims"); *United States v. Heaton*, 458 F. Supp. 2d 1271, 1271 (D. Utah 2006) (finding that under the federal Crime Victims' Rights Act, treating "a person with

‘fairness’ is generally understood as treating them ‘justly’ and ‘equitably’”). If the constitutional guarantee of due process requires that “criminal defendants be afforded a meaningful opportunity to present a complete defense,” *California v. Trombetta*, 467 U.S. 479, 485 (1984), then an alleged victim or patient has a similar guarantee to fairness and an opportunity to present a complete case against disclosure of private matters and privileged communications.

An alleged victim is not treated with fairness and respect for dignity and privacy if not given access to relevant information known by the parties litigating the disclosure of the alleged victim’s sexual history and confidential patient-psychotherapist communications. Treating an alleged victim in such an uneven manner is contrary to the intent of Congress, the President, and CAAF, as well as the explicit crime victim rights provisions in lawful regulations and, now, the UCMJ.

An alleged victim must be treated fairly and with respect for dignity and privacy; within Mil. R. Evid. 412 and 513, this means providing meaningful notice and affording a meaningful opportunity “to be heard” by informing the alleged victim of the relevant facts and evidence and legal positions of the parties through, at minimum, a copy of the charge sheet, relevant investigative materials, and copies of the parties’ pleadings.

E. A writ is necessary and appropriate because the Military Judge deprived LT HS of her right to receive meaningful notice and to be afforded a meaningful opportunity "to be heard" when she denied LT HS's request for relevant investigative materials.

While Trial Counsel voluntarily provided VLC copies of the Defense motions[4] and his responses, Trial Counsel and the General Court-Martial Convening Authority denied repeated requests by LT HS and her counsel, in various forms, for a redacted copy of the charge sheet, statements made by LT HS, and other relevant investigative materials. Trial counsel also filed a motion opposing LT HS's request that the Military Judge order disclosure of the charge sheet and relevant investigative materials. The United States made clear that it was unwilling to meaningfully afford LT HS the rights provided to her by the Mil. R. Evid. 412 and 513.

When the Military Judge denied LT HS's request for investigative materials relevant to the motions made under Mil. R. Evid. 412 and 513, she validated the United States' position and deprived LT HS of right to receive meaningful notice and to be afforded a meaningful opportunity "to be heard." This left LT HS to prepare to and actually exercise her opportunity "to be heard"—to present facts and legal argument to the court—armed

[4] No other form of notice was provided to LT HS or required by the military judge.

with only the marginal, and biased, information that the Parties chose to include in their motions.

This deprivation was most clear when the Military Judge ruled that evidence of an alleged flirtatious and consensual encounter between the Accused and LT HS was admissible at trial under an exception found in Mil. R. Evid. 412. The Defense and United States did not submit any evidence or call any witnesses in support or opposition of the admissibility of this evidence. With nothing before the Military Judge establishing that such an encounter even took place, LT HS testified under oath that no such encounter occurred. The Military Judge, however, accepted the proffers of both Defense Counsel and Trial Counsel that the Accused testified under oath to such an encounter at the Article 32, UCMJ investigation.[5]

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[5] The parties and the military judge referenced a previous Article 39(a) or R.C.M. 802 conference where they discussed this evidence. Neither LT HS nor her counsel were present for this and have no knowledge of the substance of the statements made by the parties and the military judge. Although a military judge is not asked to determine if evidence offered under Military Rule of Evidence 412 is true, a proffer by a party is not evidence. *See, e.g., United States v. Thompson*, 29 C.M.R. 68, 71 (C.M.A. 1960); *United States v. Alexander*, 32 M.J. 664, 667 n.3 (A.F.C.M.R. 1991) (stating counsel and judges must be careful to establish a proper factual basis for evidentiary rulings). "To overcome the prohibition of Mil. R. Evid. 412, the defense must establish a foundation demonstrating constitutionally required relevance, such as 'testimony proving the existence of a sexual relationship that would have provided significant evidence on an issue of major importance to the case. . . .'" *United States v. Carter*, 47 M.J. 395, 396 (C.A.A.F. 1997) (citing United States v. Moulton, 47 M.J. 227, 229

LT HS did not receive meaningful notice and was not afforded a meaningful opportunity "to be heard" prior to this ruling. Neither LT HS nor her counsel was provided an opportunity to review the Accused's sworn testimony prior to the Military Judge making her ruling. Neither LT HS nor her counsel was permitted an opportunity to review statements of witnesses who were present at the house when the alleged "flirtatious interaction" took place to determine if such witnesses corroborated the Accused's version of events. To be clear, neither LT HS nor her counsel was provided anything other than mere proffers of counsel that would support a finding that such an encounter took place (or did not take place). Unlike the parties, who presumably had access to the entire NCIS report of investigation and Article 32 investigation report and transcript for many months, LT HS was left to present facts and legal

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(C.A.A.F. 1997)). Similar to this case, in *Carter*, the alleged victim testified at an Article 39(a) session and disputed the defense proffer of evidence under Military Rule of Evidence 412. The defense did not call any witnesses to support its proffer. CAAF found, "[i]n these circumstances, and in view of the denial of the prosecutrix, we hold that the military judge did not abuse his discretion in finding that appellant failed to establish a sufficient foundation to demonstrate that the evidence was constitutionally required to be admitted under Mil. R. Evid. 412." *Id.* at 397. Even though the evidence at issue in this court-martial fell likely falls under the exception contained in Mil. R. Evid. 412(b)(1)(B), the evidence is still subject to the relevancy requirement and balancing tests under Mil. R. Evid. 401 and 403.

argument to the Military Judge based solely on the marginal and bias information contained the pleadings.

Similarly, LT HS was deprived of her opportunity "to be heard" on the Defense motion to produce LT HS's mental health records under Mil. R. Evid. 513. Again, the Trial Counsel presented no evidence to support opposing the Defense motion. The Defense produced a single document at the hearing that allegedly documented LT HS's prescription medications at the time of the alleged sexual assault and argued that it supported reasonable grounds that LT HS may suffer from serious mental disorders. Neither LT HS nor her counsel was provided any investigative materials related to how and under what circumstances this record was obtained or with relevant witness statements to LT HS's behavior that would indicate whether or not she did or did not suffer serious mental disorders at the time of the alleged offenses or when she made her report to authorities.[6]

The Military Judge deprived LT HS of meaningful notice and a meaningful opportunity "to be heard" and demonstrated a lack of fairness and respect for LT HS's dignity and privacy when she

[6] LT HS may, of course, conduct her own thorough investigation into the facts and circumstances alleged by the parties in their pleadings. In this case, LT HS would have had to seek to interview the Accused and re-interview numerous party-goers, duplicating much of the work already performed by trained investigators.

failed to order disclosure of relevant investigative materials. Although LT HS and VLC were present during a hearing, LT HS was the only participant in the courtroom who did not have access to relevant investigative materials.

Conclusion

LT HS did not create the military justice system; nor did she cause the events that forced the system upon her. She is simply asking that the rights afforded to her under the military justice system have meaning. LT HS therefore asks this Court to issue a stay of the trial proceedings in the general court-martial of *United States v. E*[redacted], to set aside the Trial Court's rulings of December 16, 2013, made under Mil. R. Evid. 412 and 513, and to direct the Trial Court to provide LT HS investigative materials relevant to the motions made by the Parties under Mil. R. Evid. 412 and 513. Only then, will she be afforded her right to receive meaningful notice and to be afforded a meaningful opportunity "to be heard."

[redacted]

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[redacted]
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Phone (904) 270-5191, x 1213
Fax (904) 270-6879
[redacted]

Certificate of Filing and Service

I certify that a copy of the foregoing writ petition was filed with the Court in accordance with Rule 5.2 at NMCCAOJAGCODE07@navy.mil and electronically served by email on the Military Judge, LT E[redacted]—through his Trial Defense Counsel and by facsimile the Appellate Defense Division and Appellate Government Division on January 3, 2014.

[redacted]
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[redacted]

APPENDIX A

Navy Creates Victims' Legal Counsel

Story Number: NNS130809-13 Release Date: 8/9/2013 4:58:00 PM

A A A

From Defense Media Activity-Navy

FORT GEORGE G. MEADE, Md. (NNS) -- The Navy announced the establishment of the Navy's newest Sexual Assault Prevention and Response (SAPR) initiative, the Victims' Legal Counsel (VLC) Program, which will provide legal advice and advocacy for eligible victims of sexual assault.

The Victims' Legal Counsel will help victims understand the investigation and military justice process, advocate their legal rights and interests and, when appropriate, appear in court on their behalf.

"The Navy is committed to protecting the rights and interests of victims of sexual assault and ensuring the administration of a fair, transparent and efficient military justice system that guarantees due process for the accused and promotes good order and discipline," said Vice Adm. Nanette M. DeRenzi, Judge Advocate General of the Navy. "The Navy's Victims' Legal Counsel program complements the Navy's broader efforts to care for victims of sexual assault by providing them with legal advice and assistance throughout the military justice process."

Initially, the VLC Program will consist of 29 specially-trained, independent judge advocates assigned regionally to maximize availability of counsel across the Fleet. Navy VLCs will serve every geographic region, including the United States, Europe, the Pacific, and the Middle East. The program's attorneys will not be in the victim's or the accused's chain of command and will not be involved in case prosecution or defense.

"Through increased training and bystander intervention we are confronting sexual assault fleet wide, while ensuring that we provide needed care and support to victims," said Rear Adm. Sean Buck, director, 21st Century Sailor Office (N17). "This program further adds to that support."

For more information and resources to combat sexual assault visit www.sapr.navy.mil. Sexual assault affects Navy readiness, and the Navy is committed to preventing sexual assault. Join the Navy's conversation about sexual assault on social media and help raise awareness by using #NavySAPR.

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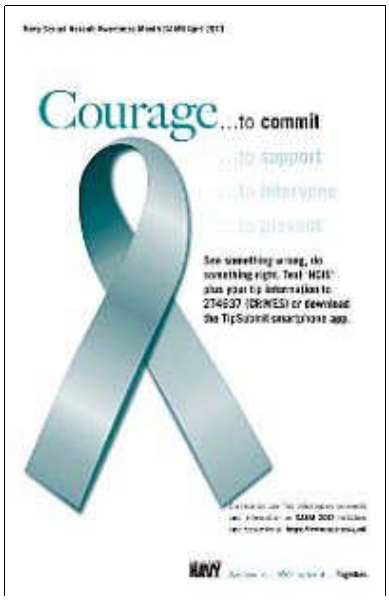

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130412-N-ZZ999-001 FT. GEORGE G. MEADE, Md. (April 12, 2013) Sexual Assault Prevention and Response is an important element of the readiness area of the 21st Century Sailor and Marine initiative which consolidates a set of objectives and policies, new and existing, to maximize Sailor and Marine personal readiness, build resiliency and hone the most combat-effective force in the history of the Navy and Marine Corps. The Department of the Navy is working to aggressively to prevent sexual assaults, to support sexual assault victims, and to hold offenders accountable. Help raise awareness by joining the conversation on social media using #SexualAssault and #SAAPM. (U.S. Navy graphic)

April 12, 2013

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APPENDIX B

31 Oct 13

From: Victims' Legal Counsel, NS Mayport, FL
To: Naval Criminal Investigative Service Resident Agency, MCB Camp Lejeune, NC
Staff Judge Advocate, 2nd MLG, MCB Camp Lejeune, NC
Trial uns -E, MCB Camp Lejeune, NC
Mr. P[redacted] S[redacted], Civilian Defense Counsel

Subj: VICTIMS' LEGAL COUNSEL NOTICE OF REPRESENTATION

Ref: (a) VLC Mayport ltr 5800 Ser 13/001 dtd 31 Oct 13

1. Per reference (a), I be etailed as Victims' Legal Counsel for Lieutenant H[redacted] S[redacted], DC, USN, in connection with an unrestricted report of sexual assault m on or 29 October 2012. The Accused is Lieutenant B[redacted] D. E[redacted], DC, USN, 2nd Dental Battalion, 2nd MLG, MCB Camp Lejeune, NC have formed an attorney-client relationship with Lieutenant S[redacted].

2. If any government agent, military authority, or other person wishes to interview or question my client regarding her reported sexual assault, that authority shall contact me to discuss the general nature of the questions to be asked and to schedule the potential interview. My client has requested that I be present for any interview. If I am unable to attend an interview in person, my attendance may be accomplished using remote means.

3. My client requests that all further communications related to the investigation and/or prosecution of her reported sexual assault be made through counsel.

4. I can be reached at (904) 270-5191, Ext. 1213 or [redacted]

/s/
P. K. K[redacted]

Copy to:
CO, NAVHOSP JAX
SARC, NAS JAX
Assigned VA

APPENDIX C

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	VICTIMS' LEGAL COUNSEL
v.	)	COURT-MARTIAL NOTICE OF
	)	APPEARANCE ON BEHALF OF
LT B[redacted]E[redacted], DC, USN	)	LT H.S., DC, USN
	)	

1. I, LCDR P[redacted] K[redacted], JAGC, USN, Navy Victims' Legal Counsel Program, Naval Station Mayport, Florida, admitted to practice law and currently in good standing in the State of Maryland and, although not appearing in a as a defense counsel or trial counsel, certified in accordance with Article 27(b), UCMJ, hereby enter my appearance in the above captioned court-martial on behalf of LT H.S., DC, USN, a named victim in the charges.

2. On 31 October 2013, I was detailed to represent LT H.S., and I have entered into an attorney-client relationship with her. I have not acted in any manner which might disqualify me in the above captioned court-martial.

3. I have reviewed the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice and the Eastern Judicial Circuit Rules of Court.

4. LT H.S. reserves the right to be present throughout the court-martial in accordance with Military Rule of Evidence 615, with the exception of closed proceedings that do not involve LT H.S..

5. To permit a meaningful exercise of my LT H.S.'s rights and privileges, I respectfully request that this Court direct the defense and government to provide me with informational copies of motions and accompanying papers filed pertaining to issues that fall under Military Rules of Evidence 412, 513, 514, and 615 and in which LT H.S.'s rights and privileges are addressed.

6. LT H.S. has limited standing in this court-martial, and LT H.S. reserves the right to make factual statements and legal arguments herself or through counsel.

7. My current contact information is as follows:

Room 1104, Building 1
NS Mayport
Mayport, FL 32227
(904) 270-5191, Ext 1213
[redacted]

Respectfully submitted this 4th day of November 2013, [redacted]

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appearance was served upon the Court, Trial Counsel, and Defense Counsel on this 4th day of November 2013 via email. [redacted]

APPENDIX D

K[redacted], P[redacted] K LCDR NAVSTA Mayport, N001

From: K[redacted], P[redacted] K LCDR NAVSTA Mayport, N001
Sent: Monday, November 04, 2013 15:17
To: L[redacted] A[redacted] M USMC, LSSS-E, HqSptBn, MCI-East
Subject: charge sheet and statements
Signed By: [redacted]

Capt L[redacted],

Can you please send me a copy of the charge sheet (I don't care if PII is redacted) and copies of any statements made by S[redacted] including any results of interview, and the summary of her 32 testimony? If the answer is no, I'll probably try to FOIA and Privacy Act it through the SJAs office.

Thanks.

v/r
P[redacted] K. K[redacted]
LCDR, JAGC, USN
Navy VLC Program, Naval Station Mayport, FL
Comm: 904.270.5191 Ext. 1213

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APPENDIX E

NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN CIRCUIT
GENERAL COURT MARTIAL

UNITED STATES	)	DEFENSE MOTION
v.	)	Mil.R.Evid. 412 Witness Production
E[redacted] E[redacted] Lieutenant U.S. Navy	)	Friday, November 8, 2013

1. NATURE OF MOTION. This is a motion filed in accordance with MRE 412(c) to determine the admissibility of the defense intent to question the Complaining Witness and her former girlfriend about their relationship. Further, it is a motion to compel the production of EM for trial, because if the motion is granted under Mil.R.Evid 412, EM becomes a relevant and necessary witness.

2. BURDEN OF PROOF. The burden is by a preponderance of the evidence.

3. BURDEN OF PERSUASION. The burden is on the defense.

4. SUMMARY OF FACTS.

The accused is alleged to have, among other things, raped the Complaining Witness during the Halloween party held at a mutual friends house in October 2012.

During the days after the complaint, the Complaining Witness has made inconsistent statements and vacillated on her desire to make the complaint at all.

During the conduct of the investigation, there was no other

witness who corroborated any of the Complaining Witnesses accounts.

During the conduct of the pretrial investigation, Article 32, UCMJ, both the accused and the Complaining Witness testified. The accused testified that he did, in fact, engage in consensual sexual intercourse with the Complaining Witness; however, it occurred hours before the Complaining Witness alleges.

The facts are that the accused and the Complaining Witness were both on the front porch of the house in which the party was being held. The accused was allowing his dog to go to its "business" and the Complaining Witness was talking to the accused. The conversation turned flirtatious and the accused ask the Complaining Witness if she wanted to go someplace more private.[1]

The Complaining Witness agreed and the accused returned his dog to the inside of the house. Be accused returned outside, and the Complaining Witness and the accused went to his vehicle and entered the backseat. While in the backseat the accused and the Complaining Witness engaged in consensual sexual activities that included sexual intercourse and the accused kissing the neck and breasts of the Complaining Witness.

[1] The accused is married. His wife was at the party, but had retired to the bedroom in which they were going to sleep in order to study for an exam she had the next day.

1 Prior to the sexual intercourse, the accused removed
2 portions of his clothing and the Complaining Witness removed
3 portions of her clothing. While engaging in sexual intercourse,
4 the accused began feeling guilty about what he was doing and
5 ended the sexual activity. The accused and Complaining Witness
6 each dressed themselves and both returned to the house and
7 resumed the party.
8 During the party, the accused and Complaining Witness
9 continued to socialize with one another. As the party ended, the
10 accused, Complaining Witness and three others were the last to
11 be awake - as others had departed or went to bed. The party
12 ended in the kitchen with the accused and Complaining Witness,
13 and another couple, dancing together in a sort of grinding
14 (sexually provocative) dance. This interaction was witnessed by
15 three others in the kitchen.
16 Everyone went to bed at about 0300, except the hostess of
17 the party. The hostess of the party stayed up cleaning till
18 0530.
19 The hostess confirmed that the accused went to the bedroom
20 in which his wife was sleeping and the Complaining Witness slept
21 on a chair in the living room.

After everyone retired to sleep, the hostess never saw or heard any movement before she went to bed, the door chime never alerted, and the slamming screen dork never slammed.

The Complaining Witness alleges that she did not go to the Accused's vehicle during the party, but that she was awaken by the Accused after everyone had went to sleep and she led out to his SUV. The Complaining Witness alleges that she did not remove her own clothing, that she tried to prevent her clothes from being removed, but relented. The Complaining Witness alleges that she said "no" on multiple occasions. The Complaining Witness alleges that when the Accused was finished having sex with her, they got dressed and went back into the house - where he went to his bedroom and she went back to sleep on the chair.

Witnesses testified during the pretrial investigation and witness statements provide that the Complaining Witness texting someone several times during the party. Witness statements indicate that the Complaining Witness was in a fight with her girlfriend, "EM", the night of the party.

5. DISCUSSION.

M.R.E. 412(a) provides that the following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in M.R.E. 412(b) and M.R.E 412(c):

1 (1) evidence offered to prove that any alleged victim
2 engaged in other sexual behavior and
3 (2) evidence offered to prove any alleged victim's
4 sexual predisposition.
5 However, there are exceptions.
6 In a proceeding, the following evidence is admissible, if
7 otherwise admissible under these rules: evidence of specific
8 instances of sexual behavior by the alleged victim with respect
9 to the person accused of the sexual misconduct offered by the
10 accused to prove consent and evidence the exclusion of which
11 would violate the constitutional rights of the accused.
12 Mil.R.Evid 412(b)(1)(B),(C).
13 The defense intends to present evidence of the flirtatious
14 interaction that occurred on the front porch between the accused
15 and the Complaining Witness. This interaction is direct evidence
16 of the Complaining Witnesses consent to engage in sexual
17 intercourse and other sexual activities with the accused.
18 Further, the defense intends on asking the Complaining
19 Witness about her relationship with E[redacted] M[redacted], her
20 girlfriend at the time. The purpose of this inquiry will go to a
21 motive to fabricate.
22 **Factors To Consider**
23 In order to overcome the exclusionary purpose of M.R.E.
24 412, an accused must "demonstrate why the general prohibition in

1 [M.R.E.] 412 should be lifted to admit evidence of the sexual
2 behavior of the victim[.]" *United States v. Moulton*, 47 M.J.
3 227, 228 (C.A.A.F. 1997). In particular, the proponent must
4 demonstrate how the evidence fits within one of the exceptions
5 to the rule. *Id.* at 228-29. *United States v. Banker*, 60 M.J.
6 216, 222 (C.A.A.F. 2004)

7 **The Test To Be Applied For Admissibility**

8 First, the military judge must determine on the basis of
9 the hearing described in M.R.E. 412(c)(2) that the evidence that
10 the accused seeks to offer is relevant for a purpose under
11 subsection M.R.E. 412(b), *and*

12 Second, the military judge must determine that the
13 probative value of such evidence outweighs the danger of unfair
14 prejudice to the alleged victim's privacy.

15 If the judge determines both of facts, in the conjunctive,
16 for the proponent of the evidence, then such evidence shall be
17 admissible under this rule to the extent an order made by the
18 military judge specifies evidence that may be offered and areas
19 with respect to which the alleged victim may be examined or
20 cross-examined.

21 **Flirtatious Behavior To Show Consent**

22 The flirtatious behavior between the accused and the
23 Complaining Witness was the precursor to them going to the
24 accused's SUV and engaging in intercourse. The Complaining

1 Witness started the behavior by getting into the accused's
2 personal space. The accused responded by suggesting people
3 would talk if they saw them in so close together. The
4 Complaining Witness continued the banter and, finally, the
5 accused asked the Complaining Witness if she wanted to go
6 somewhere private - meaning somewhere to have sex. She agreed,
7 and they went to his SUV.
8 This behavior is relevant to show that the Complaining
9 Witness had the intent to engage in sexual intercourse with the
10 accused, that she voluntarily went to his car, and that the sex
11 was consensual.
12 This evidence is admissible under M.R.E. 412(b)(1)(B)
13 **The Complaining Witness's Relationship With "EM" Goes To The**
14 **Complaining Witness's Motive To Fabricate**
15 On October 27, 2013, the accused was married and the
16 Complaining Witness was in a relationship with "EM". The
17 Complaining Witness's relationship with "EM" provides multiple
18 motives to fabricate, all of which are relevant and necessary
19 under M.R.E. 412(b)(1)(c).
20 When two people in a relationship are angry with one
21 another, it is not uncommon to have a desire desire to hurt one
22 another either physically or emotionally. Cheating on a
23 significant other out of anger is commonplace. So is remorse
24 afterwards.

1 Unsure if anyone would find out about the sexual dalliance
2 with the accused, the complaining witness claims to "EM" that
3 she is "fairly sure [sic] got raped last night" and that she
4 "felt bad about what happened and wanted to reach out to the
5 guy."[2]
6 If a relationship is in a state of instability, creating a
7 scenario wherein one person can make the other feel sorry for
8 them can bring a couple back together.
9 Further, if "EM" found out about the Complaining Witness
10 having consensual sex with a man, it may end their relationship.
11 To preempt "EM" from finding out about the consensual behavior
12 through other means - mutual friends, the complaining witness
13 getting in trouble for committing adultery, etc - she can claim
14 rape and then not fear the break up.
15 Finally, if the Complaining Witness is in a committed same
16 sex relationship and is a "huge gay advocate"[3] - but it turns out
17 that she engaged in sexual intercourse with a man, it has the
18 potential for "EM" to turn the Complaining Witness's life upside
19 down by revealing her actions.
20 These, and other motives, demonstrate that the Complaining
21 Witness's motive to fabricate the allegations against the
22 accused and the defense must be allowed to inquire into them

[2] See EM Statement and Notes
[3] See H[redacted] Statement and Notes

1 during the trial. Mil.R.Evid. 412(b)(1)(C).

2 **6. EVIDENCE.**

3 Where, as here, the defense seeks to offer evidence under
4 Mil. R. Evid. 412 to support a theory that a witness has a
5 motive to lie and should not be believed, the military judge may
6 require the defense to present additional evidence to explain
7 the nexus between the evidence offered and the alleged motive to
8 lie, unless, as it is here, the defense theory is one which is
9 "commonly understood and obvious." *United States v. Sanchez*, 40
10 M.J. 782, 785 (A.F.C.M.R. 1994) (citing *United States v. Colon-*
11 *Angueira*, 16 M.J. 20 (C.M.A. 1983)), *aff'd*, 44 M.J. 174
12 (C.A.A.F. 1996); *Dorsey*, 16 M.J. at 5-6.

13 If the military judge erroneously excludes evidence that is
14 constitutionally required to be admitted, the case will be
15 overturned unless the appellate courts can conclude, beyond a
16 reasonable doubt, that the error was harmless. *United States v.*
17 *Buenaventura*, 45 M.J. 72 at 79-80 (citing *United States v. Bins*,
18 43 M.J. 79, 86 (C.A.A.F. 1995)).

19 The defense request the court to consider the attached
20 notes and statements of "EM" and J[redacted]H[redacted]

1 **7. Witness Production.** The defense requests the production of

2 the complaining witness, EM, and J[redacted] H[redacted].

3 **8. Relief Requested.** The defense requests to be able to inquire

4 into the two aforementioned areas.

5 **9. Argument.** Oral argument is requested.

6 [redacted]

7

8

9 I certify a copy of this motion and attachments were served on

10 the trial counsel and the court today, Friday, November 8, 2013,

11 by email delivery. [redacted]

12

13

14

Contact w/ V/[redacted] [redacted]

5/9/13
1450
GBR.

E[redacted]

→ [redacted] → texted from party (ex-girlfriend)

→ J[redacted] → called on Sunday

H[redacted]

(603[redacted]
603[redacted]

(lives in Winston Salem.
704-3[redacted])

having argument via text

→ nothing about anything at party.

J[redacted] H[redacted] interview 1445

→ V/ called from car on way home (~900 AM)

→ (family is military → checked w/ family for advice

→ told V/ needed a kit done + not to change clothes.

→ V/ said at a party, got drunk, S/ + girlfriend at party

S/ got V/ to car + had sex

V/ said she said "no" → V/ felt uncomfortable, didn't have means to fight back b/c drunk

V/ felt sickness wrong place wrong time.

felt really guilty, had done something wrong.

[V/ usually very peppy, but somber during conversation]

- didn't want to get S/ in trouble.

S/ made a comment to her while having sex?

[redacted]

00480e

U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE

INVESTIGATIVE ACTION 10MAY13

CONTROL: [redacted]

S/E[redacted], E[redacted] D[redacted]/LT USN
[redacted]

RESULTS OF CONTACT WITH J[redacted] H[redacted], CIV

1. On 09May13, Reporting Agent (RA) contacted J[redacted] H[redacted], CIV, (D[redacted] via telephone regarding her contact with V/[redacted] the weekend of 27-28Oct12. H[redacted] currently lives in New Hampshire and has known V/[redacted] since Apr12.

2. H[redacted] stated V/[redacted] called her around 0900 on Sunday morning while V/[redacted] was driving home. V/[redacted] told her that she had been at a party, got drunk, the suspect (name unknown by H[redacted]) got V/[redacted] to his car and had sex with her. V/[redacted] said she said "no." V/[redacted] also said the suspect was at the party with his girlfriend.

3. H[redacted] also believes V/[redacted] mentioned that the suspect made a comment to her while he was having sex with her, however H[redacted] could not recall what the comment was.

4. H[redacted] said V/[redacted] told her that she felt uncomfortable while the incident was happening, but that she didn't have the means to fight back because she was drunk. V/[redacted] also said she felt like she was in the wrong place at the wrong time, and felt really guilty, like she had done something wrong. H[redacted] said V/[redacted] didn't want to get the suspect in trouble.

5. H[redacted] explained that she has a brother and sister in the military and that she called them for advice. H[redacted] stated she then told V/[redacted] that she needed to have a SAFE kit done and not to change her clothes.

6. H[redacted] stated V/[redacted] is usually a very peppy person, however V/[redacted] was very somber when she called that Sunday morning. H[redacted] also explained V/[redacted] is a huge gay advocate, therefore V/[redacted] was not interested at all in sexual relations with men.

REPORTED BY: G[redacted] R[redacted], Special Agent
OFFICE: RESIDENT AGENCY CAMP LEJEUNE

[redacted]

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U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE

10MAY13

INVESTIGATIVE ACTION

CONTROL: [redacted]

S/E[redacted], E[redacted] D[redacted]/LT USN
M/W/[redacted]

RESULTS OF CONTACT WITH E[redacted], CIV

1. On 09May13, Reporting Agent (RA) contacted E[redacted], CIV, (DOB:[redacted] via telephone regarding her contact with V/[redacted] the weekend of 27-28Oct12. K[redacted] was V/[redacted] girlfriend at the time of the incident, and currently lives in Winston-Salem, NC.

2. E[redacted] stated she received a phone call from V/[redacted] on Sunday while she was at work. K[redacted] said V/[redacted] was upset and stated she was "fairly sure got raped last night."

3. K[redacted] said V/[redacted] told her that she went to a party, was drinking; the guy (name unknown by K[redacted]) was harassing her all night, saying her was "going to fuck her." V/[redacted] said she got real sleepy, the guy led her to his car, he pulled her pants down, and she was trying to pull them back up. V/[redacted] then said she remembers waking up alone in the car.

4. K[redacted] said that V/[redacted] doesn't drink very much on a normal basis and that she had never seen V/[redacted] drunk. K[redacted] stated she did receive text messages from V/[redacted] on Saturday night, however none of them had to do with the party V[redacted] was at.

5. K[redacted] stated V/[redacted] felt bad about what happened and wanted to reach out to the guy. K[redacted] stated she didn't know if V[redacted] ever reach out to the guy. K[redacted] did not know of any known relationship between V/[redacted] and the guy.

REPORTED BY: G[redacted] R[redacted], Special Agent
OFFICE: RESIDENT AGENCY CAMP LEJEUNE

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APPENDIX F

NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN CIRCUIT
GENERAL COURT MARTIAL

UNITED STATES	)	DEFENSE MOTION TO COMPEL DISCOVERY
v.	)	(513)
B[redacted] E[redacted] Lieutenant U.S. Navy	)	Friday, November 8, 2013

1. NATURE OF MOTION. This is a motion to compel the government to discover the mental health records of the Complaining Witness under MRE 513(d)(8), RCM 701, and RCM 905(b)(4).

2. BURDEN OF PROOF. The burden is by a preponderance of the evidence.

3. BURDEN OF PERSUASION. The burden is on the defense.

4. SUMMARY OF FACTS.

The facts as set out in the Defense Motion to Compel Expert Consultant (F[redacted]) is incorporated by reference as if set forth herein in its entirety.

Further, on around October 3, 2013, the defense requested the following:

> *"Disclosure of all mental health records, substance abuse treatment program records, and medical records (whether military or civilian), and any other government records relating to all witnesses or potential witnesses in the instant case, where such*

1 *records may relate to the character of these persons,*
2 *their motives for testifying, their tendency to*
3 *fabricate or exaggerate, or where such records may*
4 *evidence a witness' mental or emotional instability,*
5 *history of substance abuse, low intelligence, or may*
6 *otherwise contain information relating to instances of*
7 *lying to military or civilian authorities or others,*
8 *and/or evidence of bias against the accused or any*
9 *defense witnesses."*
10 On around October 17, 2013, the trial counsel responded
11 with the following:
12 *Denied as to mental health record, substance abuse*
13 *treatment program records, and medical records (beyond*
14 *those associated with the Sexual Assault Forensic*
15 *Exam). Not necessary or relevant. Furthermore, any*
16 *information outside the control of Military*
17 *authorities would be a request for production under*
18 *RCM 703(f) and the defense must provide the Government*
19 *a description of the each item sufficient to show its*
20 *relevance and necessity, a statement where it can be*
21 *obtained, and, if known, the name, address, and*
22 *telephone number of the custodian of the evidence. The*
23 *request for "other government records" is denied as*
24 *vague and overbroad.*

1 As part of the initial discovery provided to the defense, a
2 copy of the Complaining Witness's Pharmacy Report was
3 discovered. Included on that document were the following
4 prescriptions that preceded the evening of the allegation:
5 Doxepin, Citalopram, and Zolpidem Tartrate.

6 **Doxepin**

7 Doxepin is used to treat depression and anxiety. Doxepin is
8 in a class of medications called tricyclic antidepressants. It
9 works by increasing the amounts of certain natural substances in
10 the brain that are needed for mental balance. Side effects of
11 Doxepin include, inter alia, nightmares and changes in sex drive
12 and ability.[1]

13 **Citalopram**

14 Citalopram is used to treat depression. Citalopram is in a
15 class of antidepressants called selective serotonin reuptake
16 inhibitors (SSRIs). It is thought to work by increasing the
17 amount of serotonin, a natural substance in the brain that helps
18 maintain mental balance. Side effects of Citalopram include,
19 inter alia, changes in sex drive and confusion, problems with
20 concentration and memory.[2]

21 **Zolpidem (Ambien)**

22 Zolpidem is used to treat insomnia (difficulty falling

[1] http://vsearch.nlm.nih.gov
[2] Id.

1 asleep or staying asleep). Zolpidem belongs to a class of
2 medications called sedative-hypnotics. It works by slowing
3 activity in the brain to allow sleep. Side effects include,
4 inter alia, unusual dreams, drugged feeling and, if you get up
5 too soon after taking zolpidem, you may experience memory
6 problems.

7 **5. DISCUSSION.**

8 MRE 513 provides that A patient has a privilege to refuse
9 to disclose and to prevent any other person from disclosing a
10 confidential communication made between the patient and a
11 psychotherapist or an assistant to the psychotherapist, in a
12 case arising under the UCMJ, if such communication was made for
13 the purpose of facilitating diagnosis or treatment of the
14 patient's mental or emotional condition.

15 In any case in which the production or admission of records
16 or communications of a patient other than the accused is a
17 matter in dispute, a party may seek an interlocutory ruling by
18 the military judge.

19 **Evidence And Purpose For Which Mental Health Records Is Sought**

20 Based upon the (1) types of medications prescribed, (2) the
21 evidence of the Complaining Witness arguing with her girlfriend,
22 (3) feeling of guilty after alleging that she was "fairly sure"
23 she got raped, but felt bad and wanted to reach out to the
24 Accused, and (4) reaching out to the accused personally after

1 making the allegation, they are, together, indicators of someone
2 who has been traumatized in the past or is suffering from sever
3 depression. With a person who has been traumatized in the past,
4 there are issues of transference (which could include
5 transference onto the Accused) and other conditions wherein the
6 Complaining Witness could be concerned with engaging in a
7 consensual casual or chance sexual relationship, as it would
8 deal with her current condition.
9 Further, if the Complaining Witness is suffering from
10 depression, as it appears, it could include psychotic
11 depression, which has the possibility to result in breaks with
12 reality; or it could include a bi-polar disorder, characterized
13 by cycling mood changes, which could explain her consensual
14 behavior evolving into an allegation of rape.
15 **Service On Opposing Party And Notifying The Patient**
16 I do not intend on notifying the Complaining Witness;
17 however, she does have counsel assigned and I suggest a copy of
18 this motion be served upon him.
19 **6. EVIDENCE.**
20 The defense will provide a redacted copy of the medical record
21 cited to the court if needed.

1 **7. RELIEF REQUESTED.**

2 The defense requests the military judge order a

3 hearing to determine the discoverability and admissibility

4 of the mental health records of the Complaining Witness.

5 **8. ARGUMENT.** Oral argument is requested.

6

7

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9 I certify a copy of this motion and attachments were served on

10 the trial counsel and the court today, Friday, November 8, 2013,

11 by email delivery.

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APPENDIX G

14 Nov 13

From: LT H[redacted] S[redacted], DC, USN
To: Commanding General, 2nd Marine Logistics Group

Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST
ICO U.S. V. LT B[redacted] E[redacted], DC, USN

Ref: (a) The Freedom of Information Act, 5 U.S.C. §552
(b) The Privacy Act, 5 U.S.C. §552a
(c) SECNAVINST 5211.5E
(d) SECNAVINST 5720.42

1. This is a request pursuant to references (a) through (d) for documents regarding the investigation and court-martial of Lieutenant B[redacted] E[redacted], DC, USN, in connection with an unrestricted report of sexual assault at Camp Lejeune, North Carolina made on or about 28 October 2012.

2. I respectfully request a copy of the following documents:

a. The Article 34, UCMJ Advice, Charge Sheet, and Convening Order for the subject court-martial, less redactions of signatures and social security numbers pursuant to exemption (b)(6) of the FOIA.

b. The Article 32, UCMJ Investigating Officer Report, including the summary of any testimony by me in the subject court-martial less redactions of personally identifiable information, signatures and social security numbers pursuant to exemption (b)(6) of the FOIA. Redactions of opinions and pre-decisional recommendations made according to exemption (b)(5) are specifically not requested, however the factual summaries of testimony are not recommendations.

c. Any statements signed by me, or any "Results of Interview" or similar written documents summarizing statements made by me that are relevant to the charges in the subject court-martial.

3. The above documents are requested under the more liberal of either reference (a) or (b), as said acts apply to the respective documents. Sexual assaults in the military are an item of general public interest, and this request is not primarily in the commercial interests of the requester. Therefore, I request any fees be waived. If you do not agree to waive fees associated with this request, please contact me through my Victims' Legal Counsel, LCDR P[redacted] K[redacted], JAGC, USN, at (904) 270-5191 x1213 or [redacted]

Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST
ICO U.S. V. LT B[redacted] E[redacted], DC, USN

4. If you deny any portion of this request, please cite each specific exemption you feel justifies the refusal to release the information, and provide the remaining information with the redactions shown.

5. Please direct any questions regarding this request and provide the requested documents to my Victims' Legal Counsel, LCDR P[redacted] K[redacted], JAGC, USN, at (904) 270-5191 x1213 or [redacted].

Very Respectfully,

[redacted] 14Nov13

H[redacted] S[redacted]
LT, DC, USN

APPENDIX H

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	**AMENDED**
	)	VICTIMS' LEGAL COUNSEL
v.	)	REQUEST FOR CHANGE OF DATE
	)	FOR ARTICLE 39(a) MOTIONS
LT B[redacted] E[redacted], DC, USN	)	HEARING
	)	

1. Nature of Request. This is a request supported by good cause to change the date of the Article 39(a) Motions Hearing in the above captioned case. The hearing is currently scheduled for 10 December 2013; however, detailed Victims' Legal Counsel (VLC) has a planned out-of-country family vacation during the week of 9 December 2013. Detailed VLC respectfully requests the Article 39(a) Motions Session be docketed for 3 December 2013.

2. Summary of Facts.

a. On 31 October 2013, the undersigned counsel, LCDR P[redacted] K[redacted], JAGC, USN, was detailed as VLC for LT H.S., DC, USN, the named victim in the charges in this court-martial.

b. On 31 October 2013, notice of VLC representation was served on Trial Counsel and Civilian Defense Counsel.

c. On 4 November 2013, detailed VLC entered a Notice of Appearance with the Eastern Judicial Circuit in this court-martial.

d. On 8 November 2013, Trial Counsel informed detailed VLC that an Article 39(a) Motions Hearing was scheduled for 10 December 2013.

e. On 12 November 2013, detailed VLC received two defense motions that implicate LT H.S.'s privacy interests and privileges under Military Rules of Evidence (M.R.E.) 412 and 513.

f. LT H.S. desires to present legal argument and possibly present facts through counsel at the Article 39(a) Motions Hearing in response to the defense motions under M.R.E. 412 and M.R.E. 513.

g. In October 2013, detailed VLC booked a family vacation on Carnival Cruise Lines, which is non-refundable and non-transferrable. The cruise departs 9 December 2013 and returns on 14 December 2013. Leave was authorized by Deputy Chief of Staff, Navy Victims' Legal Counsel Program prior to purchase of this cruise.

3. Discussion.

M.R.E. 412 and M.R.E. 513 provide LT H.S. the reasonable opportunity to be heard, including the opportunity to present facts and legal argument to the court. M.R.E. 412(c); M.R.E. 513(e); *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013). This

includes the right to be heard through counsel. *Kastenberg*, 72 M.J. 370-71. LT H.S. desires to exercise her right to be heard through counsel, and in order to effectively exercise her right to be heard, detailed VLC respectfully requests a change of date for the Article 39(a) Motions Hearing in which these matters will be litigated.

On the scheduled date for the Article 39(a) Motions Hearing, detailed VLC has planned leave that cannot be re-scheduled without significant personal strife and financial loss. However, detailed VLC has no obligations in the weeks after or before the currently scheduled Article 39(a) Motions Hearing.

At the present time, it is unclear if LT H.S.'s interests are entirely aligned with those of Trial Counsel. Detailed VLC intends to file written pleadings on behalf of LT H.S. addressing the defense motions by 21 November 2013; however, such pleadings may not be sufficient to address any arguments or presentation of evidence that may occur at the hearing. Without her detailed VLC being present at the hearing,[1] LT H.S. may be denied her right to be heard.

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[1] Detailed VLC is co-located with LT H.S. in Jacksonville, FL. Detailed VLC has access to a VTC site and has requested that Trial Counsel propose using this technology pursuant to Rule for Courts-Martial 703(b) and 914B in lieu of LT H.S. and detailed VLC traveling to Camp Lejeune. However, LT H.S. and detailed VLC recognize that the defense requested LT H.S.'s production in its M.R.E. 412 motion.

4. **Remedy.** Detailed VLC respectfully requests this honorable Court to reschedule the Article 39(a) Motions Hearing for 3 December 2013. There is no request at this time to modify trial dates or trial milestone dates.

[redacted]

P. K. K[redacted]
LCDR, JAGC, USN
Victims' Legal Counsel

CERTIFICATE OF SERVICE

I certify that a copy of this pleading was served upon the Court, Trial Counsel, and Defense Counsel on this 15th day of November 2013 via email.

[redacted]

P. K. K[redacted]

****

Motion Responses

1. Trial Counsel does / does not oppose this rescheduling request.

_____, 20__ _____

Date A. M. L[redacted]

Capt, U.S. Marine Corps

Trial Counsel

1. Defense Counsel does / does not oppose this rescheduling request.

_____, 20__ _____

Date P. S[redacted]

Civilian Defense Counsel

****

Court Ruling

1. The above request is approved / disapproved. The court-martial shall convene for an Article 39(a) session on _____, 20__; Trial will commence on _____, 20__.

_____, 20__ _____

Date Military Judge

APPENDIX I

****

Motion Responses

1. Trial Counsel does / does not oppose this rescheduling request.

_____, 20__
Date

A. M. L[redacted]
Capt, U.S. Marine Corps
Trial Counsel

1. Defense Counsel does / [redacted] oppose this rescheduling request.
** Please see below.

[redacted]

November 19, 20 13
Date

P. S[redacted]
Civilian Defense Counsel

****

Court Ruling

1. The above request is approved / disapproved. The court-martial shall convene for an Article 39(a) session on _____, 20__; Trial will commence on _____, 20__.

_____, 20__
Date

_____
Military Judge

I am currently docketed for an Administrative Separation Board at WNY on 2 December 2013, a special court-martial at SJAFB from 3-5 December 2013, 39a MBCL on 16 December, 39a at MCBQ 19 December, and 39a at NAB on 20 December 2013. I'm scheduled for vacation 22 December 2013 to 5 January 2014. Further I have a contested members trial the weeks of 6, 13, 20, and 27 (E[redacted]) January 2013.

****

Motion Responses

1. Trial Counsel ~~does~~ / does not oppose this rescheduling request.

15 Nov, 2013
Date

[redacted]
A. M. [redacted]
Capt, U.S. Marine Corps
Trial Counsel

1. Defense Counsel does / does not oppose this rescheduling request.

_____, 20__
Date

P. S[redacted]
Civilian Defense Counsel

****

Court Ruling

1. The above request is approved / ~~disapproved~~ as modified. The court-martial shall convene for an Article 39(a) session ~~on~~ at 0900 16 DECEMBER, 2013; Trial will commence on 27 JANUARY, 2014.

21 NOVEMBER, 2013
Date

[redacted]
Military Judge

C[redacted] G[redacted]
LtCol, USMC
Military Judge

APPENDIX J

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	VICTIM'S RESPONSE
	)	TO DEFENSE MOTION
V.	)	TO DETERMINE THE
	)	ADMISSIBILITY OF
	)	EVIDENCE UNDER
	)	M.R.E. 412
B[redacted] E[redacted]	)	
LT, DC, USN	)	

1. NATURE OF RESPONSE

LT H.S., through counsel, respectfully requests that this Court prohibit the parties from introducing evidence of specific instances of sexual behavior with her former partner. Further, while LT H.S. acknowledges that some evidence of her relationship with her former partner may be relevant and material to the defense, and even the government, LT H.S. requests that this Court exercise its broad power to limit the parties' presentation of evidence regarding LT H.S.'s sexual predisposition. With regard to an alleged "flirtatious interaction" between LT H.S. and the Accused on the front porch prior to his sexual assault of LT H.S., LT H.S. requests that this Court impose reasonable limitations on the scope and manner of any examination on the said alleged interaction.

2. SUMMARY OF FACTS[1]

(1) LT H.S. is the named victim in the charges in this court-martial. The charges in this case stem from the Accused's sexual assault of LT H.S. in the early morning hours on 28 October 2012. The Accused and LT H.S. attended a Halloween party that began the evening of 27 October 2012, and both planned to sleep over at the host's residence. The Accused assaulted LT H.S. in the middle of the night in his vehicle.

(2) At the time of the sexual assault, LT H.S. was highly intoxicated, and the Accused overcame her verbal and physical resistance to sexual contact and sexual acts.

(3) On 27 October 2012, LT H.S. was in a relationship with E.M., a female person. They had been in this relationship for close to a year.

(4) On 8 November 2013, the defense provided notice that it intends to present evidence of "flirtatious interaction" between the Accused and LT H.S. on the front porch of the host's house, evidence of LT H.S.'s relationship with E.M., and evidence that LT H.S. is a "huge gay advocate" at

[1] LT H.S. and her counsel have been disadvantaged in reciting the facts of this court-martial as the government has refused to provide copies of the charge sheet, LT H.S.'s statements, and other ancillary documents despite repeated requests from LT H.S. including a FOIA/Privacy Act request.

trial. The defense also requested that E.M. be produced for trial.

(5) LT H.S. will testify at trial that she did not have a "flirtatious interaction" with the Accused on the front porch of the house.

3. DISCUSSION

I. EVIDENCE OF A "FLIRTATIOUS INTERACTION" BETWEEN THE ACCUSED AND LT H.S. ON THE FRONT PORCH OFFERED TO PROVE CONSENT

LT H.S. does not contest that the type of sexual behavior alleged by the defense may fall under the exception to in Military Rule of Evidence (M.R.E.) 412 found in M.R.E. 412(b)(1)(B). Presumably, based on the defense proffer that there were no eyewitnesses to this alleged behavior, the defense intends to cross-examine LT H.S. on this subject. If this Court finds such evidence admissible, LT H.S. asks this Court to impose reasonable limitations on the parties' examination to prevent questioning that is repetitive, harassing, and only marginally relevant.

Military judges have wide latitude to impose reasonable limits on examinations of witnesses, especially in areas that trigger M.R.E. 412. Importantly, the right to confront witnesses by cross examination is not unlimited. See Delaware v. Van Arsdall, 475 U.S. 673, 678-

79 (1986). Trial judges have "wide latitude" to "impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Id. "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Id. (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam)). Although an accused has a right to confront and cross-examine witnesses, he does not have a "free license to cross-examine a witness to such an extent as would 'hammer th[e] point home to the jury.'" United States v. Collier, 67 M.J. 347 (C.A.A.F. 2009) (quoting United States v. James, 61 M.J. 132, 135 (C.A.A.F. 2005)). Cross-examination is sufficient if the motivation for testifying has been exposed, and "further inquiry . . . would [be] marginally relevant at best and potentially misleading." Id. (citing United States v. Carruthers, 64 M.J. 340, 344 (C.A.A.F. 2007)).

In light of LT H.S.'s expected testimony that there was no "flirtatious interaction" on the front porch, LT H.S. asks this Court to prevent the parties from continuing

to ask questions about the alleged "flirtatious interaction" once it has been established that LT H.S. denies that the said interaction ever took place. Further inquiry would be marginally relevant at best because it would result in LT H.S. repeating her answer that the said interaction did not take place and would result in harassment of LT H.S. Further, the defense theory that such evidence supports a defense of consent, or mistake of fact as to consent, would not be furthered by repetitive questioning on the subject by the defense and repetitive denials that the alleged interaction took place by LT H.S.

II. EVIDENCE OF LT H.S.'S RELATIONSHIP WITH E.M. OFFERED TO DEMONSTRATE A MOTIVE TO FABRICATE

The defense argues that evidence that LT H.S. was in an argument with E.M., a female with whom LT H.S., also a female, was in a relationship with on the night that she was sexually assaulted by the Accused, is "constitutionally required" to support a defense theory that LT H.S. fabricated the sexual assault. The danger of permitting any party to pursue this line of questioning is that it can implicate LT H.S.'s sexual predisposition to engage in same-sex sexual behavior or cross into areas of other

sexual behavior by LT H.S., and such evidence is specifically excluded under M.R.E. 412.

In its motion, the defense argues that the proffered evidence is admissible under the "constitutionally required" exception to M.R.E. 412 found at M.R.E. 412(b)(1)(C). Under that exception, the defense bears the burden of showing that the evidence is relevant, material, and that the probative value of the proffered evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the members, or by considerations of undue delay, waste of time, or needless presentation of evidence.

M.R.E. 412 is applicable to proceedings such as this court-martial involving alleged sexual offenses. M.R.E. 412 operates to exclude evidence that an alleged victim of a sexual offense engaged in other sexual behavior or to prove an alleged victim's sexual predisposition unless such evidence falls within one of the rule's three exceptions: (1) evidence of specific instances of sexual behavior offered by the accused to show that he was not the source of semen, injury, or other physical evidence; (2) evidence of the victim's past sexual behavior with the accused when offered to show the victim's consent; or (3) evidence that is constitutionally required to be admitted. M.R.E.

412(a)&(b). The defense has the burden of establishing evidence of other sexual behavior or sexual predisposition of the victim falls under one of these three exceptions before the evidence may be admitted. United States v. Carter, 47 M.J. 395, 396 (C.A.A.F. 1998).

"Generally, evidence must be admitted within the ambit of [the "constitutionally required" exception found in] M.R.E. 412(b)(1)(C) when the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011) (citing United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011)). The relevance standard is the M.R.E. 401 relevance standard. Whether the evidence is material depends upon "the importance of the issue for which the evidence [is] offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue." United States v. Banker, 60 M.J. 216, 222 (C.A.A.F. 2004). (citing United States v. Colon-Angueira, 16 M.J. 20, 26 (C.M.A. 1983)). "Finally, if evidence is material and relevant, then it must be admitted when the accused can show that the evidence is more probative than the dangers of unfair prejudice. Those dangers include concerns about

'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" Ellerbrock, 70 M.J. at 318-19 (citing M.R.E. 412(c)(3) & Van Arsdall, 475 U.S. at 679).

In this case, the defense's vague proffer that it intends to present evidence "about [LT H.S.'s] relationship with [E.M.]" does not permit LT H.S., and presumably this Court, to intelligently apply the legal standards to determine the admissibility of specific evidence. However, any evidence beyond establishing the existence of a relationship between LT H.S. and E.M. that implicates sexual predisposition or presents sexual behavior would not be relevant and material to the defense theory of motive to fabricate. LT H.S.'s sexual predisposition - her sexual orientation - and specific sexual behavior with E.M. are not relevant or important to the issue of whether or not LT H.S. fabricated, as alleged by the defense, to protect a relationship; the specific details of the relationship and sexual orientation of the parties in the relationship are inconsequential. It is the existence of the relationship that may be relevant and material to the defense theory.

Finally, applying the M.R.E. 403 balancing test to evidence of LT H.S. sexual orientation in this context and specific details of LT H.S.'s relationship with E.M., the

minimal probative value of this evidence as it relates to the alleged motive to fabricate is substantially outweighed by the danger of unfair prejudice, confusing the issues, and wasting time. LT H.S. should not be prejudiced by being required to disclose intimate details of a same-sex relationship and her sexual orientation, nor the Court be required to endure more than minimal questioning regarding LT H.S.'s same-sex relationship with E.M.

III. EVIDENCE THAT LT H.S. IS A "HUGE GAY ADVOCATE" OFFERED DEMONSTRATE A MOTIVE TO FABRICATE

The defense also argues in its motion that LT H.S. has a motive to fabricate based on her sexual orientation and advocacy of equality for gay and lesbian persons. Such evidence clearly is evidence of sexual predisposition and covered under M.R.E. 412. See, e.g., United States v. Grant, 49 M.J. 295, 297 (C.A.A.F. 1998) (upholding military judge's application of M.R.E. 412 to defense proffer that evidence of victim's sexual orientation was admissible under the "constitutionally required" exception). In order for such evidence to be admissible under the "constitutionally required" exception to M.R.E. 412, the defense must demonstrate that the evidence is relevant and

material to a defense theory and that it passes the M.R.E. 403 balancing test.

The defense has failed to demonstrate that this evidence is relevant and material to its theory. First, for this theory to be relevant material to the defense, the defense would have to present evidence that LT H.S. believed that the Accused, a married man, planned to publicize that he committed adultery with a fellow Naval officer prior to LT H.S. making her report of sexual assault on the morning of 28 October 2012. Therefore, its relevance at best is conditioned on the presentation of some evidence that LT H.S. believed that the Accused intended to publicize the sexual assault as a consensual sexual encounter. The defense motion is devoid of any such evidence; the defense theory rests entirely on speculation, and applying the legal standard, the defense has failed to demonstrate that such evidence is relevant and material.

Further, applying the M.R.E. 403 balancing test, evidence of LT H.S.'s sexual orientation and alleged advocacy of equality for gay and lesbian persons may still be highly inflammatory in today's military culture even with the repeal of "Don't Ask, Don't Tell," resulting in unfair prejudice, confusion of the issues, and wasting the Court's time. The probative value, if any, of such

evidence is extremely low since the defense has failed to connect the evidence to its theory of fabrication. The evidence should be properly excluded at trial under M.R.E. 412 and M.R.E. 403.

4. BURDEN

As the moving party, the defense has the burden by a preponderance of the evidence that other sexual behavior or sexual predisposition of LT H.S. falls under one of the three M.R.E. 412 exceptions before the evidence may be admitted. R.C.M. 905(c); United States v. Carter, 47 M.J. 395, 396 (C.A.A.F. 1998).

5. ORAL ARGUMENT

LT H.S., through counsel, desires to present legal argument orally and possibly present evidence.

Respectfully submitted,

P. K. K[redacted]
LCDR, JAGC, USN
Victims' Legal Counsel
For LT. H.S.

****

Certificate of Service

I hereby attest that a copy of the foregoing pleading was served on the Court, Defense Counsel, and Trial Counsel electronically on 21 November 2013.

[redacted]

P. K. [redacted]

APPENDIX K

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	PATIENT'S RESPONSE
	)	TO DEFENSE MOTION
V.	)	TO COMPEL DISCOVERY
	)	AND PRODUCTION OF
	)	PRIVILEGED RECORDS
	)	UNDER M.R.E. 513
B[redacted] E[redacted]	)	
LT, DC, USN	)	

1. NATURE OF RESPONSE

LT H.S., through counsel, respectfully requests that this Court deny the defense motion to compel the discovery and production of LT H.S.'s mental health records. The defense has failed to demonstrate the threshold showing to order production of LT H.S.'s mental health records, even for an in camera review by the military judge, under Military Rule of Evidence (M.R.E.) 513(e).

2. SUMMARY OF FACTS[1]

(a) LT H.S. is the named victim in the charges in this court-martial. The charges in this case stem from the Accused's sexual assault of LT H.S. in the early morning hours on 28 October 2012. The Accused and LT H.S. attended

[1] LT H.S. and her counsel have been disadvantaged in reciting the facts of this court-martial as the Government has refused to provide copies of the charge sheet, LT H.S.'s statements, and other ancillary documents despite repeated requests including a FOIA/Privacy Act request.

a Halloween party that began the evening of 27 October 2012, and both planned to sleep over at the host's residence. The Accused assaulted LT H.S. in the middle of the night in his vehicle.

(2) At the time of the sexual assault, LT H.S. was highly intoxicated, and the Accused overcame her verbal and physical resistance to sexual contact and sexual acts.

(3) LT H.S. arrived at the party at approximately 1730 on 27 October 2010 and began consuming alcohol soon after she arrived. LT H.S. had not consumed alcohol on that date prior to arriving at the party.

(4) Although LT H.S. was prescribed certain medications in October 2012 to address depression and difficulty sleeping, she had not taken any medication since 26 October 2012 at approximately 2130. She last took Doxepin at approximately 2130 on 26 October 2013. She last took Citalopram at approximately 2130 on 26 October 2013. She last took Zolpidem (Ambien) several weeks, perhaps months, prior to 27 October 2012.

(5) LT H.S. invokes her right under M.R.E. 513 to prevent disclosure of confidential communications made between her and any psychotherapist.

3. DISCUSSION

In 1996, the Supreme Court recognized a psychotherapist-patient privilege under Federal Rule of Evidence 501 in Jaffee v. Redmond, 518 U.S. 1 (1996). In 1999, the Military Rules of Evidence were amended to codify a new psychotherapist-patient privilege. Military Rule of Evidence (M.R.E.) 513 codifies a qualified psychotherapist-patient privilege in military courts-martial. A patient has the right to refuse disclosure of confidential communications made between the patient and psychotherapist if such communications were made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. M.R.E. 513(a). M.R.E. 513(d) details a series of exceptions to the psychotherapist-patient privilege, including when admission or disclosure of the communication is "constitutionally required." M.R.E. 513(d)(8).

In any case in which the production of records of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. M.R.E. 513(e)(1). In order to obtain such a ruling, the party seeking the records must file a written motion "specifically describing the evidence and stating the

purpose for which it is sought or offered." M.R.E. 513(e)(1)(A) (emphasis added).

Before ordering production or admission of disputed evidence, the military judge must conduct a hearing. M.R.E. 513(e)(2). The patient must be afforded a reasonable opportunity to attend the hearing and be heard, including the opportunity to present facts and legal argument to the court. Id.; LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013). This includes the right to be heard through counsel. Kastenberg, 72 M.J. at 370-71.

The procedure for producing records claimed privileged under M.R.E. 513 was outlined by the Navy-Marine Corps Court of Criminal Appeals in United States v. Klemick. 65 M.J. 576 (2006). An in camera review of such records is appropriate upon a threshold showing based on a three part test:

> (1) Did the moving party set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to M.R.E. 513?
>
> (2) Is the information sought merely cumulative of other information available? And,
>
> (3) Did the moving party make reasonable efforts to obtain the same or substantially similar information through a non-privileged source?

Id. at 580. The court also noted that "this standard is not high, because we know that the moving party will often

be unable to determine the specific information contained in a psychotherapist's records." Id. Nevertheless, in order for the privilege under M.R.E. 513 to have any legal force, courts must strictly hold the moving party to this threshold showing, or else privileged records will be produced for an in camera review in every case when requested by a party based on nothing more than speculation.

The purpose of a legal privilege is to promote individual and social interests. In Jaffee v. Redmond, the Supreme Court emphasized the role of trust in psychotherapy. Noting that effective psychotherapy requires an "atmosphere of confidence and trust" and that the problems discussed with a mental health care provider are often private and sensitive, the Court concluded that "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." Jaffee, 518 U.S. at 10.

Even review by a military judge defeats this recognized individual and social interest and pierces the privilege under M.R.E. 513 because a "confidential communication" as defined by M.R.E. 513(b) is one that is not intended to be disclosed to a third party, and there is no written exception for review by the military judge

unless the required threshold showing for production and an in camera review has been made by the moving party. Patients must be confident that their statements to mental health providers will not be revealed to anyone - even a military judge - simply because an accused speculates that there might be a communication that could be helpful to the defense. Adopting a standard of speculation would defeat the privilege, chill communications between patients and mental health care providers, and jeopardize the mental health of society. To pierce the M.R.E. 513 privilege, more than speculation is required by the law, and the defense has failed to make its threshold showing in this court-martial.

In its motion, the defense failed to set forth a specific factual basis demonstrating a reasonable likelihood that the requested records would yield evidence admissible under an exception to M.R.E. 513. The majority of the defense motion relates to medications prescribed to LT H.S. but does not address what evidence is contained in the requested records that would be admissible under an exception to M.R.E. 513. Simply because a certain type of evidence may be helpful to the defense, if it exists, does not dismiss the defense's obligation to demonstrate a reasonable likelihood that the requested records would

yield such admissible evidence and surely does not give the defense a right to compel production and a search through LT H.S.'s mental health record in fanciful hopes that such evidence may be found. Protecting the confidentiality of individuals and preventing a "blanket fishing expedition" by the defense are legitimate interests for military judges to uphold. United States v. Kelly, 52 M.J. 773, 775 (A.C.C.A. 1999). For the privilege under M.R.E. 513 to have legal meaning, the defense must do more than simply cast its fishing line by alleging commonly prescribed medications indicate that a Naval officer and practicing dentist suffers serious mental health disease. The defense has provided no specific factual basis that the requested records contain evidence that would be admissible at trial.

In its motion, the defense generally avers that it seeks evidence that LT H.S. suffers from "depression" which could include "psychotic depression, which has the possibility to result in breaks with reality" or that LT H.S. suffers from "bi-polar disorder, characterized by cycling mood changes, which could explain her consensual behavior involving into an allegation of rape." Defense Motion at 5. Yet, the defense has provided no statements from any person who alleges that they have observed LT H.S. exhibiting any indicators of such serious mental health

disease. At least one commentator agrees that defense counsel must obtain some knowledge about the contents of the requested records before being able to make a threshold showing to pierce M.R.E. 513. LTC Peter Masterson states:

> The defense counsel often will not know the contents of the statements they seek. This makes it difficult to argue that their production is constitutionally required. Therefore, defense counsel must obtain as much background information about the victims and witnesses as possible to determine what their statements to psychotherapists and their mental health records may contain. Defense counsel should talk to the witnesses and victims and their families, friends, and co-workers.

LTC Peter Masterson, The Military's Psychotherapist-Patient Privilege: Benefit or Bane for Military Accused, 2001 ARMY LAW. 18, 23. .

To pierce the privilege, order production, and conduct an in camera review, the defense must set for a specific factual basis demonstrating a reasonable likelihood that LT H.S.'s records would contain evidence admissible under an exception to M.R.E. 513. The defense motion is devoid of any mention of what specific evidence it believes is contained in the privileged records and what exception under M.R.E. 513 such evidence would be admissible under at trial. Even assuming that that the defense has set forth a specific factual basis, such a proffer must demonstrate a reasonable likelihood that the records would contain

evidence admissible under an exception to M.R.E. 513, such as the "constitutionally required" exception to M.R.E. 513, which is commonly argued by defense counsel.

M.R.E. 513(d)(8) provides that the psychotherapist-patient privilege does not apply "when admission or disclosure of a communication is constitutionally required." To amount to a constitutional right, an accused must show that by excluding such evidence he was denied a "meaningful opportunity to present a complete defense." United States v. Jones, 2008 CCA LEXIS 484, *17 (A.F.C.C.A. Oct. 22, 2008) rev'd on other grounds, 68 M.J. 465 (C.A.A.F. 2010) (citing Holmes v. South Carolina, 547 U.S. 319, 324 (2006)). The defense has failed to demonstrate a reasonable likelihood that there is evidence in LT H.S.'s mental health records and that the failure to produce that evidence would deny the Accused a meaningful opportunity to present a complete defense. If this Court adopts the defense argument, the privilege under M.R.E. 513 would be pierced on every occasion where the defense speculates that the witness suffers from a serious mental health disease.

In addition to failing to meet the factual threshold of the first part of the Klemick test, the defense also failed to satisfy the second or third parts of the test. The information sought, if it exists, is cumulative of

other information available. Despite the fact that LT H.S. did not take the medications on the night she was sexually assaulted by the Accused, the Court may nevertheless find the defense has a reasonable basis for inquiring as to how these medications may have affected - if at all - LT H.S.'s ability to perceive, remember, and recount the details of the Accused's sexual assault. See M.R.E. 602 (a witness may testify only if evidence is introduced sufficient to support a finding that the witness has personal knowledge). The defense can question the many eyewitnesses to determine whether LT H.S. behaved in any unusual ways that may indicate she suffered from some kind of disorder on the night of the assault and the following day when she reported the assault. The defense can also cross-examine LT H.S. about her behavior and actions on the night of the sexual assault and throughout her decision to report the Accused's sexual assault. Moreover, LT H.S. has already admitted that she was intoxicated on the night in question.

Finally, it is unknown what efforts, if any, the defense has made to obtain information about LT H.S.'s behavior or possible mental health disease from non-privileged sources. As stated above, the defense has produced no statements or evidence indicating that it has obtained information that LT H.S. presents any symptoms of

the serious mental health disease it alleges, or that it even attempted to obtain such information.

The defense has failed to meets the threshold showing to require production of LT H.S.'s mental health records, even for an in camera review by the military judge. Therefore, this Court should deny the defense request for production of LT H.S.'s mental health records.

4. BURDEN

The burden is on the defense to meet the threshold showing for production of LT H.S.'s mental records for in camera review. United States v. Klemick, 65 M.J. 576 (N.M.C.C.A. 2006).

5. ORAL ARGUMENT

LT H.S., through counsel, desires to present legal argument orally and possibly present evidence.

Respectfully submitted,

P. K. K[redacted]
LCDR, JAGC, USN
Victims' Legal Counsel
For LT. H.S.

****

Certificate of Service

I hereby attest that a copy of the foregoing pleading was served on the Court, Defense Counsel, and Trial Counsel electronically on 21 November 2013.

[redacted]

P. K. K[redacted]

APPENDIX L

GENERAL COURT-MARTIAL
EASTERN JUDICIAL CIRCUIT
UNITED STATES MARINE CORPS

U N I T E D S T A T E S v. B[redacted] D. E[redacted] Lieutenant/O-3 U.S. Navy	))))))))))	Government Response to Defense Motion "Mil. R. Evid. 412 Witness Production" 22 November 2013

1. **Relief Requested**: The Government respectfully moves the court, pursuant to Rule for Courts-Martial 906(b)(13) and Military Rule of Evidence (M.R.E.) 412, to deny the defense motion in part and preclude the introduction of evidence or eliciting of testimony regarding specific instances of sexual conduct involving the victim in this case. Furthermore, the Government respectfully requests that the court deny any requested production of E.K.

2. **Summary of Facts**:

a. The accused is charged with violations of Articles 120, 133, and 134 UCMJ, related to his sexual assault of LT H.S., another dentist at a Halloween party in October 2012.

b. On or about October 2012 the victim was in a same-sex relationship with E.K. (identified as "E.M." in the defense filing).

3. **Discussion**

a. Applicable Law

Evidence regarding the sexual behavior of the victim of a sexual assault is generally inadmissible. Mil. R. Evid. 412(a). Sexual behavior includes "any sexual

behavior not encompassed by the alleged offense." Mil. R. Evid. 412(d). The rule "is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses." Manual for Courts-Martial (M.C.M.) 2012, A22-36, (Analysis of M.R.E. 412). The rule is one of exclusion: evidence offered of a victim's sexual behavior or predisposition will not be admitted unless it meets one of the three exceptions found in M.R.E. 412(b). *United States v. Gaddis*, 70 M.J. 248, 251-52 (C.A.A.F. 2011). Those three exceptions include: 1) "when specific instances of sexual behavior by the victim are offered to prove that someone other than the accused was the source of some evidence"; 2) "when the behavior is offered to prove consent"; or 3) "when exclusion would violate the appellant's constitutional rights." *United States v. Key*, 2012 CCA LEXIS 321, 15 (N.M.C.C.A., July 10, 2012) (citing *United States v. Banker*, 60 M.J. 216, 221 (C.A.A.F. 2004)). Under the third "constitutional rights" exception, evidence of sexual behavior is to be admitted only when "the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice," to include the risk of "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Key*, 2012 CCA LEXIS 321 at 15-16 (citing *United States v. Ellerbrook*, 70 M.J. 314, 319 (C.A.A.F. 2011)).

b. <u>"Flirtatious Behavior to Show Consent"</u>

The Government believes that depending on how the facts come out at trial, evidence relating to allegedly flirtatious behavior on the part of the victim and the accused may be relevant. However, the Government would request the court to

appropriately limit the questions posed by the defense to just those necessary to inquire into whether or not this activity took place.

c. The Victim's Relationship with E.K.

The Government believes that while limited questioning may be allowed about the victim's relationship with E.K., it should not be as broad or as unbridled as the defense suggests. While the fact that the victim was in a relationship may be relevant, further inquiry into it is not necessary or relevant and would serve only to harass or embarrass LT H.S. Such inquiry into specific instances of sexual conduct would not further the defense aim of establishing a motive to fabricate, and would not be permissible under M.R.E. 412(b)(1)(C). However, at this point the defense has failed to properly articulate just what information they are trying to introduce or how they intend to introduce it, limiting the Government's ability to respond to this portion of the defense motion.

d. "Huge Gay Advocate" Evidence

The Government believes that any evidence relating to LT H.S. being a "huge gay advocate" is properly excluded under M.R.E. 412 and does not fit under the constitutional exception of M.R.E. 412(b)(1)(C). The defense has failed to identify specifically how this information is relevant to their defense. Specifically, they have failed to demonstrate the nexus between being a "huge gay advocate" and the potential impact on her life due to having a relationship with a man. Furthermore, the defense has failed to present any evidence which would make being a "huge gay advocate" relevant. They have not presented or proffered any evidence that would suggest that LT H.S. had any reason to believe that the sexual activity would become known to other people, that such people

would share that information with people that know LT H.S. and that it would somehow impact her life. Such an attenuated supposition hardly rises to the level of relevance necessary to outweigh the dangers of proceeding down this line of testimony or questioning.

e. Production of E.K.

Finally, the defense has failed to demonstrate why the testimony of E.K. would be relevant and necessary for to the defense. Even if the defense is permitted to cross-examine LT H.S. about her relationship with E.K., that does not mean that E.K. need be produced to testify at trial. Such production would have little probative value and would result in the asking of personal and intimate questions of a person with an extremely attenuated involvement in the events in question.

4. **Burden of Proof**: The defense "has the burden of demonstrating why the general prohibition in Mil.R.Evid. 412 should be lifted to admit evidence of the sexual behavior of the victim." *United States v. Carter*, 47 M.J. 395, 396 (C.A.A.F. 1998).

5. **Evidence**:

The Government intends to make the witnesses requested by the defense available through remote means pursuant to R.C.M. 703(b)(1). LT H.S. is currently stationed in Florida and will have access to VTC. E.K. is currently in Winston-Salem, NC and will likely be telephonic. Ms. H[redacted] currently resides in New Hampshire, and will likely be telephonic.

6. **Argument**: The government requests oral argument.

[redacted]

A. M. L[redacted]
Captain, U.S. Marine Corps
Trial Counsel

I hereby certify that a copy of the above motion was served upon defense counsel and the Court by electronic means on 22 November 2013.

[redacted]

A. M. L[redacted]
Captain, U.S. Marine Corps
Trial Counsel

APPENDIX M

GENERAL COURT MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES v. B[redacted] D. E[redacted] Lieutenant/O-3 U.S. Navy	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF: COMPEL DISCOVERY (M.R.E. 513) 22 November 2013

1. **Nature of Motion.** This is the Government's response to a defense motion for appropriate relief to compel discovery. The Government opposes the compulsion of discovery. As set forth in greater detail below, the Government respectfully requests that the court deny the defense motion in that it is not relevant and necessary to the preparation of the defense and that such information is protected by Military Rule of Evidence (M.R.E.) 513.

2. **Summary of Facts.**

a. The accused is charged with violations of Articles 120, 133, and 134 UCMJ, related to his sexual assault of another dentist at a Halloween party in October 2012.

3. **Discussion.**

Rule for Court-Martial 703(a) and Article 46, UCMJ both provide that the Defense shall enjoy equal access to obtain witnesses and evidence, to include production of evidence and witnesses, but only when such evidence would be "relevant and necessary" to the preparation of the defense. *See generally, U.S. v. Rodriguez*, 57 M.J. 765, 770 (N.M.C.C.A 2002); *aff'd*, 60 M.J. 239 (C.A.A.F. 2002). Thus, this right is not without limits. *Id*. at 772. The touchstone is relevance and necessity. When the Defense fails to articulate in any meaningful way how the requested discovery would lead to evidence that tends to make the existence of any fact that is of

consequence more or less probable, the request ought to be denied. Moreover, the request must be reasonable and not be a "fishing expedition." United States v. Franchia, 32 C.M.R. 315 (C.M.A. 1962). Reasonableness, like relevance, depends on the facts of the case and the nature and scope of the request including the purpose for which the information is sought. United States v. Dienst, 16 M.J. 727 (A.F.C.M.R. 1983). Also to be considered is whether the request is narrow or broad and whether it identifies the information with particularity to include whether or not the information exists. A general request provides the government with no more notice of the information sought than if the defense does not ask at all. *See* United States v Agurs, 427, U.S. 97 (1976). Moreover, the government is under no general duty to do investigative work for the defense, including identifying and locating all favorable information that is not otherwise known. *See* United States v. Gans 23 M.J. 540 (A.C.M.R. 1986). That responsibility rests with the accused and his counsel. *Id*

The military rules of evidence (M.R.E.) provide a psychotherapist-patient privilege. stating:

> "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."

M.R.E. 513. Any patient may claim this privilege and may authorize the trial counsel to claim it on his or her behalf. Id. at (c). If the victim did see a psychotherapist as defined in M.R.E. 513(b), then the privilege applies to any statements she made during the course of her treatment. The government, at her request and on behalf of the victim, respectfully requests that the court deny disclosure of these records based on the psychotherapist-patient privilege. Once a patient has asserted the privilege, the Court must conduct a hearing in accordance with M.R.E. 513(e) to

determine whether the privilege applies and, if so, whether any of the exceptions in MRE 513(d) mandate disclosure.

The defense has moved the Court to order the disclosure of the victim's private communications made to her psychotherapist. M.R.E. 513 prevents such a disclosure unless one of the exceptions listed in subsection (d) apply. On their face, the exceptions described in 513(d)(1-7) are inapplicable. The only possible exception – and the only exception the defense claims in this case – is (d)(8) which requires disclosure "when constitutionally required."

The defense must articulate more than the mere possibility of constitutionally required evidence. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-52 (1987). The text of the rule requires that the party seeking admission must specifically describe the evidence sought and the purpose for which it is sought. M.R.E. 513(e)(1)(A). Courts are unwilling to allow the defense to go on a "fishing expedition" into a patient's records based upon mere speculation that those records might contain some helpful cross-examination material. *United States v. Briggs*, 48 M.J. 143 (1998).

In *Pennsylvania v. Ritchie*, the United States Supreme Court faced a similar issue to the one currently before the court. In *Richie*, a state law made certain government agency documents privileged. *Id*. The accused claimed that his Sixth Amendment confrontation rights were violated by the law because the documents limited his ability to impeach the only eyewitness, his daughter, and that the file may contain names of some witnesses favorable to him. *Id*. at 51-52. The Supreme Court specifically rejected the Pennsylvania State Supreme Court's holding that "a statutory privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach or otherwise undermine a witness' testimony." *Id.* Instead, the court held that the "ability to question adverse

witnesses . . . does not include the power to require disclosure of any and all information that might be useful in contradicting unfavorable testimony." *Id*. at 53. The court also stated that "the Confrontation Clause only guarantees 'an opportunity for effective cross examination, not cross examination that is effective in whatever way and to whatever extent the defense might wish'." *Id*.

The Supreme Court also examined the clash of privileged documents and the Sixth Amendment in *Davis v. Alaska*, 415 U.S. 308 (1974). In *Davis*, the defense had a concrete, specific theory of possible motive to fabricate based on specific facts that it discovered through witness interviews, namely that the witness was still on probation from a juvenile offense and he therefore would want to implicate someone else in order to keep from violating his probation. *Id*. at 308-309. *Davis* differs from *Ritchie* in that in *Davis*, the Confrontation Clause was violated because even though the defense already knew of the information, they were prevented from even asking the question because of the state law that sealed juvenile records. However, in *Ritchie* the defense could ask whatever questions it wanted but they could not overcome a statutory privilege and view a private document because it might contain more ammunition. *Id.* at 53.

The case law on the "constitutionally required" exception under M.R.E. 513 is scarce. *United States v. Klemick* provides the standard threshold the defense must show in order to get an *in camera* review of the victim's records. 65 M.J. 576, 578 (NMCCA 2006). However, the court in *Klemick* was dealing with the exception under M.R.E. 513(d)(2), the "child and spousal abuse exception," not the "constitutionally required" exception under MRE 513(d)(8). *Id*. at 578. Furthermore, in the first prong of the *Klemick* test, the moving party must show a reasonable likelihood that the records would yield evidence admissible under one of the M.R.E.

513 exceptions, but the court in *Klemick* does not define admissibility under the "constitutionally require" exception. However, the "constitutionally required" exception does appear in another section of the Military Rules of Evidence. M.R.E. 412(b)(1)(C). Under M.R.E. 412, the evidence sought is constitutionally required if the defense can articulate how the evidence sought is relevant, material, and favorable to the defense. *United States v. Morris*, 47 M.J. 695, 704 (NMCCA 1997).

In *Morris*, a pre-M.R.E. 513 case, the defense sought a victim's psychological records to look for possible impeachment evidence. *Id*. at 700. The court in *Morris* only released psychotherapist patient records in which the victim specifically discussed the incident in question. *Id*. Even without an actual privilege, the judge still balanced the need for privacy against the accused's Sixth Amendment right of confrontation and refused to disclose her entire record for the defense to peruse. *Id*.

From the text of M.R.E. 513, as well as cases like *Klemick, Briggs, Morris, Ritchie*, and *Davis*, the parameters of the "constitutionally required" exception take shape. First the defense must meet the three prong test in *Klemick* and establish: 1) the specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to M.R.E. 513; 2) that the information sought is not cumulative of other information available; and 3) that the defense made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

However, the Court's inquiry does not stop with the *Klemick* test. In order to establish the first prong in *Klemick* and demonstrate that the records are likely to reveal information on the "constitutionally required" exception that the defense is claiming, the defense must meet the requirements set forth in *Briggs, Morris, Ritchie* and *Davis*. The defense must specifically

describe the evidence sought and the purpose for which it will be used. The courts are not willing to allow the privilege to be defeated for a defense "fishing expedition" into records, which *might* contain *some* useful information for cross-examination (emphasis added). The Confrontation Clause is violated by restriction on the ability to ask relevant questions, not by denial of unrestricted access to privileged records in order to figure out which questions would be best to ask. Furthermore, the defense must show that the information sought is relevant, material, and favorable to the defense.

Turning to the facts of this case, the defense has failed to establish all of the elements of the *Klemick* test. First, the defense is seeking review the victim's records in search of evidence that "may relate to the character of these persons, their motives for testifying, their tendency to fabricate or exaggerate, or where such records may evidence a witness' mental or emotional instability, history of substance abuse, low intelligence, or may otherwise contain information relating to instance of lying to military or civilian authorities or others, and/or evidence of bias against the accused or any defense witness." Such a broad request is tantamount to the "fishing expedition" envisioned by *Briggs*. 48 M.J. 143. Any impeachment evidence that might be contained in her records is cumulative to the impeachment evidence already available to the defense regarding her perceptions, memory and drugs she may have been taking. Secondly, the impeachment evidence that is available to the defense is available through non-privileged means, such as the toxicology report cited by the defense and her basic ability to recollect as well as any information that they have otherwise gathered. Therefore, the defense fails to meet the second and third prongs in *Klemick*. Additionally, the basis the defense provided for why the victim's records may provide some impeachment material fails to demonstrate anything inconsistent with her allegation that she and the accused assaulted her.

The defense wants access to the victim's records in order to extract embarrassing facts and attempt to impeach her on the witness stand by simply inflaming the passions of the members. Both M.R.E. 513 and *Pennsylvania v. Ritchie* deny the defense access to such a fishing expedition. Unless and until the defense can demonstrate by the preponderance of the evidence why any communications to the therapist are relevant, material, and favorable, then the records must remain protected.

Now that the defense has requested the psychiatric records and the government has claimed the privilege on the victim's behalf, the Court must conduct a hearing in accordance with M.R.E. 513(e). At this hearing, the Court must determine whether the privilege applies and if any exceptions to the rule apply. The party seeking admission must specifically describe the evidence sought and the purpose for which it is sought. M.R.E. 513(e)(1)(A). If the Court is persuaded by the party seeking the records, the Court must hold a hearing and view the evidence *in camera*, issuing protective orders as necessary and sealing the motion and related papers in order to protect the patients privacy. *Id*. at (2)-(5).

Therefore, if and only if the Court believes that the defense has established the proper basis in accordance with M.R.E. 513 and case law, the Court should receive a sealed, authenticated copy of the victim's psychiatric records and view them *in camera*. At the hearing the burden will be on the defense to show by a preponderance of the evidence that the privilege does not apply or that an exception applies. R.C.M. 905 (c)(1-2).

4. **Evidence and Burden of Proof.** The burden of proof is a preponderance of the evidence, R.C.M. 905(c)(1). As the moving party, the defense bears the burden of persuasion, R.C.M. 905(c)(2). The government offers no evidence in support of its motion response.

5. **Relief Requested.** The requests that the court deny the defense's motion in its entirety except as to those provisions to which the government has agreed to produce.

6. **Argument.** The government requests oral argument.

[redacted]
A. M. L[redacted]
Captain, U.S. Marine Corps
Trial Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel electronically on 22 November 2013.

[redacted]
A. M. L[redacted]
Captain, U.S. Marine Corps
Trial Counsel

APPENDIX N

Korody, Patrick K LCDR NAVSTA Mayport, N001

From: K[redacted], P[redacted] K LCDR NAVSTA Mayport, N001
Sent: Monday, December 02, 2013 12:04
To: L[redacted], A[redacted] M USMC, LSSS-E, HqSptBn, MCI-East
Subject: status on FOIA/Privacy Act Request
Signed By: [redacted]

Importance: High

Capt L[redacted],

I respectfully request a written response to LT S[redacted]s FOIA/Privacy Act request in the next 48 hours. Failure for the government to provide a response will lead me to explore additional options, such as contacting LT S[redacted] s congressional representative, the IG, appealing to M&RA, and/or requesting a continuance from the court until this issue is resolved.

I'd like to resolve this without creating additional work and exposure for all parties, but my client and I need the requested information to adequately address and protect her interests and rights.

v/r
P[redacted] K. K[redacted]
LCDR, JAGC, USN
Navy VLC Program, Naval Station Mayport, FL
Comm: 904.270.5191 Ext. 1213

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APPENDIX O

UNITED STATES MARINE CORPS
2D MARINE LOGISTICS GROUP
II MARINE EXPEDITIONARY FORCE
PSC BOX 20002
CAMP LEJEUNE NC 28542-0002

IN REPLY REFER TO:
5800
SJA

DEC 4 2013

From: Commander, 2d Marine Logistics Group
To: LT H[redacted] S[redacted], DC, USN
Via: LCDR [redacted] K[redacted], JAGC, USN

Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST ICO U.S. v. LT B[redacted] E[redacted], DC, USN

Ref: (a) The Freedom of Information Act, 5 U.S.C. 552
(b) LT S[redacted] ltr of 14 Nov 13

Encl: (1) Convening Order

1. Your request of 14 November 2013 is denied in part and granted in part.

a. Your request for the Article 34, UCMJ Advice Letter is denied pursuant to exemption (b)(5) of reference (a) as it is a pre-decisional recommendation.

b. Your request for the Charge Sheet is denied as it is exempted by section 7(b) of reference (a) in that its disclosure "could reasonably be expected to interfere with enforcement proceedings, [or] would deprive [LT E[redacted]] a right to a fair trial."

c. Your request for the Convening Order is granted and is enclosed.

d. Your request for the Article 32 Investigating Officer Report is denied pursuant to exemptions (b)(5) and (7) of reference (a) as it is a pre-decisional recommendation and its disclosure "could reasonably be expected to interfere with enforcement proceedings, [or] would deprive [LT E[redacted]] a right to a fair trial." Your request for the summaries of your testimony and the testimony of others is denied. At present, section 7(b) of reference (a) exempts disclosure of the requested summaries because revealing them "could reasonably be expected to interfere with enforcement proceedings, [or] would deprive [LT E[redacted]] a right to a fair trial."

e. Your request for any statements signed by your or any "Results of Interview" or similar written documents summarizing statements made by you that are relevant to the charges is denied. At present, section 7(b) of reference (a) exempts their disclosure because revealing the requested documents "could reasonably be expected to interfere with enforcement proceedings, [or] would deprive [LT E[redacted]] a right to a fair trial."

Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST ICO U.S. v. LT B[redacted] E[redacted], DC, USN

2. The point of contact on this matter is Captain Ma[redacted] E. N[redacted], at 910-451-5806, or [redacted]

A. L. T[redacted]

UNITED STATES MARINE CORPS
2D MARINE LOGISTICS GROUP
PSC BOX 20002
CAMP LEJEUNE, NORTH CAROLINA 28542-0002

IN REPLY REFER TO:
5817
GCMCO 1-12

OCT 01 2012

GENERAL COURT MARTIAL CONVENING ORDER 1-12

Pursuant to the authority contained in Article 22, Uniform Code of Military Justice, Rule for Courts-Martial 504, and section 0120 of the Judge Advocate General Manual of the Navy, a General Court-Martial is hereby convened. It may proceed at Marine Corps Base, Camp Lejeune, North Carolina, or any such authorized place as directed. The court will be constituted as follows:

MEMBERS

Lieutenant Colonel M. A. D[redacted], U.S. Marine Corps
Major R. R. G[redacted], U.S. Marine Corps
Major R. L. C[redacted], U.S. Marine Corps
Major R. J. L[redacted] Jr., U.S. Marine Corps
Major D. M. B[redacted], U.S. Marine Corps
Captain K. V. P[redacted], U.S. Marine Corps

[redacted]

E. D. E[redacted]
Commanding General
U.S. Marine Corps

ORIGINAL
ENCLOSURE (1)

APPENDIX P

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	MOTION
	)	FOR MATERIALS NECESSARY
V.	)	TO EXERCISE SUBSTANTIVE
	)	LEGAL RIGHTS ON BEHALF
	)	OF VICTIM H.S.
	)	
	)	
E[redacted] E[redacted]	)	
LT, DC, USN	)	

1. NATURE OF MOTION

LT H.S., through counsel, respectfully requests that this Court order the government to provide materials necessary for her to exercise substantive legal rights afforded to her as a crime victim in the military justice system.

2. SUMMARY OF FACTS

(a) LT H.S. is the named victim in the charges in this court-martial. The charges in this case stem from the Accused's sexual assault of LT H.S. in the early morning hours on 28 October 2012.

(b) On 31 October 2013, the undersigned counsel was detailed as Victims' Legal Counsel for LT H.S., and on 4 November 2013, the undersigned counsel entered an appearance in this court-martial.

(c) The undersigned counsel has made repeated requests in writing and orally to the government to provide certain documents necessary for LT H.S. to exercise her substantive legal rights a crime victim in the military justice system. The government denied these requests, including a request made under the Freedom of Information Act and Privacy Act that was denied on 4 December 2013.[1]

(d) The defense in this case has filed motions seeking to admit evidence that falls under Military Rule of Evidence (M.R.E.) 412 and to compel the production of LT H.S.'s psychotherapist records that are privileged under M.R.E. 513.

3. DISCUSSION

Historically, the military justice system, like the federal criminal justice system, "functioned on the assumption that crime victims should behave like good Victorian children - seen but not heard." Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1013 (9th Cir. 2006) (discussing the application of the Crime Victims' Rights Act (CVRA) in federal court). In 1994, the Department of

[1] While LT H.S. did make a FOIA and Privacy Act request to the General Court-Martial Convening Authority in this case for a copy of the charge sheet and certain investigative materials, LT H.S. is not relying on these authorities in this Motion. Rather, the legal authority for this Motion rests on a crime victim's substantive legal rights in the military justice system. FOIA and the Privacy Act are ways for members of the general public to obtain information from the government. LT H.S., while a member of the general public, has substantive legal rights in the military justice system as a crime victim.

Defense issued its first Victim Witness Assistance Procedures (VWAP) directive and instruction, and subsequently issued a new VWAP directive instruction in 2004 that enumerated seven of the eight rights codified in the Crime Victims' Rights Act (CVRA) of 2004, 18 U.S.C. sec. 3771. See DoDD 1030.01 and DoDI 1030.2 series. These lawful regulations, and other additions to the Uniform Code of Military Justice (UCMJ) and Military Rules of Evidence (M.R.E.), ushered in a new era in which crime victims are full participants in the military justice system.

Department of Defense Directive (DoDI) 1030.01 dated 23 April 2007 (interim change) provides a crime victim substantive legal rights. Paragraph 4.4 provides that "[a] crime victim has the right to:

4.4.1. Be treated with fairness and respect for the victim's dignity and privacy.

4.4.2. Be reasonably protected from the accused offender.

4.4.3. Be notified of court proceedings.

4.4.4. Be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.

4.4.5. Confer with the attorney for the Government in the case.

4.4.6. Receive available restitution.

4.4.7. Be provided information about the conviction, sentencing, imprisonment, and release of the offender."

Although it is unclear if the CVRA directly applies to military justice proceedings, the Department of Defense has, by instruction, and the military courts have recognized as much, adopted the overwhelming majority of substantive rights that the CVRA provides to crime victims. See Daniels v. Kastenberg, 2013 LEXIS CCA 286, *22 (A.F.C.C.A. April 2, 2013) ("We note Department of Defense Instruction (DoDI) 1030.01, Victim and Witness Assistance, ¶ 4.4 (23 April 2007, interim change), provides victims of crimes under the UCMJ with generally the same rights found in 18 U.S.C. § 3771(a)(1)-(8). . . .") (rev'd on other grounds in LRM v. Kastenberg, 72 M.J. 364, (C.A.A.F. 2013)).

Congress and the President have given substantive legal rights to crime victims through the UCMJ and M.R.E. For example, Congress amended Article 54, UCMJ in 2012 to provide a sexual assault victim who testifies with the right to receive a copy of the authenticated record of trial. Art. 54(e), UCMJ. The President, by Executive Order 13643 in 2013, re-issued the M.R.E. which contain substantive legal rights for crime victims. M.R.E. 412 provides that a sexual assault victim has the right to be

notified and heard before evidence of other sexual behavior or predisposition is admitted at a court-martial. M.R.E. 513 provides similar rights for patients with respect to mental health records. M.R.E. 615 plainly lays out a crime victim's right to be present during court proceedings absent specific findings made by the military judge.

In July 2013, the Court of Appeals for the Armed Forces (C.A.A.F) enforced a victim's substantive legal right to present facts and make legal argument, including through counsel, to the court when given the opportunity to be "heard" by the M.R.E. In LRM v. Kastenberg, the C.A.A.F. reviewed the statutory construction of M.R.E. 412 and M.R.E. 513 and case law to find that "[a] reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel." 72 M.J. 364, 370 (2013). The court in Kastenberg understood that when the Congress and the President codified these substantive legal rights for crime victims (or patients), they did so with the intent of providing these interested parties - like defendants - with a meaningful opportunity to exercise these rights; such an opportunity is embodied in the notion of fairness and due process that is the bedrock of the American legal system.

Like an accused represented by a defense counsel, a crime victim with substantive legal rights must be afforded access to the information necessary to exercise those rights. When an accused requests information through counsel, he does so in order to have the means to meaningfully exercise his substantive legal rights; these means include challenging the admissibility of evidence, cross-examining witnesses, and making legal argument. A victim is afforded the same means to exercise substantive legal rights, such as under M.R.E. 412 and 513, but can only meaningfully do so, like an accused, if given the necessary information.

The Congress, the President, and the C.A.A.F. recognized that these substantive legal rights afforded to crime victims become meaningless unless they are viewed through the lens of due process guaranteed under the due process clause of the Fifth Amendment to the Constitution. See Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (applying constitutional due process to Texas adoption proceeding and finding "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

present their objections."). In other words, all of the substantive legal rights that are afforded to crime victims in the military justice system are imbued with the requirements that they be interpreted in a meaningful manner - to do otherwise would ignore the mandate that victims be these afforded rights. Due process and fairness require that crime victims - like the government and defense - be adequately informed in order to meaningfully exercise their substantive rights.

Among these rights are the right to confer[2] with the attorney for the government in the case[3], to be treated with fairness and respect for dignity and privacy, and to be "heard" under M.R.E. 412 and M.R.E. 513; these rights are implicated in this case. To make a victim's views and legal arguments fully and effectively to the parties and the court and to present evidence, the victim must first be adequately informed, and LT H.S. seeks materials - namely

---

[2] The word "confer" supports the existence of a substantive legal right that can only be exercised with information. Webster's New World Dictionary defines "confer" to mean "to have a conference or talk; to meet for discussion." Black's Law Dictionary defines "conference" as a "meeting of several persons for deliberation, for the interchange of opinion, or for the removal of differences or disputes." A crime victim cannot "confer" with the attorney for the government if they have no information upon which to form opinions and differences, or on which to base a dispute. This right becomes meaningless if only one party to the conference has information.

[3] The Discussion to R.C.M. 306(b) makes clear the policy that commanders consider the views of the victim when reaching disposition decisions. This is often accomplished by the crime victim conferring with government counsel.

copies of her statements,[4] a copy of the charge sheet, and other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime. Information that establishes the totality of circumstances of the alleged crime is imperative since evidence for or against the admissibility, for example, of evidence falling under M.R.E. 412 may be derived from statements of other witnesses, including the accused.

Crime victims deprived of access to information cannot be meaningfully informed such that he or she can fully and effectively confer with government counsel, exercise legal rights, or be heard under M.R.E. 412 and 513. This principle that information is necessary to make an informed and effective decision or legal argument is not new to military courts. For example, military courts recognize that to support an *in camera* review of mental health records under M.R.E. 513, a party must make a threshold showing but that "this standard is not high, because [the courts] know that the moving party will often be unable to determine the specific information contained in a

[4] LT H.S. made her unrestricted report of sexual assault more than 1 year ago. She has made sworn statements and testified at an Article 32, UCMJ investigation. While LT H.S. knows the facts of this case, these statements are needed to determine what statements - and specific words or phrases - were used in the past to describe the facts related to the case.

psychotherapist's records." United States v. Klemick, 65 M.J. 576, 580 (N.M.C.C.A. 2006). Likewise, a victim cannot meaningfully form views, let alone make their views known or present legal arguments or evidence to parties or the court, if not meaningfully informed. At this time, LT H.S. does not know what evidence exists in this case such that she can even present it to the parties and the court since she has been denied access by the government. Therefore, in this case, LT H.S. will be denied her substantive legal rights to "confer" with government counsel and be "heard" by the court unless she is afforded access to key information.

Importantly, while neither the Constitution, Congress, or the President has specifically defined the terms "fairness" and "respect," those words must at minimum guarantee a victim's rights are given no less consideration than an accused's rights or government interests. See Snyder v. Massachusetts 291 U.S. 97, 122 (1934) (Cardozo, J.) ("[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."), reaffirmed by Payne v. Tennessee, 501 U.S. 808, 827 (1991); Morris v. Slappy, 461 U.S. 1, 14 (1983) (stating that "in the

administration of criminal justice, courts may not ignore the concerns of victims"); United States v. Heaton, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006) (finding that under the federal Crime Victims' Rights Act, treating "a person with 'fairness' is generally understood as treating them 'justly' and 'equitably'"). The legislative history of the CVRA instructs that "fairness includes the notion of due process." 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statements of Sen Kyl).

Victims are not on an even playing field if the victim – the persons most impacted by the crime – is not given access to key information known by the parties when the victim's rights are implicated. Treating victims in such an uneven manner is contrary to the intent of Congress, the President, and the C.A.A.F., as well as the explicit provision of a right to fairness and respect in the DoD regulations. Accordingly, denying a crime victim access to information denies a crime victim the ability to exercise those legal rights in a meaningful manner.

LT H.S., as described above, has a right to the requested information. In this case, where the defense is seeking to admit both evidence of sexual predisposition and other sexual behavior and seeking production of her mental health records, LT H.S. has compelling privacy

interests at stake. LT H.S. must be afforded a meaningful opportunity to protect public disclosure of private information during a court-martial, and the only way to meaningfully exercise these rights is to know what information is known by the parties that may have some bearing on these issues.

Lastly, the government and defense will likely respond that providing the requested information to LT H.S. will somehow taint her testimony in this case. But they do not cry foul when an accused has access to the entire discovery provided by the government to the defense, attends an entire Article 32, UCMJ investigation, is present for all court sessions and trial on the merits, and then testifies last in his own defense. The only thing that providing LT H.S. the requested information will accomplish is the enforcement of the substantive legal rights that are provided to her under the law.

4. BURDEN

The burden is on the government to demonstrate that it has afforded LT H.S. her substantive legal rights as a crime victim.

5. REMEDY REQUESTED

LT H.S. requests that this Court order the government to provide her copies of her statements, a copy of the

charge sheet, and other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime.

At this time, LT H.S. is not seeking a continuance of the Article 39(a) session. LT H.S. requests that this Court hear this Motion first and, if the Court orders production, give a sufficient recess to permit LT H.S. and her counsel to review the information prior to presenting facts and legal argument on the M.R.E. 412 and 513 motions.

6. ORAL ARGUMENT

LT H.S., through counsel, desires to present legal argument orally.

Respectfully submitted,

[redacted]

P. K. K[redacted]
LCDR, JAGC, USN [redacted]
Victims' Legal Counsel
For LT. H.S.

****

Certificate of Service

I hereby attest that a copy of the foregoing pleading was served on the Court, Defense Counsel, and Trial Counsel electronically on 6 December 2013.

[redacted]

P. K. K[redacted]

APPENDIX Q

GENERAL COURT-MARTIAL
EASTERN JUDICIAL CIRCUIT
UNITED STATES MARINE CORPS

U N I T E D S T A T E S v. B[redacted] D. E[redacted] Lieutenant/O-3 U.S. Navy	)	Government Response to Victim Motion "For Materials Necessary to Exercise Substantive Legal Rights on Behalf of Victim H.S." 11 December 2013

1. **Relief Requested**: The Government respectfully moves the court to deny LT H.S.'s motion in its entirety.

2. **Summary of Facts**:

The accused is charged with violations of Articles 120, 133, and 134 UCMJ, related to his sexual assault of LT H.S., another dentist at a Halloween party in October 2012.

3. **Discussion**

Rules for Courts-Martial (R.C.M) 701 and 703 provide the statutory guidance for the management of disclosure and production of evidence by the Government. However, the rules only govern disclosures to the *defense* and production of items requested by the *defense*. It should be noted that these rules do not make reference to "all parties," instead they specifically refer to "the prosecution and the defense"[1] or "the *trial counsel* shall provide . . . to *the defense*."[2]

In *LRM v. Kastenberg* the Court of Appeals for the Armed Forces (C.A.A.F) specifically addressed the question of whether certain Military Rules of Evidence

[1] R.C.M. 703(a)
[2] R.C.M. 701(a)

(M.R.E.) require that a victim be allowed to make certain arguments before the court, through a counsel. 72 M.J. 364 (C.A.A.F. 2013). C.A.A.F. looked at M.R.E.s 412 and 513 and the actual language that was used addressed the victim's rights. Specifically, C.A.A.F. focused on the M.R.E.s' references to the victim being afforded an opportunity to be "heard." *Id.* at 369-370. C.A.A.F.'s decision said nothing about rights to documents, such as statements, charge sheets, or investigations, beyond the filings that implicate rights under those M.R.E.s.

LT H.S.'s argument regarding Due Process is also misplaced. The Fifth Amendment states, in the relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law." While a criminal defendant has a readily cognizable claim that in a criminal prosecution one faces the potential depravation of all three, a crime victim cannot make the same claim.

LT H.S., through her VLC, has been able to properly exercise her rights without the requested documentation. She has been provided copies of both defense motions which implicate her rights under M.R.E. 412 and 513. She has filed responses to both of those motions. Through her counsel she has been able to confer with the Government counsel about the progression of the case. She, along with her VLC, are scheduled to appear via VTC at the 39(a) on 16 December.

The potential danger of the disclosure of the requested documents is significant. LT H.S.'s request is for "copies of her statements, a copy of the charge sheet, and other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime." VLC Motion at 11-12. Provision to a witness of copies of their own statements, the charge sheet, or other investigatory documents

threatens to taint the judicial proceeding. While it is certainly not improper for a witness to review their statement prior to testifying, or even while having his/her recollection refreshed, being provided copies to take home is another matter. The charge sheet presents additional concerns related to potential violations of the accused's privacy. A victim in possession of a charge sheet could also create the appearance of impropriety, as a member of the public may believe that this would potentially taint a victim's testimony. The final request dealing with "investigatory documents" is so broad and vague as to render it meaningless. A request so lacking in specificity can hardly be responded to. It is sufficient to say that LT H.S. has failed to specifically articulate *what* she is looking for, *where* she believes it to be located, *how* it will assist her in the exercise of her rights, and *why* she is unable to exercise her rights without it. There is a significant risk of danger if a witness were to be provided copies of an investigation which detailed the statements, or summaries of statements, of other witnesses.

4. **Burden of Proof**: The Government specifically disagrees with LT H.S.'s assertion that the burden is on the Government. LT H.S. has provided no case, statute, or authority for that proposition. Under R.C.M. 905(c)(2), LT H.S., as the moving party, has the burden of proof. Under R.C.M. 905(c)(1), the burden of proof for this motion is by a preponderance of the evidence.

5. **Evidence**: The Government offers no additional evidence for this motion.

6. **Argument**: The Government requests oral argument.

[redacted]

A. M. L[redacted]
Captain, U.S. Marine Corps
Trial Counsel

I hereby certify that a copy of the above motion was served upon defense counsel and the Court by electronic means on 11 December 2013.

[redacted]

A. M. L[redacted]
Captain, U.S. Marine Corps
Trial Counsel

APPENDIX R

CHARGE I: **Violation of the UCMJ, Article 134**

SPECIFICATION: In that Lieutenant B[redacted] D. E[redacted], U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, orally communicate to Lieutenant H[redacted] S[redacted], U.S. Navy, certain indecent language, to wit: "I'm going to fuck you tonight," or words to that effect, which conduct was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.

CHARGE II: **Violation of the UCMJ, Article 120**

SPECIFICATION 1: In that Lieutenant B[redacted] D. E[redacted], U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit a sexual act upon Lieutenant [redacted] S[redacted] U.S. Navy, to wit: penetration of her vulva with his penis, by using unlawful force against her.

SPECIFICATION 2: In that Lieutenant B[redacted] D. E[redacted], U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit a sexual act upon Lieutenant Hi[redacted] S[redacted] U.S. Navy, to wit: penetration of her vulva with his penis, by causing bodily harm to her.

SPECIFICATION 3: In that Lieutenant B[redacted] D. E[redacted], U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit a sexual act upon Lieutenant H[redacted] S[redacted] U.S. Navy, to wit: penetration of her vulva with his penis, when Lieutenant S[redacted] was incapable of consenting to the sexual act due to impairment by a drug, intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused.

SPECIFICATION 4: In that Lieutenant B[redacted] D. E[redacted], U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit sexual contact upon Lieutenant H[redacted]. S[redacted] U.S. Navy, to wit: touching her breast with his mouth, by using unlawful force against her.

SPECIFICATION 5: In that Lieutenant B[redacted] D. E[redacted], U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit sexual contact upon Lieutenant H[redacted] S[redacted] U.S. Navy, to wit: touching her breast with his mouth, by causing bodily harm to her.

SPECIFICATION 6: In that Lieutenant B[redacted] D. E[redacted], U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit sexual contact upon Lieutenant H[redacted] S[redacted] U.S. Navy, to wit: touching her breast with his mouth, when Lieutenant S[redacted] was incapable of consenting to the sexual contact due to impairment by a drug, intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused.

SPECIFICATION 7: In that Lieutenant B[redacted] D. E[redacted], U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit sexual contact upon Lieutenant H[redacted] S[redacted] U.S. Navy, to wit: touching her vagina with his penis, by using unlawful force against her.

SPECIFICATION 8: In that Lieutenant B[redacted] D. E[redacted], U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on

or about 28 October 2012, commit sexual contact upon Lieutenant H[redacted]. S[redacted] U.S. Navy, to wit: touching her vagina with his penis, by causing bodily harm to her.

SPECIFICATION 9: In that Lieutenant B[redacted] D. E[redacted], U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit sexual contact upon Lieutenant Hi[redacted] S[redacted] U.S. Navy, to wit: touching her vagina with his penis, when Lieutenant [redacted] was incapable of consenting to the sexual contact due to impairment by a drug, intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused.

ADDITIONAL CHARGE: Violation of the UCMJ, Article 133

SPECIFICATION: In that Lieutenant B[redacted] D. E[redacted], U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, wrongfully and dishonorably engage in sexual intercourse with Lieutenant H[redacted] S[redacted], U.S. Navy, a woman not his wife, while she was incapable of consenting due to impairment by a drug, intoxicant or similar substance, and that condition was known or reasonably should have been known by the said Lieutenant E[redacted], which conduct was unbecoming an officer and a gentleman.

APPENDIX S

***** S[redacted], H[redacted] C[redacted] *****

PDTS Cardholder ID: [redacted]
Age: 27y Sex: FEMALE

PDTS Person Code: 28 Oct 2012 12:51
Profile Length: 180 DAYS

Allergies: NKA

Pharmacy Comment: NONE

CHCS PROFILE (LAST 180 DAYS)

RX #	DRUG	STATUS	QTY	FILL DATE	REF LEFT
[redacted]					

PDTS RX#	DRUG NAME <PHARMACY NAME/PHYSICIAN>	CPD QTY	DAYS SUPPLY	NEW/ REFILL	DATE FILLED
7035546	DOXEPIN 10 MG CAPSULE <TARGET PHARMACY #1107/BOEKER, THOMAS WHITEFORD>	90	30	0	26 Oct 2012
7030229	CITALOPRAM HBR 20 MG TABLET <TARGET PHARMACY #1107/BOEKER, THOMAS WHITEFORD>	30	30	1	26 Oct 2012
~~4473272~~	ZOLPIDEM TARTRATE 10 MG TAB <TARGET PHARMACY #1107/BOEKER, THOMAS WHITEFORD>	30	30	0	12 Sep 2012

*** END OF REPORT ***

at Mirana

K Fahr
10-25-12

E[redacted]

X11
AE 00155
Pg ___ of ___

APPENDIX T

K[redacted], P[redacted] K LCDR NAVSTA Mayport, N001

From: H[redacted] LtCol N[redacted] K <n[redacted].h[redacted]@usmc.mil>
Sent: Monday, December 16, 2013 17:06
To: K[redacted], P[redacted] K LCDR NAVSTA Mayport, N001
Cc: R[redacted], P[redacted] B USMC, LSSS-E, HqSptBn, MCI-East; M[redacted] S[redacted], FCT-ACCT: See telephone tab for POC/Owners; [redacted]; L[redacted], A[redacted] M USMC, LSSS-E, HqSptBn, MCI-East
Subject: RE: US v E[redacted]
Signed By: n[redacted].h[redacted]@usmc.mil

I will not do written rulings.

-----Original Message-----
From: K[redacted], P[redacted] K LCDR NAVSTA Mayport, N001
[redacted]
Sent: Monday, December 16, 2013 3:28 PM
To: H[redacted] LtCol N[redacted] K
Cc: R[redacted] Capt P[redacted]B; EJC Clerk of Court;
[redacted]; L[redacted] Capt [redacted] M
Subject: US v E[redacted]

LtCol H[redacted],

I forgot to ask during the Art 39(a), but will I be provided a copy of your written rulings and findings of fact for the MRE 412, 513 and my motion for information/documentation?

Thank you.

v/r
P[redacted] K. K[redacted]
LCDR, JAGC, USN
Navy VLC Program, Naval Station Mayport, FL
Comm: 904.270.5191 Ext. 1213

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APPENDIX U

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	LT HCS REQUEST TO
	)	DELAY REVIEW OF
V.	)	MENTAL HEALTH
	)	RECORDS IN
	)	ANTICIPATION OF
	)	A WRIT OF MANDAMUS
B[redacted] E[redacted]	)	
LT, DC, USN	)	

LT HCS, through counsel, respectfully requests this Court to delay review of her mental records by the Court until 3 January 2014. LT HCS intends to seek a Writ of Mandamus under the All Writs Act, 28 U.S.C. § 1651 with the Navy-Marine Corps Court of Criminal Appeals (NMCCA) prior to that date. LT HCS intends to ask NMCCAA for a stay of the proceedings and to set aside the military judge's ruling denying LT HCS's motion for investigative materials, the military judge's ruling regarding the admissibility of evidence under M.R.E 412, and the military judge's order to produce records that fall under M.R.E. 513.

This request will not delay any proceeding or prevent any party from adequately preparing for trial, which is not scheduled to commence until 28 January 2014. Granting this request will permit LT HCS the opportunity to pursue further legal action to enforce her legal rights and protect her privacy interests prior to review of these confidential records by the military judge or release of these records to any party.

Respectfully submitted,

[redacted]

P. K. K[redacted]
LCDR, JAGC, USN
Victims' Legal Counsel
For LT. H.S.

****

Certificate of Service

I hereby attest that a copy of the foregoing pleading was served on the Court, Defense Counsel, and Trial Counsel electronically on 26 December 2013.

[redacted]

APPENDIX V

K[redacted], P[redacted] K LCDR NAVSTA Mayport, N001

From: H[redacted] LtCol N[redacted] K <n[redacted].h[redacted]@usmc.mil>
Sent: Friday, December 27, 2013 12:25
To: K[redacted], P[redacted] K LCDR NAVSTA Mayport, N001
Cc: R[redacted], P[redacted]B USMC, LSSS-E, HqSptBn, MCI-East; M[redacted], S[redacted], FCT-ACCT: See telephone tab for POC/Owners; [redacted] L[redacted], A[redacted] M USMC, LSSS-E, HqSptBn, MCI-East; 'Sam Moore'
Subject: RE: US v E[redacted] - LT HCS REQUEST TO DELAY REVIEW OF MH RECORDS
Signed By: n[redacted].h[redacted]@usmc.mil

I had already reviewed the records; they were delivered prior to the holiday but I have not had an opportunity to properly redact irrelevant information.

-----Original Message-----
From: K[redacted], P[redacted]k K LCDR NAVSTA Mayport, N001
[redacted]
Sent: Thursday, December 26, 2013 1:24 PM
To: H[redacted] LtCol N[redacted] K
Cc: R[redacted] Capt P[redacted] B; EJC Clerk of Court;
[redacted]; L[redacted] Capt A[redacted] M; 'S[redacted] M[redacted]
Subject: US v E[redacted] - LT HCS REQUEST TO DELAY REVIEW OF MH RECORDS
Importance: High

LtCol H[redacted],

Please find the attached request on behalf of LT HCS to delay your review of her mental health records until after 3 January 2014. LT HCS intends to file a writ of mandamus with NMCCA, and has retained Mr. S[redacted] M[redacted] to assist her with the writ. I am assisting Mr. M[redacted] and believe that the writ will be filed early next week.

Very respectfully,

P[redacted] K. K[redacted]
LCDR, JAGC, USN
Navy VLC Program, Naval Station Mayport, FL
Comm: 904.270.5191 Ext. 1213

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APPENDIX W

GENERAL COURT-MARTIAL
EASTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES	)	
v.	)	ORDER TO CONDUCT EX PARTE 39A
E[redacted], B[redacted] LIEUTENANT U.S. NAVY	)	30 December 2013

1. On 16 December 2013, in accordance with MRE 513, this court ordered an *in camera* review of the September and October 2012 mental health records of the complaining witness, LT HCS, held in the possession of Dr. T[redacted] B[redacted] of Wilmington, NC.

2. After reviewing these records, the court has determined portions of the records are relevant and should be released to defense counsel. However, there are other portions of the records that this court will allow LT HCS and her legal counsel (LC) to be heard on, prior to making a determination regarding releasing the privileged information. LC may contact the military judge in the form of an ex parte RCM 802 conference in order to focus on the issue to be discussed during the 39A session.

3. **ORDER.** LT HCS and her LC are hereby ordered to conduct an ex parte 39A with the below signed military judge on Monday, 6 January at 1300. Videoteleconferencing is permitted.

SO **ORDERED**, this 30th day of December 2013

[redacted]
N. K. H[redacted]
Lieutenant Colonel, U.S. Marine Corps
Military Judge

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

H.S.	)	**PETITION FOR EXTRAORDINARY**
LT, DC, U.S. Navy	)	**RELIEF IN THE NATURE OF A**
Petitioner	)	**WRIT OF *MANDAMUS***
	)	
v.	)	**NMCM No. 201400007**
	)	
N. H[redacted]	)	
LtCol, U.S. Marine Corps	)	
Military Judge	)	**O R D E R**
Respondent	)	
	)	
Blake Entralgo	)	
LT, DC, U.S. Navy	)	
Real Party in Interest	)	

On 23 January 2014, the United States produced an authenticated verbatim transcript of proceedings pursuant to this Court's Order of 8 January 2014. Included therein are supplemental rulings by the Respondent on the Defense Motions with respect to MILITARY RULES OF EVIDENCE 412(c) and 513(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) and the VLC's Motion for Materials Necessary to Exercise Substantive Legal Rights on behalf of [Petitioner] of 6 December 2013.

Having considered the record of proceedings now before the Court and the specific relief requested, it is by this Court, this 5th day of February 2014,

ORDERED:

1. That the Stay of Proceedings issued by this Court is hereby **VACATED.**

2. That the Petitioner's request for a writ of *mandamus* setting aside the Respondent's rulings of 16 December 2013 on the defense MIL. R. EVID. 412 and 513 motions, and further directing the Respondent to order production to VLC and LT H.S. of "investigative materials relevant to the motions and

responses made by the Parties under MIL. R. EVID. 412 and 513" is hereby **DENIED**.

For the Court

R.H. T[redacted]
Clerk of Court

Copy to:
NMCCA (51.2)
LtCol H[redacted]
S[redacted] M[redacted] (Counsel for Petitioner)
LCDR K[redacted] (VLC)
P[redacted] S[redacted] (CDC)
Capt R[redacted] (DC)
Capt A.M. L[redacted] (TC)
45
46
52
02
05

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

H.S.	)	**PETITION FOR EXTRAORDINARY**
LT, DC, U.S. Navy	)	**RELIEF IN THE NATURE OF A**
Petitioner	)	**WRIT OF *MANDAMUS***
	)	
v.	)	**NMCM No. 201400007**
	)	
N. H[redacted]	)	
LtCol, U.S. Marine Corps	)	
Military Judge	)	**O R D E R**
Respondent	)	
	)	
Blake Entralgo	)	
LT, DC, U.S. Navy	)	
Real Party in Interest	)	

This matter comes before us in the form of a Petition for Extraordinary Relief in the Nature of a Writ of *Mandamus*. The Real Party in Interest, Lieutenant Blake D. Entralgo, DC, USN, is charged with, *inter alia*, rape and sexual assault of the petitioner, LT HS, DC, USN. The petitioner seeks a Writ of *Mandamus* specifically asking that we "set[] aside the [Respondent's] rulings of December 16, 2013, under Mil. R. Evid. 412 and 513, and direct[] the [Respondent] to order the United States to provide LT HS investigative materials that are relevant to the motions made under Mil. R. Evid. 412 and 513." Petition dated 3 January 2014 at 3. Trial is currently scheduled to begin on 26 January 2014.

The Petitioner is represented by both detailed Victim's Legal Counsel (VLC), LCDR P[redacted] K[redacted], JAGC, USN, and civilian counsel, Mr. S[redacted] M[redacted], Esq. On 4 November 2013, VLC served a notice of appearance with trial counsel, detailed defense counsel, and the trial court. *Id.*, Appendix C. On 8 November 2013, civilian defense counsel for the Real Party in Interest filed a motion under MILITARY RULE OF EVIDENCE 412(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) seeking admissibility of alleged sexual behavior between LT HS and the Real Party in Interest, and a motion to compel discovery of LT HS's mental health records under MIL. R. EVID. 513(c). Petition, Appendices E and F. Both LT HS, through VLC, and the United States opposed the defense motions. *Id.*, Appendices J-M. The military judge scheduled an Article 39a, UCMJ, session to hear the defense motions on 16 December 2013.

Prior to the scheduled motion session, VLC submitted a "Motion for Materials Necessary to Exercise Substantive Legal Rights on Behalf of [LT] HS," seeking copies of LT HS's statements to Naval Criminal Investigative Service agents, LT HS's testimony at the Article 32, UCMJ, pretrial hearing in the subject case, a copy of the charge sheet and "other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime." *Id.*, Appendix P at 7-8. The stated purpose of the request is so that LT HS and VLC may be meaningfully informed and therefore exercise "[LT HS's] substantive legal rights to 'confer' with government counsel and be 'heard' by the court . . . ." *Id.*, Appendix P at 9. The Government opposed VLC's motion, arguing that the Rules for Courts-Martial afforded LT HS no entitlement to the requested information; furthermore, since LT HS had been provided copies of the defense motions and was appearing at the Article 39a session via video-teleconferencing (VTC), she received the notice and opportunity to be heard afforded by MIL. R. EVID. 412 and 513. *Id.*, Appendix Q at 1-2.

On 16 December 2013, the Respondent, Lieutenant Colonel N[redacted] H[redacted], USMC, heard VLC's motion to compel production, and the defense MIL. R. EVID. 412 and 513 motions. VLC and LT HS appeared via VTC. Petition at 7. After hearing argument, the Respondent denied VLC's motion, citing a failure to demonstrate necessity for the requested information. However, the Respondent ordered the Government to provide VLC with a copy of the charge sheet. *Id.* at 8. After next hearing the defense MIL. R. EVID. 412 motion, the Respondent ruled from the bench allowing certain evidence to be admitted at trial and made several other rulings pertaining to the remaining evidence sought under MIL. R. EVID. 412. *Id.* at 9. Finally, after hearing the defense motion for discovery under MIL. R. EVID. 513, the Respondent ordered, over the VLC's objection, the production of LT HS's mental health records no later than 27 December 2013 for an *in camera* review. *Id.* at 9-10.

Also on 16 December 2013, VLC requested via email copies of the Respondent's written rulings and findings of fact on the VLC's motion to compel production, and the defense MIL. R. EVID. 412 and 513 motions. *Id.*, Appendix T. That same day, the Respondent replied to VLC via email that "[She] will not do written rulings." *Id.* On 26 December 2013, VLC requested that the Respondent delay her *in camera* review of LT HS's mental health records in order to provide VLC and LT HS an opportunity to pursue relief through a Writ of *Mandamus* to this Court. *Id.*, Appendix U. The following day, 27 December 2013, the Respondent

replied to VLC that she had already received and reviewed *in camera* the requested records. *Id.*, Appendix V. On 30 December 2013, the Respondent issued an order for an *Ex Parte* Article 39a session to be held on 6 January 2014, because "the court has determined portions of the [mental health records of LT HS] are relevant and should be released to defense counsel. However, there are other portions of the records that this court will allow [LT HS] and [VLC] to be heard on, prior to making a determination regarding releasing the privileged information." *Id.*, Appendix W.

VLC, on behalf of LT HS, now requests that this Court: 1) issue a Stay of Proceedings in the subject case; 2) set aside the Respondent's rulings of 16 December 2013 on the defense MIL. R. EVID. 412 and 513 motions; and 3) issue a Writ of *Mandamus* directing the Respondent to order production to VLC and LT HS of "investigative materials relevant to the motions and responses made by the Parties under Mil. R. Evid. 412 and 513." *Id.* at 1.

Based on the foregoing, it is, by the Court, this 8th day of January 2014,

ORDERED:

1. The proceedings in the subject case are hereby **STAYED** under further notice of the court;

2. That the United States shall provide to the court an authenticated transcript of the proceedings to date on or before 22 January 2014;

3. That, the Respondent shall, on or before 22 January 2014, provide this Court with written findings of fact and conclusions of law on the defense MIL. R. EVID. 412 and 513 motions, unless findings of fact and conclusions of law were made orally on the record and included in the transcript of proceedings.

For the Court

R.H. T[redacted]
Clerk of Court

Copy to:
NMCCA (51.2)

LtCol H[redacted]h
LCDR K[redacted] (VLC)
P[redacted] S[redacted] (CDC)
Capt R[redacted](DC)
Capt A.M. I[redacted] (TC)
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DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	MOTION
	)	FOR MATERIALS NECESSARY
V.	)	TO EXERCISE SUBSTANTIVE
	)	LEGAL RIGHTS ON BEHALF
	)	OF VICTIM H.S.
	)	
	)	
BLAKE ENTRALGO	)	
LT, DC, USN	)	

1. NATURE OF MOTION

LT H.S., through counsel, respectfully requests that this Court order the government to provide materials necessary for her to exercise substantive legal rights afforded to her as a crime victim in the military justice system.

2. SUMMARY OF FACTS

(a) LT H.S. is the named victim in the charges in this court-martial. The charges in this case stem from the Accused's sexual assault of LT H.S. in the early morning hours on 28 October 2012.

(b) On 31 October 2013, the undersigned counsel was detailed as Victims' Legal Counsel for LT H.S., and on 4 November 2013, the undersigned counsel entered an appearance in this court-martial.

(c) The undersigned counsel has made repeated requests in writing and orally to the government to provide certain documents necessary for LT H.S. to exercise her substantive legal rights a crime victim in the military justice system. The government denied these requests, including a request made under the Freedom of Information Act and Privacy Act that was denied on 4 December 2013.[1]

(d) The defense in this case has filed motions seeking to admit evidence that falls under Military Rule of Evidence (M.R.E.) 412 and to compel the production of LT H.S.'s psychotherapist records that are privileged under M.R.E. 513.

3. DISCUSSION

Historically, the military justice system, like the federal criminal justice system, "functioned on the assumption that crime victims should behave like good Victorian children - seen but not heard." Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1013 (9th Cir. 2006) (discussing the application of the Crime Victims' Rights Act (CVRA) in federal court). In 1994, the Department of

[1] While LT H.S. did make a FOIA and Privacy Act request to the General Court-Martial Convening Authority in this case for a copy of the charge sheet and certain investigative materials, LT H.S. is not relying on these authorities in this Motion. Rather, the legal authority for this Motion rests on a crime victim's substantive legal rights in the military justice system. FOIA and the Privacy Act are ways for members of the general public to obtain information from the government. LT H.S., while a member of the general public, has substantive legal rights in the military justice system as a crime victim.

Defense issued its first Victim Witness Assistance Procedures (VWAP) directive and instruction, and subsequently issued a new VWAP directive instruction in 2004 that enumerated seven of the eight rights codified in the Crime Victims' Rights Act (CVRA) of 2004, 18 U.S.C. sec. 3771. See DoDD 1030.01 and DoDI 1030.2 series. These lawful regulations, and other additions to the Uniform Code of Military Justice (UCMJ) and Military Rules of Evidence (M.R.E.), ushered in a new era in which crime victims are full participants in the military justice system.

Department of Defense Directive (DoDI) 1030.01 dated 23 April 2007 (interim change) provides a crime victim substantive legal rights. Paragraph 4.4 provides that "[a] crime victim has the right to:

4.4.1. Be treated with fairness and respect for the victim's dignity and privacy.

4.4.2. Be reasonably protected from the accused offender.

4.4.3. Be notified of court proceedings.

4.4.4. Be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.

4.4.5. Confer with the attorney for the Government in the case.

4.4.6. Receive available restitution.

4.4.7. Be provided information about the conviction, sentencing, imprisonment, and release of the offender."

Although it is unclear if the CVRA directly applies to military justice proceedings, the Department of Defense has, by instruction, and the military courts have recognized as much, adopted the overwhelming majority of substantive rights that the CVRA provides to crime victims. See Daniels v. Kastenberg, 2013 LEXIS CCA 286, *22 (A.F.C.C.A. April 2, 2013) ("We note Department of Defense Instruction (DoDI) 1030.01, Victim and Witness Assistance, ¶ 4.4 (23 April 2007, interim change), provides victims of crimes under the UCMJ with generally the same rights found in 18 U.S.C. § 3771(a)(1)-(8). . . .") (rev'd on other grounds in LRM v. Kastenberg, 72 M.J. 364, (C.A.A.F. 2013)).

Congress and the President have given substantive legal rights to crime victims through the UCMJ and M.R.E. For example, Congress amended Article 54, UCMJ in 2012 to provide a sexual assault victim who testifies with the right to receive a copy of the authenticated record of trial. Art. 54(e), UCMJ. The President, by Executive Order 13643 in 2013, re-issued the M.R.E. which contain substantive legal rights for crime victims. M.R.E. 412 provides that a sexual assault victim has the right to be

notified and heard before evidence of other sexual behavior or predisposition is admitted at a court-martial. M.R.E. 513 provides similar rights for patients with respect to mental health records. M.R.E. 615 plainly lays out a crime victim's right to be present during court proceedings absent specific findings made by the military judge.

In July 2013, the Court of Appeals for the Armed Forces (C.A.A.F) enforced a victim's substantive legal right to present facts and make legal argument, including through counsel, to the court when given the opportunity to be "heard" by the M.R.E. In LRM v. Kastenberg, the C.A.A.F. reviewed the statutory construction of M.R.E. 412 and M.R.E. 513 and case law to find that "[a] reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel." 72 M.J. 364, 370 (2013). The court in Kastenberg understood that when the Congress and the President codified these substantive legal rights for crime victims (or patients), they did so with the intent of providing these interested parties - like defendants - with a meaningful opportunity to exercise these rights; such an opportunity is embodied in the notion of fairness and due process that is the bedrock of the American legal system.

Like an accused represented by a defense counsel, a crime victim with substantive legal rights must be afforded access to the information necessary to exercise those rights. When an accused requests information through counsel, he does so in order to have the means to meaningfully exercise his substantive legal rights; these means include challenging the admissibility of evidence, cross-examining witnesses, and making legal argument. A victim is afforded the same means to exercise substantive legal rights, such as under M.R.E. 412 and 513, but can only meaningfully do so, like an accused, if given the necessary information.

The Congress, the President, and the C.A.A.F. recognized that these substantive legal rights afforded to crime victims become meaningless unless they are viewed through the lens of due process guaranteed under the due process clause of the Fifth Amendment to the Constitution. See Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (applying constitutional due process to Texas adoption proceeding and finding "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

present their objections."). In other words, all of the substantive legal rights that are afforded to crime victims in the military justice system are imbued with the requirements that they be interpreted in a meaningful manner - to do otherwise would ignore the mandate that victims be these afforded rights. Due process and fairness require that crime victims - like the government and defense - be adequately informed in order to meaningfully exercise their substantive rights.

Among these rights are the right to confer[2] with the attorney for the government in the case[3], to be treated with fairness and respect for dignity and privacy, and to be "heard" under M.R.E. 412 and M.R.E. 513; these rights are implicated in this case. To make a victim's views and legal arguments fully and effectively to the parties and the court and to present evidence, the victim must first be adequately informed, and LT H.S. seeks materials - namely

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[2] The word "confer" supports the existence of a substantive legal right that can only be exercised with information. Webster's New World Dictionary defines "confer" to mean "to have a conference or talk; to meet for discussion." Black's Law Dictionary defines "conference" as a "meeting of several persons for deliberation, for the interchange of opinion, or for the removal of differences or disputes." A crime victim cannot "confer" with the attorney for the government if they have no information upon which to form opinions and differences, or on which to base a dispute. This right becomes meaningless if only one party to the conference has information.

[3] The Discussion to R.C.M. 306(b) makes clear the policy that commanders consider the views of the victim when reaching disposition decisions. This is often accomplished by the crime victim conferring with government counsel.

copies of her statements,[4] a copy of the charge sheet, and other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime. Information that establishes the totality of circumstances of the alleged crime is imperative since evidence for or against the admissibility, for example, of evidence falling under M.R.E. 412 may be derived from statements of other witnesses, including the accused.

Crime victims deprived of access to information cannot be meaningfully informed such that he or she can fully and effectively confer with government counsel, exercise legal rights, or be heard under M.R.E. 412 and 513. This principle that information is necessary to make an informed and effective decision or legal argument is not new to military courts. For example, military courts recognize that to support an *in camera* review of mental health records under M.R.E. 513, a party must make a threshold showing but that "this standard is not high, because [the courts] know that the moving party will often be unable to determine the specific information contained in a

[4] LT H.S. made her unrestricted report of sexual assault more than 1 year ago. She has made sworn statements and testified at an Article 32, UCMJ investigation. While LT H.S. knows the facts of this case, these statements are needed to determine what statements - and specific words or phrases - were used in the past to describe the facts related to the case.

psychotherapist's records." United States v. Klemick, 65 M.J. 576, 580 (N.M.C.C.A. 2006). Likewise, a victim cannot meaningfully form views, let alone make their views known or present legal arguments or evidence to parties or the court, if not meaningfully informed. At this time, LT H.S. does not know what evidence exists in this case such that she can even present it to the parties and the court since she has been denied access by the government. Therefore, in this case, LT H.S. will be denied her substantive legal rights to "confer" with government counsel and be "heard" by the court unless she is afforded access to key information.

Importantly, while neither the Constitution, Congress, or the President has specifically defined the terms "fairness" and "respect," those words must at minimum guarantee a victim's rights are given no less consideration than an accused's rights or government interests. See Snyder v. Massachusetts 291 U.S. 97, 122 (1934) (Cardozo, J.) ("[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."), reaffirmed by Payne v. Tennessee, 501 U.S. 808, 827 (1991); Morris v. Slappy, 461 U.S. 1, 14 (1983) (stating that "in the

administration of criminal justice, courts may not ignore the concerns of victims"); United States v. Heaton, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006) (finding that under the federal Crime Victims' Rights Act, treating "a person with 'fairness' is generally understood as treating them 'justly' and 'equitably'"). The legislative history of the CVRA instructs that "fairness includes the notion of due process." 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statements of Sen Kyl).

Victims are not on an even playing field if the victim – the persons most impacted by the crime – is not given access to key information known by the parties when the victim's rights are implicated. Treating victims in such an uneven manner is contrary to the intent of Congress, the President, and the C.A.A.F., as well as the explicit provision of a right to fairness and respect in the DoD regulations. Accordingly, denying a crime victim access to information denies a crime victim the ability to exercise those legal rights in a meaningful manner.

LT H.S., as described above, has a right to the requested information. In this case, where the defense is seeking to admit both evidence of sexual predisposition and other sexual behavior and seeking production of her mental health records, LT H.S. has compelling privacy

interests at stake. LT H.S. must be afforded a meaningful opportunity to protect public disclosure of private information during a court-martial, and the only way to meaningfully exercise these rights is to know what information is known by the parties that may have some bearing on these issues.

Lastly, the government and defense will likely respond that providing the requested information to LT H.S. will somehow taint her testimony in this case. But they do not cry foul when an accused has access to the entire discovery provided by the government to the defense, attends an entire Article 32, UCMJ investigation, is present for all court sessions and trial on the merits, and then testifies last in his own defense. The only thing that providing LT H.S. the requested information will accomplish is the enforcement of the substantive legal rights that are provided to her under the law.

4. BURDEN

The burden is on the government to demonstrate that it has afforded LT H.S. her substantive legal rights as a crime victim.

5. REMEDY REQUESTED

LT H.S. requests that this Court order the government to provide her copies of her statements, a copy of the

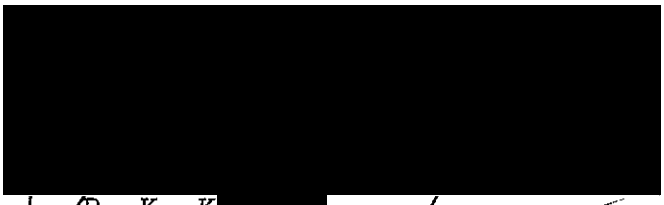
charge sheet, and other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime.

At this time, LT H.S. is not seeking a continuance of the Article 39(a) session. LT H.S. requests that this Court hear this Motion first and, if the Court orders production, give a sufficient recess to permit LT H.S. and her counsel to review the information prior to presenting facts and legal argument on the M.R.E. 412 and 513 motions.

6. ORAL ARGUMENT

LT H.S., through counsel, desires to present legal argument orally.

Respectfully submitted,



P. K. K[redacted]
LCDR, JAGC, USN
Victims' Legal Counsel
For LT. H.S.

****

Certificate of Service

I hereby attest that a copy of the foregoing pleading was served on the Court, Defense Counsel, and Trial Counsel electronically on 6 December 2013.

[redacted]

P. K. K[redacted]

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

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	)	FOR MATERIALS NECESSARY
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Like an accused represented by a defense counsel, a crime victim with substantive legal rights must be afforded access to the information necessary to exercise those rights. When an accused requests information through counsel, he does so in order to have the means to meaningfully exercise his substantive legal rights; these means include challenging the admissibility of evidence, cross-examining witnesses, and making legal argument. A victim is afforded the same means to exercise substantive legal rights, such as under M.R.E. 412 and 513, but can only meaningfully do so, like an accused, if given the necessary information.

The Congress, the President, and the C.A.A.F. recognized that these substantive legal rights afforded to crime victims become meaningless unless they are viewed through the lens of due process guaranteed under the due process clause of the Fifth Amendment to the Constitution. See Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (applying constitutional due process to Texas adoption proceeding and finding "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

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Importantly, while neither the Constitution, Congress, or the President has specifically defined the terms "fairness" and "respect," those words must at minimum guarantee a victim's rights are given no less consideration than an accused's rights or government interests. See Snyder v. Massachusetts 291 U.S. 97, 122 (1934) (Cardozo, J.) ("[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."), reaffirmed by Payne v. Tennessee, 501 U.S. 808, 827 (1991); Morris v. Slappy, 461 U.S. 1, 14 (1983) (stating that "in the

administration of criminal justice, courts may not ignore the concerns of victims"); United States v. Heaton, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006) (finding that under the federal Crime Victims' Rights Act, treating "a person with 'fairness' is generally understood as treating them 'justly' and 'equitably'"). The legislative history of the CVRA instructs that "fairness includes the notion of due process." 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statements of Sen Kyl).

Victims are not on an even playing field if the victim – the persons most impacted by the crime – is not given access to key information known by the parties when the victim's rights are implicated. Treating victims in such an uneven manner is contrary to the intent of Congress, the President, and the C.A.A.F., as well as the explicit provision of a right to fairness and respect in the DoD regulations. Accordingly, denying a crime victim access to information denies a crime victim the ability to exercise those legal rights in a meaningful manner.

LT H.S., as described above, has a right to the requested information. In this case, where the defense is seeking to admit both evidence of sexual predisposition and other sexual behavior and seeking production of her mental health records, LT H.S. has compelling privacy

interests at stake. LT H.S. must be afforded a meaningful opportunity to protect public disclosure of private information during a court-martial, and the only way to meaningfully exercise these rights is to know what information is known by the parties that may have some bearing on these issues.

Lastly, the government and defense will likely respond that providing the requested information to LT H.S. will somehow taint her testimony in this case. But they do not cry foul when an accused has access to the entire discovery provided by the government to the defense, attends an entire Article 32, UCMJ investigation, is present for all court sessions and trial on the merits, and then testifies last in his own defense. The only thing that providing LT H.S. the requested information will accomplish is the enforcement of the substantive legal rights that are provided to her under the law.

4. BURDEN

The burden is on the government to demonstrate that it has afforded LT H.S. her substantive legal rights as a crime victim.

5. REMEDY REQUESTED

LT H.S. requests that this Court order the government to provide her copies of her statements, a copy of the

charge sheet, and other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime.

At this time, LT H.S. is not seeking a continuance of the Article 39(a) session. LT H.S. requests that this Court hear this Motion first and, if the Court orders production, give a sufficient recess to permit LT H.S. and her counsel to review the information prior to presenting facts and legal argument on the M.R.E. 412 and 513 motions.

6. ORAL ARGUMENT

LT H.S., through counsel, desires to present legal argument orally.

Respectfully submitted,

P. K. K[redacted]
LCDR, JAGC, USN
Victims' Legal Counsel
For LT. H.S.

****

Certificate of Service

I hereby attest that a copy of the foregoing pleading was served on the Court, Defense Counsel, and Trial Counsel electronically on 6 December 2013.

P. K. K[redacted]

ATTACHMENT B

GENERAL COURT-MARTIAL
EASTERN JUDICIAL CIRCUIT
UNITED STATES MARINE CORPS

UNITED STATES v. Blake D. ENTRALGO Lieutenant/O-3 U.S. Navy	)	Government Response to Victim Motion "For Materials Necessary to Exercise Substantive Legal Rights on Behalf of Victim H.S." 11 December 2013

1. **Relief Requested**: The Government respectfully moves the court to deny LT H.S.'s motion in its entirety.

2. **Summary of Facts**:

The accused is charged with violations of Articles 120, 133, and 134 UCMJ, related to his sexual assault of LT H.S., another dentist at a Halloween party in October 2012.

3. **Discussion**

Rules for Courts-Martial (R.C.M) 701 and 703 provide the statutory guidance for the management of disclosure and production of evidence by the Government. However, the rules only govern disclosures to the *defense* and production of items requested by the *defense*. It should be noted that these rules do not make reference to "all parties," instead they specifically refer to "the prosecution and the defense"[1] or "the *trial counsel* shall provide . . . to *the defense*."[2]

In *LRM v. Kastenberg* the Court of Appeals for the Armed Forces (C.A.A.F) specifically addressed the question of whether certain Military Rules of Evidence

[1] R.C.M. 703(a)
[2] R.C.M. 701(a)

(M.R.E.) require that a victim be allowed to make certain arguments before the court, through a counsel. 72 M.J. 364 (C.A.A.F. 2013). C.A.A.F. looked at M.R.E.s 412 and 513 and the actual language that was used addressed the victim's rights. Specifically, C.A.A.F. focused on the M.R.E.s' references to the victim being afforded an opportunity to be "heard." *Id.* at 369-370. C.A.A.F.'s decision said nothing about rights to documents, such as statements, charge sheets, or investigations, beyond the filings that implicate rights under those M.R.E.s.

LT H.S.'s argument regarding Due Process is also misplaced. The Fifth Amendment states, in the relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law." While a criminal defendant has a readily cognizable claim that in a criminal prosecution one faces the potential depravation of all three, a crime victim cannot make the same claim.

LT H.S., through her VLC, has been able to properly exercise her rights without the requested documentation. She has been provided copies of both defense motions which implicate her rights under M.R.E. 412 and 513. She has filed responses to both of those motions. Through her counsel she has been able to confer with the Government counsel about the progression of the case. She, along with her VLC, are scheduled to appear via VTC at the 39(a) on 16 December.

The potential danger of the disclosure of the requested documents is significant. LT H.S.'s request is for "copies of her statements, a copy of the charge sheet, and other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime." VLC Motion at 11-12. Provision to a witness of copies of their own statements, the charge sheet, or other investigatory documents

threatens to taint the judicial proceeding. While it is certainly not improper for a witness to review their statement prior to testifying, or even while having his/her recollection refreshed, being provided copies to take home is another matter. The charge sheet presents additional concerns related to potential violations of the accused's privacy. A victim in possession of a charge sheet could also create the appearance of impropriety, as a member of the public may believe that this would potentially taint a victim's testimony. The final request dealing with "investigatory documents" is so broad and vague as to render it meaningless. A request so lacking in specificity can hardly be responded to. It is sufficient to say that LT H.S. has failed to specifically articulate *what* she is looking for, *where* she believes it to be located, *how* it will assist her in the exercise of her rights, and *why* she is unable to exercise her rights without it. There is a significant risk of danger if a witness were to be provided copies of an investigation which detailed the statements, or summaries of statements, of other witnesses.

4. **Burden of Proof**: The Government specifically disagrees with LT H.S.'s assertion that the burden is on the Government. LT H.S. has provided no case, statute, or authority for that proposition. Under R.C.M. 905(c)(2), LT H.S., as the moving party, has the burden of proof. Under R.C.M. 905(c)(1), the burden of proof for this motion is by a preponderance of the evidence.

5. **Evidence**: The Government offers no additional evidence for this motion.

6. **Argument**: The Government requests oral argument.

[redacted]

A. M[redacted]
Captain, U.S. Marine Corps
Trial Counsel

I hereby certify that a copy of the above motion was served upon defense counsel and the Court by electronic means on 11 December 2013.

A. M. L[redacted]
Captain, U.S. Marine Corps
Trial Counsel

EASTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT MARTIAL

UNITED STATES	)	
	)	
V.	)	**SUPPLEMENTAL COURT RULING**
	)	RE: MRE 412 MOTION
ENTRALGO, Blake	)	
LT, O-3	)	
U.S. NAVY	)	

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1. **Nature of the Motion**. Pursuant to Military Rule of Evidence (MRE) 412, the Defense moved the court to allow evidence of flirtations between the accused and the Complaining Witness (CW) on the night of the alleged sexual assault, evidence of the committed relationship status of CW, and evidence that CW was a "huge gay advocate." At the Article 39(a) session held on 16 December 2013, the court received evidence and heard the arguments by counsel, including Legal Counsel for CW, on this motion. This is a supplement to the ruling delivered orally on the record at that hearing, and is specifically directed at the evidence regarding flirtations between the accused and CW.

2. **Findings of Fact**.

a.The accused testified at the Article32 hearing that flirtations occurred between himself and CW at the party where the alleged sexual assault occurred.

b. The accused does not deny a sexual encounter occurred later that evening, but alleges it was consensual.

c. CW testified at the 39a that flirtations between herself and the accused did not occur at the party where the alleged sexual assault occurred.

3. **Discussion**.

Flirtatious behavior between CW and accused just prior to the alleged sexual assault is a fact in dispute between CW and accused, and should be left to the Finder of Fact to decide.

Evidence that the accused and CW flirted during the evening of the alleged sexual assault is relevant to circumstantially support the accused contention that a consensual sexual encounter occurred between the accused and CW later that evening.

The brief proximity in time between the alleged flirtatious conduct and the alleged sexual assault makes the probative value of such evidence outweigh the danger of unfair prejudice, specifically the short time period between events makes consent more likely than if the evidence was not introduced. There is no *unfair* prejudice to CW to allow the accused to defend against her

accusations by providing his version of events that evening. Consent of the CW is the most important issue in this case and should be allowed to be fully explored by the defense.

The defense motion with respect to MRE 412 evidence relative to flirtations between the accused and CW is **GRANTED**.

[redacted]
N. K. H[redacted]
Lieutenant Colonel, USMC
Military Judge

EASTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT MARTIAL

UNITED STATES	)	
	)	
V.	)	**SUPPLEMENTAL COURT RULING**
	)	RE: MRE 513 MOTION
ENTRALGO, Blake	)	
LT, O-3	)	
U.S. NAVY	)	

---

1. **Nature of the Motion**. Pursuant to Military Rule of Evidence (MRE) 513, the Defense moved the court to order an *in camera* review of the Complaining Witness' (CW) mental health records related to prescriptions CW filled just prior to the alleged sexual assault. At the Article 39(a) session held on 16 December 2013, the court received evidence and heard the arguments by counsel, including Legal Counsel for CW, on this motion. This is a supplement to the ruling delivered orally on the record at that hearing.

2. **Findings of Fact**.

a. CW was dispensed two psychotropic drugs two days before the alleged sexual assault by Dr. Thomas Whiteford.

b. CW was dispensed a different psychotropic drug approximately six weeks prior to the alleged sexual assault by Dr. Thomas Whiteford.

c. Defense counsel attempted to ask CW questions regarding the circumstances of these drugs at the Article 32 session.

d. Defense counsel attempted to ask CW questions regarding the circumstances of these drugs at the 39a session.

e. Defense counsel requested an *in camera* review of CW's mental health records in the possession of Dr. Thomas Whiteford.

3. **Discussion**.

Given the close proximity in time between CW picking up brand new prescriptions for psychotropic drugs and her allegation of sexual assault, there is a reasonable likelihood that the requested privileged records would yield evidence admissible under the constitutionally required exception to MRE 513 specifically related to CW's emotional state at the time of the offense; the information is not cumulative of other information available; and the defense made reasonable efforts to obtain the same or substantially similar information directly from CW.

The motion is **GRANTED**.

N. K. H[redacted]
Lieutenant Colonel, USMC
Military Judge

AE XXXII
Pg 1 of 1

ATTACHMENT C

WESTERN PACIFIC JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT MARTIAL

UNITED STATES	)	
	)	**VICTIMS' LEGAL COUNSEL (VLC) RESPONSE REGARDING ADMISSION OF PRELIMINARY INQUIRY AND MRE 412 EVIDENCE**
v.	)	
Michael I. WOODYE **Staff Sergeant** **U.S. MARINE CORPS**	)	
	)	**DATE: 6 April 2014**

1. Nature of Motion. Pursuant to the M.R.E. 412, Ms. BVD, the victim in this matter, respectfully moves the Court to exclude 412 evidence into her sexual history of alleged extramarital sexual affairs, which the trial and defense counsel refer to as "swinging." This evidence does not meet any exception under M.R.E. 412 and cannot meet any of the thresholds for admissibility under M.R.E. 401 through 403.

2. Facts.

a. Victim Counsel concurs with all facts in defense's responses to "Government's Motion for Ruling on Admission of Preliminary Inquiry" and "Ruling on Admissibility of Evidence under MRE 412" (27 March 2014) with the exception of, 2(f).

b. The Victim Counsel also concurs with the facts as stated in the "Government Motion in Limine" dated 21 March 2014 with the exception of item 2(f).

c. Ms. BVD was sexually assaulted by the accused on 5 July 2013, less than one week after Ms. BVD and Cpl ML arrived in Okinawa.

d. The sexual assault occurred while Ms. BVD and Cpl ML were in temporary billeting at the Shogun Inn located on Kadena Air Force Base.

e. Ms. BVD and Cpl ML were later moved into government housing on Camp Shields.

f. During the Preliminary Inquiry conducted in February 2014, Cpl ML stated that in *August 2014, at "Camp Shields,"* he engaged in wrongful sexual intercourse with someone other than his legal wife. (Emphasis added)

g. The investigating officer, Capt. J[redacted]D. O'[redacted] stated that Cpl ML was forthcoming and that the misconduct was reported as an isolated event.

h. During the Preliminary Inquiry, Cpl ML did not state that he discussed having wrongful sexual intercourse with someone other than his legal wife with Mrs. V[redacted]l[redacted] the 5th ANGLICO Family Readiness Officer.

i. However, during the Preliminary Inquiry, Mrs. P[redacted] indicated in her statement that Cpl ML previously told her that he engaged in "spouse swapping" when they arrived on island and within 1-2 months, "he was not OK with such decisions."

j. Mrs. P[redacted]also speculated that the alleged "spouse swapping" started "*before* the incident with SSgt W[redacted] incident." (Emphasis Added)

k. On 13 November 2014, during the Article 32, the following colloquy occurred between the defense counsel and the victim, Ms. BVD:

> **D.C.:** "Have you guys ever had any conversations about adultery? Like for instance, with my wife and I, if I said if one of those things, like, "I would kill you if you did that."
>
> **Ms. BVD:** "....No. I have accused him of cheating on me before, but that was literally like right when we started dating. So, no I mean since we've been married, no everything's been fine. Since before we were married, everything's been fine.

l. The rest of the exchange between Defense and Ms. BVD was questioning regarding why "then" did she not she tell her husband after the first incident with SSgt W[redacted] (implying that she may have had reservations due to some previous discussion about the consequences of "cheating/adultery.")

m. During the Article 32, the following colloquy occurred between the defense counsel and the victim's husband, Cpl ML:

> **DC**: ...have you and your wife ever talked about, you know, what would happen if one of y'all cheated on the other. Like, obviously, you get mad, but have you ever had that conversation?
>
> **Cpl ML**: No, Sir. Not that I recall.

DC: Okay, so you all have never had the conversation of one cheating on the other?

Cpl ML: No, Sir.

n. The next questions were regarding the amount of alcohol purchased and consumed.

o. No evidence, including the above lines of questioning, was ever offered at the Article 32 concerning "spouse swapping" or conversations about "spouse swapping" between the Ms. BVD and her spouse during the Article 32.

p. Victim Counsel is not aware of any evidence indicating that the accused was aware of the alleged "spouse swapping" at the time of the incident.

q. The accused did not testify at the Article 32.

r. Victim Counsel is also not aware of any evidence indicating that the accused committed the offense based on supposed consent or intent to "spouse swap."

3. Discussion. Victim Counsel concurs with Trial Counsel's legal analysis as indicated in the 21 March 2014, Motion In Limine (Ruling on Admissibility of Evidence Under M.R.E. 412), but offers this supplemental analysis. In this case, evidence of "spouse swapping" is not constitutionally required under M.R.E. 412. Where evidence offered is allegedly constitutionally required, it is important for defense counsel to detail an accused's theory of relevance and constitutional necessity. U.S. v. Banker, 60 M.J. 216, 221 (C.A.A.F. 2004). Defense has failed to do so for the three foregoing reasons.

1) The Preliminary Inquiry is bareback hearsay evidence that is not constitutionally required under M.R.E. 412 and does not meet any of the enumerated exceptions.

Taken as true, Cpl ML stated that sexual misconduct between himself and some other woman occurred in August. The accused sexually assaulted Ms. D[redacted] only a couple of days after arriving in Okinawa on Kadena in July. This could only have been *before* the couple moved into base housing on Camp Shields where they first met the Air Force couple. Therefore, Family Readiness

Officer's speculation that the couple engaged in "spouse swapping" before the incident with the accused is easily rebutted and discredited. Moreover, here statement made out of court is being offered for the truth of the fact that the couple either had a "conversation" about or were engaged in "spouse swapping." The statement by the Family Readiness Officer is hearsay within hearsay (Preliminary Inquiry) with no exception that can overcome the requirements and balancing factors of M.R.E. 412 and 403. (See government's "Discussion" par 3(c) (2)-(6)).

2) Defense has failed to connect the dots between the Preliminary Inquiry and this case to sufficiently articulate any reasonable theory of relevance or constitutional necessity.

The Preliminary Inquiry into Cpl ML's private sexual activity is not proof of a prior "conversation" between the victim and her spouse concerning cheating or adultery. The defense has made an unfounded assumption that because an instance of "spouse swapping" allegedly occurred, the couple must have discussed it at some point. The defense makes a second unfounded assumption that because they must have discussed "spouse swapping," the couple probably discussed "cheating" or "adultery." These assumptions are not supported by any of the evidence in the Preliminary Inquiry.

In U.S. v. Coates, a victim allegedly lied at an Article 32 about the existence of a relationship with another Marine because other witnesses contradicted her testimony. The defense sought to impeach the victim's Article 32 statements describing previous sexual activity by the victim with that Marine while she was intoxicated. The Court prohibited the accused from introducing evidence using a theory of mistake of fact. The Court opined that answers given between trial and the Article 32 were not offered to directly impeach the trial statement. Additionally, the answers while facially opposite resulted from the "inexact nature of the questions and her understanding for the terms within those questions." Consequently, the court held, the evidence was not relevant and would have caused confusion of the issues before the members where there was no probative value. 2003 WL 21058262 (N.M.Ct.Crim.App.). Coates, while unreported, is on point and demonstrates the appropriate M.R.E. 412 analysis. Just like in Coates, the questions Ms. BVD and

her spouse answered at the Article 32 were privately sexual in nature. The defense was asking questions different in nature than in the prior Article 32 in an attempt to produce inconsistencies. Here, the questions asked by defense were about cheating. However, the defense wants to now ask questions in an inexact nature that puts consensual "spouse swapping" and "cheating" in the same context, when the couple may not have that understanding. The Coates court required the defense to connect the dots further to prevent needless confusion of the issues before the members. The defense should have no less obligation to this court.

3) The probative value of this evidence is substantially outweighed by the danger of unfair prejudice to the integrity of the trial process and Ms. BVD's right to privacy.

Even if the court agrees that some inference can be drawn from Cpl ML's admissions, proof of the existence of "spouse swapping" does not prove the existence of a conversation about "cheating" or "adultery." This evidence is still inadmissible because it can only be used improperly. Any probative value for truthfulness has not been causally linked to any defense theory of consent or mistake of fact on the part of the accused. No other facts in this case exist to show any agreement by the couple to engage in consensual sex with the accused. No facts suggest that the accused knew about any "spouse swapping," or that the accused was under the mistaken belief that he was engaged in "spouse swapping" on the eve of the crime. The evidence is so tenuous because, *nothing* connects the alleged "spouse swapping" to this case or any motive to fabricate. The absence of any nexus to this case is relative to the weakness of the probative value. That weak probative value is substantially outweighed by the danger of unfair prejudice to the trial given the confusion this evidence will cause (See Government "Discussion" par. 3(c)(5))

Defense sites U.S. v. Gaddis, highlighting the fact that the Gaddis court allowed defense to introduce "some evidence" regarding the sexual history of an under aged victim for the use of impeaching her credibility. However, in Gaddis, the court set very strict parameters and limited the use of any substantive evidence, (copies of emails, witness statements, etc.) and references to the prior sexual activity of the victim and the fact that e-mails *contained* rumors of prior sexual

activity with a specific person. In that case, there was a clearly articulated established motive to lie about the sexual assault. However, the court *still* determined that this evidence would confuse the panel. 70 M.J. 258 (C.A.A.F. 2011). "Unfair prejudice" means an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one". Id. M.R.E. 403 addresses prejudice to the integrity of the trial process, not prejudice to a particular party or witness. U.S. v. Collier, 67 M.J. 347, 354 (C.A.A.F.2009). By contrast, M.R.E. 412(c)(3) focuses directly on prejudice to the interests of a particular witness—the alleged victim—whose privacy interest may or may not fall within the M.R.E. 403 criteria, depending on the circumstances of the case. Here the evidence sought not only fails to show any motivation to lie about the sexual assault, but also fails to have any nexus to any stated theory of the defense that would justify such an intrusion. Because the mere presentation of this evidence would only serve to confuse the members, and suggest that they make a decision based on sexual innuendo, it therefore is dangerously prejudicial to the trial process and Ms. BVD.

The defense also cites U.S. v. Ellerbrock to demonstrate yet another distinguishable example of admission of evidence under M.R.E. 412. In Ellerbrock, the victim admitted that she was afraid that her husband would divorce her, so the existence of a prior affair may have established a greater motive for victim to lie about whether her sexual encounter with accused was consensual. Here, the defense has already failed to establish any prior understanding or discussion that infidelity/cheating that would end the relationship at the Article 32. Ellerbrock is clearly distinguishable from this case.

Even if the court is inclined to admit the evidence under a general theory of witness credibility by the defense, C.A.A.F. has repudiated attempts to admit evidence under M.R.E. 412 where the defense's theory is too far-fetched. In U.S. v. Smith, the victim had previously admitted to another witness that she had lied about an allegation of sexual assault by an enlisted member to preserve a secret (fraternization), which if revealed could have an adverse impact on her career. CAAF held that cross-examination by the accused (another cadet) regarding the victim's sexual indiscretions was not constitutionally required, despite the fact that she lied about an important

issue that would impeach her credibility. The court reasoned that to the extent that Defense tried to introduce some nonconsensual aspect of a theory of bias, via MRE 608(c), he failed to frame or raise the issue as such at trial. In concluding that the details of the "secret" were not relevant to the defense's case to establish an issue of credibility, the court further opined that, "the Appellant's theory of admission was too far-fetched to pass constitutional and M.R.E. 403 muster. 68 M.J. 445 (C.A.A.F 2010)./ Victim Counsel can discern no particular theory of admissibility that can legally supported such an intrusion and confusion of Ms. BVD's private sexual affairs before the members.

4. **Relief Requested.** For the reasons set forth in both the Government's discussion and this motion, Ms. BVD prays that the court excludes evidence of the preliminary inquiry and "spouse swapping" from the fact-finding process.

5. **Oral Argument.** Oral argument is respectfully requested.

6. **Burden of Proof.** Defense counsel has the burden of demonstrating why the general prohibition in M.R.E. 412 should be lifted to admit evidence of the sexual behavior of the victim. U.S. v. Carter, 47 MJ 395, 396 (C.A.A.F. 1998).

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Date: 2014.04.07 09:22:02 +09'00'
C. M. H[redacted]
Major, U.S. Marine Corps
Victims' Legal Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court, defense and trial counsel on 7 April 2014.

[redacted]

C. M. H[redacted]
Major, U.S. Marine Corps
Victims' Legal Counsel

ATTACHMENT E

EASTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT MARTIAL

UNITED STATES	)	
	)	
V.	)	**SUPPLEMENTAL COURT RULING**
	)	RE: DISCOVERY REQUEST BY
ENTRALGO, Blake	)	COMPLAINING WITNESS
LT, O-3	)	
U.S. NAVY	)	

1. **Nature of the Motion**. The Complaining Witness (CW) in the above captioned case seeks relief from the court in compelling discovery from the government of materials necessary to exercise CW's substantive legal rights as they pertain to MRE 412 and 513. At the Article 39(a) session held on 16 December 2013, the court received evidence and heard the arguments by counsel, including Legal Counsel for CW, on this motion. This is a supplement to the ruling delivered orally on the record at that hearing.

2. **Findings of Fact**.

a. Defense filed motions regarding MRE 412 and 513 on 8 November 2013. AE XXI and XII, respectively. The government provided LC with copies of these pleadings.

b. Non-Party Legal Counsel (LC) representing the Complaining Witness (CW) filed responses to the MRE 412 and 513 motions on 21 November 2013. AE XXIII and XIII, respectively.

c. On 6 December 2013, two weeks *after* LC responded to the defense MRE 412 and 513 motions, LC filed this motion to compel discovery of materials necessary for CW to exercise substantive legal rights afforded to her as an alleged crime victim in the military justice system. AE XIX.

d. A 39a was scheduled to hear the CW compel discovery motion, as well as the defense MRE 412 and 513 motions. LC consented to have all three motions heard on the same day. AE XIX.

e. CW via LC requested the following be produced for discovery: copies of the charge sheets; any statements made by CW, including summaries of any testimony by CW provided thus far; and "copies of any other statements or summaries of statements or testimony by anyone, including the accused, that are relevant, particularly to MRE 412 & 513 issues that have been raised in this case." Record at 30.

f. Defense moved the court in AE XXI to find MRE 412 exceptions with respect to three different scenarios: (a) alleged flirtatious behavior between the accused and CW on the night of the charged offenses; (b) the status of CW as "in a relationship" at the time of the charged offenses; and tangentially, (c) that CW was a "huge gay advocate."

g. In their written briefs, both government counsel and LC concurred that items (a) and (b) above would fall under an exception to MRE 412, however both requested limitations on the *extent* of cross of CW regarding the interactions between the accused and CW, as well as the *scope* of cross of CW regarding the gender of CW's significant other, as well as any sexual acts between CW and her significant other. AE XXII and XXIII.

h. In support of the defense request to allow evidence of CW's position as a "huge gay advocate" as an exception to MRE 412, the defense included in their motion a NCIS Results of Contact with J[redacted] H[redacted], CIV. Among the six paragraphs within that document there contained a statement that CW was a "huge gay advocate". AE XXI. No other evidence in support of this proposition was offered to the court, nor was any foundation for that proposition included in the witness statement.

i. The basis of the defense MRE 513 motion was a pharmacy report which indicated that two days before the charged offense, CW was dispensed two different medications that are prescribed to treat depression and/or anxiety. AE XII.

j. The pharmacy report was mentioned, but not attached to AE XII until the motions session on 16 December 2013.

3. **Discussion**.

There is no statutory requirement for the government to provide discovery to CW that is enforceable by this court. The Rules for Courts-Martial regarding discovery place requirements between trial and defense counsel, the actual parties to the litigation. RCM 701, 703.

Despite no statutory requirement to provide discovery to CW, LC argues that LRM v Kastenburg, 72 M.J. 364 (C.A.A.F. 2013) implicates an enforceable discovery responsibility on the trial counsel. Assuming such a discovery obligation is implicated, existing statutory requirements between trial and defense are helpful when analyzing what is discoverable and what should be produced.

The rules of discovery have a reoccurring theme regarding discoverable items as being that which are *material to the preparation* of the requesting party or are intended for use by the opposing party. RCM 701 (emphasis added). The right to have evidence produced rests on its relevance and necessity. RCM 703.

In this case, the specific info requested by LC in this case is not tailored to the need to present a basis for a claim of privilege or exclusion raised by the defense motions. AE XXI and XII. Rather, the discovery request filed by LC is overly broad and nothing more than what is commonly referred to as a "fishing expedition."

LC stated CW wants to know what is in the possession of the government that implicates her substantive legal rights under MRE 412 and 513. Record at 30. The answer to that legitimate

demand would be all pleadings that involve MRE 412, 513 and 514, as well as the evidence used to support those pleadings. Those materials should sufficiently enable CW to exercise her substantive legal rights, and those materials were provided to CW by the government.

Providing CW with the materials to be considered during this hearing is wholly sufficient to allow CW to exercise her substantive legal rights. CW knew in advance both the arguments of counsel regarding the theory of admissibility or releasability, as well as any evidence in support of those propositions. The court has the role of a gatekeeper for privileged information falling under MRE 412 and 513. That privileged information will not be presented in the court-martial without first holding a hearing with the military judge. The military judge, exercising its gatekeeping function, will base its ruling on those materials which had already been provided to CW, as well as any testimony and/or argument presented at the motion session. There is no question CW could not exercise her substantive legal rights since she had the same information as the military judge.

LC counters that CW nevertheless requires essentially the government case file so that CW can see if there is any other evidence to support her position, whatever that may be. The court finds this request to be overly broad, and to the detriment of the government's case in chief.

The court is hard pressed to determine that the government case file, as broadly requested by LC, is relevant and necessary for CW to exercise her substantive rights. Particularly illustrative to this point is that LC filed exceptional responses to both defense MRE 412 and 513 motions, squarely addressing the arguments of defense. Even more compelling is that these responses were filed *before* LC filed this motion for discovery. Clearly, LC did not believe the government case file was relevant and necessary to address the substantive legal rights of CW that have been raised thus far in the case.

There may be occasions when the court would compel a discovery request of CW beyond the motions and attachments based on MREs 412/513/514. An example of an appropriate discovery request in this case would have requested the pharmacy report mentioned in, but not attached to, the MRE 513 defense motion. Had LC filed an appropriately tailored discovery request for that report, I wholeheartedly believe it would have been provided since the relevance is so obvious, and given the government's willingness to provide the pleadings and their attachments to LC. In fact, had the LC crafted an appropriately tailored request, the 39a session would not have been recessed, and thereby delayed,[1] while the court waited for a copy to be sent, and then digested/discussed between LC/CW.

LC claimed that it was "absurd" for LC to conduct its own investigation when the government has all the information at their fingertips. Record at 31. The court agrees that there is no need for duplicative efforts when they can be avoided. However, this court also thinks it is "absurd" not to do some of your own investigation when representing a client. There are occasions that the

[1] Albeit 12 minutes. Record at 53.

court anticipates due diligence would require LC to interview witnesses, and/or do some investigation, relevant to a CW's claim of privilege or exclusion, regardless if those efforts are parallel or in conjunction with TC efforts since LC and TC have different clients. An interview by LC of Ms. Hochschwender is a great example of supplemental investigation that LC should be expected to do in preparation for the MRE 412 motions session. Another example of an appropriately tailored discovery request would have been to produce any statements made by Jessica Hochschwender, or any other witness, that discussed anything about CW being a "huge gay advocate."

In this case, the court finds that LC/CW did not require the broad breadth of evidence requested. It appears to the court to be a request for information to enable LC/CW to evaluate the government's case against the accused. There is a significant chance that the government's case against the accused would be jeopardized if the CW has access to essentially the entire government case file, specifically in the form of CW's impeachment under the 600 series of the Military Rules of Evidence. The court took pause at LC's argument in this regard.

For all intents and purposes, LC wants full disclosure of the government case file. Disclosure appears to be at the expense of the government's chances of obtaining a conviction of the assailant, a goal presumably shared by CW. This imbalance is demonstrated by LC's argument that giving the case file to CW is no different than allowing CW to be in the courtroom during other witnesses' testimony *since she can be impeached by the 600 series in that regard too.*[2] Record at 33. In other words, "Give me the file, I don't care if my credibility is attacked as a result of having the file even though this is a case that comes down to my credibility." The court is incredulous at this proposition offered by the counsel representing the person alleged to be the victim of the sexual assault. Is the LC intruding on the government's case at the expense of impeaching CW's credibility?

There are parameters to LC's new role in these proceedings that should include a balance between their client's ability to exercise their "substantive legal rights" with the end state of convicting an assailant. That balance is achieved by requesting a discriminating list of discovery to the government for only that evidence which is relevant and necessary to protect those substantive legal rights, just as the discovery rules would normally require.

Though this ruling is written as a supplement to the oral ruling made at the 39a session on 16 December 2013, and after the MRE 412 and 513 motions were litigated and ruled on, the results of those motions are also informative.

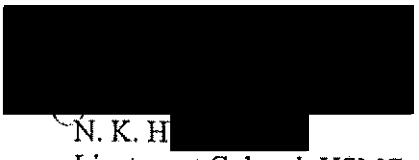
[2] Arguably, a savvy trial counsel would call the CW before the other witnesses, thereby alleviating those impeachment problems.

In the MRE 412 motion, essentially all parties concurred that two of the three items that defense proffered as exceptions to MRE 412 would be admissible.[3] The government and LC opposed the third exception proposed by defense. The court agreed, denying the defense motion in that regard. The LC/CW prevailed on the motion.

With respect to the MRE 513 motion, the court ordered an *in camera* review, over the objection of LC, of 56 days of CW's mental health records after defense demonstrated a reasonable likelihood that the records contained constitutionally required information. The *in camera* review did result in identifying constitutionally required information to explain the emotional state of the CW at the time of the alleged assault and a motive to fabricate. Though the CW did not prevail, and disagrees with the court's ruling, CW was afforded all the tools necessary in order to exercise her claim of privilege or exclusion.

The substantive legal rights of CW have been protected in this case.

The motion is **DENIED**.



N. K. H

Lieutenant Colonel, USMC
Military Judge

[3] LC did object to a technicality regarding one of the 412 items, but agreed in concept to the relevancy of the defense theory.

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

H.S. **LT, DC, U.S. Navy** **Petitioner**	)	**PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF *MANDAMUS***
v.	)	**NMCM No. 201400007**
N. H[redacted] **LtCol, U.S. Marine Corps** **Military Judge** **Respondent**	)	**O R D E R**
Blake Entralgo **LT, DC, U.S. Navy** **Real Party in Interest**	)	

This matter comes before us in the form of a Petition for Extraordinary Relief in the Nature of a Writ of *Mandamus*. The Real Party in Interest, Lieutenant Blake D. Entralgo, DC, USN, is charged with, *inter alia*, rape and sexual assault of the petitioner, LT HS, DC, USN. The petitioner seeks a Writ of *Mandamus* specifically asking that we "set[] aside the [Respondent's] rulings of December 16, 2013, under Mil. R. Evid. 412 and 513, and direct[] the [Respondent] to order the United States to provide LT HS investigative materials that are relevant to the motions made under Mil. R. Evid. 412 and 513." Petition dated 3 January 2014 at 3. Trial is currently scheduled to begin on 26 January 2014.

The Petitioner is represented by both detailed Victim's Legal Counsel (VLC), LCDR P[redacted] K[redacted], JAGC, USN, and civilian counsel, Mr. S[redacted] M[redacted], Esq. On 4 November 2013, VLC served a notice of appearance with trial counsel, detailed defense counsel, and the trial court. *Id.*, Appendix C. On 8 November 2013, civilian defense counsel for the Real Party in Interest filed a motion under MILITARY RULE OF EVIDENCE 412(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) seeking admissibility of alleged sexual behavior between LT HS and the Real Party in Interest, and a motion to compel discovery of LT HS's mental health records under MIL. R. EVID. 513(c). Petition, Appendices E and F. Both LT HS, through VLC, and the United States opposed the defense motions. *Id.*, Appendices J-M. The military judge scheduled an Article 39a, UCMJ, session to hear the defense motions on 16 December 2013.

Prior to the scheduled motion session, VLC submitted a "Motion for Materials Necessary to Exercise Substantive Legal Rights on Behalf of [LT] HS," seeking copies of LT HS's statements to Naval Criminal Investigative Service agents, LT HS's testimony at the Article 32, UCMJ, pretrial hearing in the subject case, a copy of the charge sheet and "other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime." *Id.*, Appendix P at 7-8. The stated purpose of the request is so that LT HS and VLC may be meaningfully informed and therefore exercise "[LT HS's] substantive legal rights to 'confer' with government counsel and be 'heard' by the court . . . ." *Id.*, Appendix P at 9. The Government opposed VLC's motion, arguing that the Rules for Courts-Martial afforded LT HS no entitlement to the requested information; furthermore, since LT HS had been provided copies of the defense motions and was appearing at the Article 39a session via video-teleconferencing (VTC), she received the notice and opportunity to be heard afforded by MIL. R. EVID. 412 and 513. *Id.*, Appendix Q at 1-2.

On 16 December 2013, the Respondent, Lieutenant Colonel N[redacted] H[redacted], USMC, heard VLC's motion to compel production, and the defense MIL. R. EVID. 412 and 513 motions. VLC and LT HS appeared via VTC. Petition at 7. After hearing argument, the Respondent denied VLC's motion, citing a failure to demonstrate necessity for the requested information. However, the Respondent ordered the Government to provide VLC with a copy of the charge sheet. *Id.* at 8. After next hearing the defense MIL. R. EVID. 412 motion, the Respondent ruled from the bench allowing certain evidence to be admitted at trial and made several other rulings pertaining to the remaining evidence sought under MIL. R. EVID. 412. *Id.* at 9. Finally, after hearing the defense motion for discovery under MIL. R. EVID. 513, the Respondent ordered, over the VLC's objection, the production of LT HS's mental health records no later than 27 December 2013 for an *in camera* review. *Id.* at 9-10.

Also on 16 December 2013, VLC requested via email copies of the Respondent's written rulings and findings of fact on the VLC's motion to compel production, and the defense MIL. R. EVID. 412 and 513 motions. *Id.*, Appendix T. That same day, the Respondent replied to VLC via email that "[She] will not do written rulings." *Id.* On 26 December 2013, VLC requested that the Respondent delay her *in camera* review of LT HS's mental health records in order to provide VLC and LT HS an opportunity to pursue relief through a Writ of *Mandamus* to this Court. *Id.*, Appendix U. The following day, 27 December 2013, the Respondent

replied to VLC that she had already received and reviewed *in camera* the requested records. *Id.*, Appendix V. On 30 December 2013, the Respondent issued an order for an *Ex Parte* Article 39a session to be held on 6 January 2014, because "the court has determined portions of the [mental health records of LT HS] are relevant and should be released to defense counsel. However, there are other portions of the records that this court will allow [LT HS] and [VLC] to be heard on, prior to making a determination regarding releasing the privileged information." *Id.*, Appendix W.

VLC, on behalf of LT HS, now requests that this Court: 1) issue a Stay of Proceedings in the subject case; 2) set aside the Respondent's rulings of 16 December 2013 on the defense MIL. R. EVID. 412 and 513 motions; and 3) issue a Writ of *Mandamus* directing the Respondent to order production to VLC and LT HS of "investigative materials relevant to the motions and responses made by the Parties under Mil. R. Evid. 412 and 513." *Id.* at 1.

Based on the foregoing, it is, by the Court, this 8th day of January 2014,

ORDERED:

1. The proceedings in the subject case are hereby **STAYED** under further notice of the court;

2. That the United States shall provide to the court an authenticated transcript of the proceedings to date on or before 22 January 2014;

3. That, the Respondent shall, on or before 22 January 2014, provide this Court with written findings of fact and conclusions of law on the defense MIL. R. EVID. 412 and 513 motions, unless findings of fact and conclusions of law were made orally on the record and included in the transcript of proceedings.

For the Court

R.H. T[redacted]
Clerk of Court

Copy to:
NMCCA (51.2)

LtCol H[redacted]
LCDR K[redacted] (VLC)
[redacted] (CDC)
Capt R[redacted] (DC)
Capt A.M. I[redacted] (TC)
45
46
52
02
05

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

H.S. **LT, DC, U.S. Navy** **Petitioner**	)	**PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF *MANDAMUS***
v.	)	**NMCM No. 201400007**
N. H[redacted] **LtCol, U.S. Marine Corps** **Military Judge** **Respondent**	)	**O R D E R**
Blake Entralgo **LT, DC, U.S. Navy** **Real Party in Interest**	)	

On 23 January 2014, the United States produced an authenticated verbatim transcript of proceedings pursuant to this Court's Order of 8 January 2014. Included therein are supplemental rulings by the Respondent on the Defense Motions with respect to MILITARY RULES OF EVIDENCE 412(c) and 513(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) and the VLC's Motion for Materials Necessary to Exercise Substantive Legal Rights on behalf of [Petitioner] of 6 December 2013.

Having considered the record of proceedings now before the Court and the specific relief requested, it is by this Court, this 5th day of February 2014,

ORDERED:

1. That the Stay of Proceedings issued by this Court is hereby **VACATED.**

2. That the Petitioner's request for a writ of *mandamus* setting aside the Respondent's rulings of 16 December 2013 on the defense MIL. R. EVID. 412 and 513 motions, and further directing the Respondent to order production to VLC and LT H.S. of "investigative materials relevant to the motions and

responses made by the Parties under MIL. R. EVID. 412 and 513" is hereby **DENIED.**

For the Court

R.H. T[redacted]
Clerk of Court

Copy to:
NMCCA (51.2)
LtCol H[redacted]
S[redacted] M[redacted] (Counsel for Petitioner)
LCDR K[redacted] (VLC)
P[redacted] S[redacted] (CDC)
Capt R[redacted] (DC)
Capt A.M. L[redacted] (TC)
45
46
52
02
05

ATTACHMENT F

UNITED STATES MARINE CORPS
Regional Victims' Legal Counsel-West
Marine Corps Installations West
Box 555031
Camp Pendleton, CA 92055-5031

IN REPLY REFER TO:
5800
VLCO
31 Jul 14

From: [redacted], USMC, Victims' Legal Counsel
To: Distribution List

Subj: NOTIFICATION OF REPRESENTATION BY VICTIMS LEGAL COUNSEL OF [redacted] ICO US V [redacted]

Ref: (a) 10 U.S.C. §1044
(b) 10 U.S.C. §1565b
(c) SECDEF Memorandum of 14 Aug 13
(d) MARADMIN 583/13
(e) DoD Instruction 6495.02 of 28 Mar 13
(f) DoD Instruction 1030.2 of 4 Jun 04
(g) LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013)

1. As the Regional Victims Counsel-West Officer-in-charge and pursuant to the references, I have detailed myself as Victims' Legal Counsel for [redacted]. I have formed an attorney-client relationship with [redacted] and will represent her throughout the investigative process and subsequent legal proceedings in connection with the subject case.

2. The accused in this case is identified as Lance Corporal [redacted], currently assigned to 9th Communications Battalion, I Marine Expeditionary Force Headquarters Group, Camp Pendleton. I am not aware of the name of the accused detailed military defense counsel or civilian counsel.

3. Please do not contact my client directly. [redacted] requests that any Government agent, military authority, or other person who wishes to interview or question her related to the subject matter contact me first as her legal representative. I will coordinate her participation if she should desire.

4. I respectfully request that you provide me notice and copies of, prior to execution, any official requests, subpoenas, search authorizations, or search warrants issued by Government agents that may implicate my client's legal right to be treated with fairness and with respect for her dignity and privacy.

5. My client asserts all her legal rights as a victim of crime, including, but are not limited to, the right to be protected from the offender, the right to be notified of court-proceedings, the right to be present at all court proceedings absent a court order, the right to confer with Government counsel to include the right to be consulted regarding any decision to pursue or not pursue charges against the

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offender, and the right to be provided information about any conviction, sentence, imprisonment, and release of the offender.

6. My client invokes her privileges under Military Rules of Evidence (M.R.E.) 412, 513, and 514 to fullest extent under the law. If you believe it necessary to obtain any privileged information, please contact me to discuss the matter.

7. In order for my client to meaningfully exercise her rights and privileges provided to crime victims by statute, regulation, and case law, I request that the Government provide to me on behalf of my client copies of the following:

a. Charge sheet in the subject case;

b. Motions with attachments that involve my client's privileges relating to M.R.E 412, 513, and 514;

c. Statements made by my client in connection with the investigation of the case, including all sworn and unsworn statements made to Naval Criminal Investigative Service (NCIS) special agents, and other law enforcement investigators;

d. Statements, sworn and unsworn, made by any individuals interviewed by law enforcement investigators in connection with this case, including to NCIS special agents, that involve observations or opinions regarding victim sexual behavior or predisposition as defined by M.R.E. 412;

e. Any permissive authorization for search and seizure pertaining to evidence seized from my client, and related evidence custody documents; and

f. Article 32 Investigating Officer's report with relevant attachments and/or appendices.

8. I can be reached at [redacted]

Distribution List:

SJA
STC
SDC
NCIS
HQE

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UNITED STATES MARINE CORPS
Regional Victims' Legal Counsel-West
Marine Corps Installations West
Box 555031
Camp Pendleton, CA 92055-5031

IN REPLY REFER TO:
5800
RVLC-West/[redacted]
21 May 14

From: [redacted], Regional Victims' Legal Counsel West OIC
To: Judge Advocate General (Code 14)

Subj: FREEDOM OF INFORMATION ACT APPEAL FILE NUMBER USMC-HQ [redacted]

Ref: (a) Department of Navy Ltr dtd 25 Mar 2014
(b) 5 U.S.C. § 552

Encl: (1) Authorization for Legal Representation
(2) Initial FOIA Request
(3) Department of Navy Ltr dtd 25 Mar 2014

1. I am writing on behalf of my client, [redacted], whom I represent in my capacity as a Victims' Legal Counsel (VLC). [redacted] has asked me to act as her legal representative for all matters concerning her Freedom of Information Act request and appeal. Enclosure (1) is an "Authorization for Legal Representation and Release of Information" letter signed by [redacted] granting me power to act on her behalf in this matter.

2. [redacted] appeals the redaction of "pre-decisional advice and recommendations" found in the Staff Judge Advocate, Training Command's letter dated 26 April 2013 and the Commanding General, Training Command's letter dated 3 May 2013. Exception (b)(5) of 5 U.S.C. § 552 was given as the reason why this information was redacted. The redaction of this information directly contradicts the guidance given by President Barack Obama in Memorandum of President of the United States, Jan. 21, 2009, 74 F.R. 4683. In this memorandum President Obama states:

> A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.
>
> The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure,

because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

3. It is important to point out key guidance in President Obama's memorandum dated 21 Jan 20019, such as "[i]n the face of doubt, openness prevails", "[a]ll agencies should adopt a presumption in favor of disclosure", [t]he presumption of disclosure should be applied to all decision involving FOIA." It is clear from President Obama's guidance that disclosure, even disclosure of an SJA's recommendation or opinion concerning an Inspector General's investigation should be granted to conform with the spirit and intent of the FOIA statute which is government transparency and accountability.

4. Further, there is federal case law that affirms President Obama's guidance in favor of disclosure. In *Department of Air Force v. Rose*, the court held that the FOIA statute was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." 425 U.S. 352, 361, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976). In addition, the Supreme Court held in *Department of Justice v. Reporters Committee*, that "the ***strong presumption in favor of disclosure*** places the burden on the agency to justify the withholding of any requested documents." (Emphasis added) 489 U.S. at 755.

5. For the reasons stated above [redacted] respectfully appeals the decision not to disclose the information contained in the Staff Judge Advocate, Training Command's letter dated 26 April 2013 and the Commanding General, Training Command's letter dated 3 May 2013. Further, [redacted] requests that all the information specifically all the "pre-decisional advice and recommendations" contained in the Staff Judge Advocate, Training Command's letter dated 26 April 2013 and the Commanding General, Training Command's letter dated 3 May 2013 be fully disclosed and sent via email to [redacted]

6. If you have any questions or concerns please contact me at [redacted]

Subj: FREEDOM OF INFORMATION ACT APPEAL FILE NUMBER USMC-HQ [redacted]

Copy to:
File

UNITED STATES MARINE CORPS
VICTIMS' LEGAL COUNSEL ORGANIZATION
NATIONAL CAPITAL REGION
3250T CATLIN AVE
QUANTICO, VA 22134-5001

IN REPLY REFER TO:
5800
VLCO
15 Oct 14

From: [redacted] USMC, Victims' Legal Counsel
To: Distribution List

Subj: NOTIFICATION OF REPRESENTATION BY VICTIMS' LEGAL COUNSEL OF SERGEANT XXXXXXXXXXXXXXX, USMC

Ref: (a) 10 U.S.C. §1044(e)
(b) 10 U.S.C. §1565b
(c) SECDEF Memorandum of 14 Aug 13
(d) MARADMIN 583/13
(e) DoD Instruction 6495.02 of 28 Mar 13
(f) DoD Instruction 1030.2 of 4 Jun 04
(g) LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013)

1. Pursuant to the references, I have been detailed as Victims' Legal Counsel for Sergeant XXXXXXXXXXXXXXX. I have formed an attorney-client relationship with Sgt M[redacted] and will represent her throughout the investigative process and subsequent legal proceedings in connection with the subject case.

2. The accused in this case is identified as Specialist XXXXXXXXX, United States Army.

3. Please do not contact my client directly. Sgt XXXX requests that any Government agent, military authority, or other person who wishes to interview or question her related to the subject matter contact me first as her legal representative. I will coordinate her participation if she should desire.

4. I respectfully request that you provide me notice and copies of, prior to execution, any official requests, subpoenas, search authorizations, or search warrants issued by Government agents that may implicate my client's legal right to be treated with fairness and with respect for her dignity and privacy.

5. My client asserts all her legal rights as a victim of crime, including, but are not limited to, the right to be protected from the offender, the right to be notified of court-proceedings, the right to be present at all court proceedings absent a court order, the right to confer with Government counsel to include the right to be consulted regarding any decision to pursue or not pursue charges against the offender, and the right to be provided information about any conviction, sentence, imprisonment, and release of the offender.

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6. My client invokes her privileges under Military Rules of Evidence (M.R.E.) 412, 513, and 514 to fullest extent under the law. If you believe it necessary to obtain any privileged information, please contact me to discuss the matter.

7. In order for my client to meaningfully exercise her rights and privileges provided to crime victims by statute, regulation, and case law, I request that the Government provide to me on behalf of my client copies of the following:

a. Charge sheet in the subject case;

b. Motions with attachments that involve my client's privileges relating to M.R.E 412, 513, and 514;

c. Statements made by my client in connection with the investigation of the case, including all sworn and unsworn statements made to Naval Criminal Investigative Service (NCIS) special agents, and other law enforcement investigators;

d. Statements, sworn and unsworn, made by any individuals interviewed by law enforcement investigators in connection with this case, including to NCIS special agents, that involve observations or opinions regarding victim sexual behavior or predisposition as defined by M.R.E. 412;

e. Any permissive authorization for search and seizure pertaining to evidence seized from my client, and related evidence custody documents; and

f. Article 32 Investigating Officer's report with relevant attachments and/or appendices.

8. I can be reached at [redacted]

[redacted]

Distribution List:

SJA
SARC
CID
Commander, General Leonard Wood Army Community Hospital

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UNITED STATES MARINE CORPS
MARINE CORPS BASE HAWAII BRANCH, PACIFIC REGION
VICTIMS' LEGAL COUNSEL ORGANIZATOIN
BOX 63062
KANEOHE BAY HAWAII 96863-3062

IN REPLY REFER TO:
5800
VLCO
18 Apr 14

From: Victims' Legal Counsel
To: Distribution List

Subj: NOTIFICATION OF REPRESENTATION BY VICTIMS' LEGAL COUNSEL OF [redacted], USMC

Ref: (a) 10 U.S.C. § 1044
(b) 10 U.S.C. § 1565b
(c) SECDEF Memorandum of 14 Aug 13
(d) MARADMIN 583/13
(e) DoD Instruction 6495.02 of 28 Mar 13
(f) DoD Instruction 1030.2 of 4 Jun 04
(g) LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013)

1. Pursuant to the references, I have been detailed as Victims' Legal Counsel for [redacted], USMC, currently assigned to Marine Aviation Logistics Squadron 24, Marine Aircraft Group 24, 1st Marine Aircraft Wing. I have formed an attorney-client relationship with MSgt Jankowski and will represent him throughout the investigative process and subsequent legal proceedings in connection with the subject case.

2. Please do not contact my client directly. [redacted] requests that any Government agent, military authority, or other person who wishes to interview or question him related to the subject matter contact me first as his legal representative. I will coordinate his participation if he should desire.

3. I respectfully request that you provide me notice and copies of, prior to execution, any official requests, subpoenas, search authorizations, or search warrants issued by Government agents that may implicate my client's legal right to be treated with fairness and with respect for his dignity and privacy.

4. My client asserts all his legal rights as a victim of crime, including, but not limited to, the right to be protected from the offender, the right to be notified of court-proceedings, the right to be present at all court proceedings absent a court order, the right to confer with Government counsel to include the right to be consulted regarding any decision to pursue or not pursue charges against the offender, and the right to be provided information about any conviction, sentence, imprisonment, and release of the offender.

5. My client invokes his privileges under Military Rules of Evidence (M.R.E.) 412, 513, and 514 to fullest extent under the law. If you believe it necessary to obtain any privileged information, please contact me to discuss the matter.

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Subj: NOTIFICATION OF REPRESENTATION BY VICTIMS' LEGAL COUNSEL OF
MASTER SERGEANT W[redacted] USMC

6. In order for my client to meaningfully exercise his rights and privileges provided to crime victims by statute, regulation, and case law, I request that the Government provide to me on behalf of my client copies of the following:

a. Charge sheet in the subject case;

b. Motions with attachments that involve my client's privileges relating to M.R.E 412, 513, and 514;

c. Statements made by my client in connection with the investigation of the case, including all sworn and unsworn statements made to Naval Criminal Investigative Service (NCIS) special agents, and other law enforcement investigators;

d. Statements, sworn and unsworn, made by any individuals interviewed by law enforcement investigators in connection with this case, including to NCIS special agents, that involve observations or opinions regarding victim sexual behavior or predisposition as defined by M.R.E. 412;

e. Any permissive authorization for search and seizure pertaining to evidence seized from my client, and related evidence custody documents; and

f. Article 32 Investigating Officer's report with relevant attachments and/or appendices.

8. I can be reached at commercial: [redacted]

Distribution List:

OIC, LSST
SJA, 1st MAW
STC
SDC
NCIS
SARC

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ATTACHMENT G

Freedom of Information Act Request (5 U.S.C. 552)

Print Form

Date: 2014 04 11

I _____ request that a copy of the following document(s) be provided to me:
Print name

Military Police Report	☒	Family Services	☐
Vehicle Accident Report	☐	Counseling Services	☐
CID Report	☐	Family Advocacy Progam	☐
Contract Number	☐	Solicitation Number	☐
Other	☐	_____	

Date of incident: 2014 04 03

Be specific in describing the records you are requesting:

I respectfully request a copy of PMO Report #. I specifically request a copy of the entire report, the complete narrative and enclosures 1-15. The reporting officials were Officer Chamberlain and Sgt Porquezz. The incident occurred on base on 3 April 2014.

I am willing to pay fees for this request up to a maximum of _____ . If you estimate that fees will exceed this amount, please inform me first.

Sincerly,

_____
Sign

Name/Address to mail requested documents to:

*if this address is to someone other than yourself, please give this agency your consent to release the requested documents to another individual.

Regional Victims' Legal Counsel-West
Marine Corps Installations West
Box 555031
Camp Pendleton, CA 92055-5031

Telephone number where I can be reached at: _____

PRIVACY ACT STATEMENT

Under the AUTHORITY 5 U S C. 552(a) and E O 9397 (SSN), this form is for OFFICIAL USE ONLY for the PURPOSE to track, process, and coordinate individual requests for access and amendment of personal records; to process appeals on denials of requests for access or amendment to personal records, to compile information for reports, and to ensure timely response to requestors. In addition to those disclosures generally permitted under 5 U S C 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a ROUTINE USE pursuant to 5 U S C 552 a(b)(3) to individuals who file FOIA requests for access to information on who has made FOIA requests and/or what is being requested under FOIA. DISCLOSURE is MANDATORY

REPORTING REQUIREMENT DD-5720-25 ARAD

MCIEAST-MCB CAMLEJ FREEDOM OF INFORMATION ACT REQUEST FORM

PRIVACY ACT STATEMENT

Information contained on this form is maintained under the Systems of Records Notice NM05720-1 FOIA Request/Appeal Files and Tracking System (April 2, 2008, 73 FR 17961) 5 U.S.C. 552, the Freedom of Information Act, as amended. **AUTHORITY:** 10 U.S.C. 5013, Secretary of the Navy; 10 U. S.C. 5041, Headquarters, Marine Corps; E.O. 9397 (SSN); and Secretary of the Navy Instruction 5720.42F, Department of the Navy Freedom of Information Act Program. **PRINCIPLE**: Individuals who request access to information under the provisions of the Freedom of Information Act (FOIA) or make an appeal under the FOIA. **PURPOSE:** To track, process, and coordinate individual requests for access and amendment of personal records; to process appeals on denials of requests for access or amendment to personal records; to compile information for reports, and to ensure timely response to requesters. **ROUTINE USE**: In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as pursuant to 5 U.S.C. 552a(b)(3). **DISCLOSURE: MANDATORY** for computer matching.

Commanding General
Attn: G-1 (FOIA Coordinator)
Marine Corps Installations East-Marine Corps Base Camp Lejeune
PSC Box 20005
Camp Lejeune, NC 28542-0005

Date REQUESTER completed this form:
04 Jun 14

☒ **FREEDOM OF INFORMATION ACT (FOIA)** (Attorney/Environmental/Investigations, Military Police Incident Reports pertaining to but not limited to: assault, breaking and entering, drugs, domestic assault, burglary and theft)

I am willing to pay the fees above $15.00 for the processing of my request in the amount of: $50.00

Case Information: (Print or type clearly)

PMO Records Indicate:

Information requested: (Describe information requested and where to locate the information) ☐ CLEOC (Electronic Report) ☒ All Documents

Completed command investigation and disposition of a sexual assault allegation in the case of [redacted]

Requester or Client's Name: Major R[redacted]C[redacted] SSN:

Names of all persons involved: [redacted]

Date of incident (DD MMM YY) : 09 Nov 13 Location of Incident: Bucharest, Romania

Requester Contact Information: (Print or type clearly)

Rank: Major Name: R[redacted]C[redacted]

Address (Barracks Personnel: Enter CO, BN, CMD) Regional Victims Legal Counsel, 66 Holcomb Blvd, Bldg 66

City: Camp Lejeune State: NC Zip Code: 28584

Do you want to pick up the report or have it mailed to you? ☒ PICK UP ☐ MAILED ☐ E-MAIL

R[redacted]C[redacted]
(Requester's Name (**PRINT**))

[redacted]
(Phone Number)

[redacted]
(Signature of Requester or agent)
(Signature required for records containing personal information)

"I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct".

AGENCY STAMP

PLEASE NOTE: This office has twenty (20) working days in which to provide a response to a FOIA Request. Depending on current workloads, information requested, dates and/or accidents etc...the response time may vary.

"FOR OFFICIAL USE ONLY - PRIVACY ACT SENSITIVE"

Any misuse or unauthorized release of personal information could result in both civil and criminal penalties.

You may return this request by faxing it back at (910) 451-1265 or e-mail to FOIA.MCIEAST@usmc.mil

Submit by Email

MCIEAST-MCB CAMLEJ/G-1/ADJ/5720.1/1 (6/12) PREVIOUS EDITIONS ARE OBSOLETE ADOBE 9.0

Freedom of Information Act/Privacy Act Request for Records and Authorization for Release

Privacy Act Advisement
Requesting personal information which includes your Social Security Number is authorized by 5 USC § 552a (Privacy Act of 1974). Providing all or part of this information is voluntary. However, without it, this agency may not be able to identify your records. Information provided herein is used to identify and retrieve records pertaining to you, and protect the privacy of individuals on whom this agency maintains records. This information is retained in our files and may be released to other agencies for official purposes.

FOIA/PA Request

I, _____, hereby request a copy of records pertaining to me maintained by Naval Criminal Investigative Service (NCIS), including criminal investigations in which I am a named victim, witness, or suspect.

Identifying information is provided as follows:

Full Name: _____

Other Names Used: _____

Date of Birth: _____ Place of Birth: _____

I authorize NCIS to release these records to my Victims' Legal Counsel, CDR C[redacted] M. S[redacted], JAGC, USN. Please mail responsive documents to:

CDR C[redacted] M. S[redacted], JAGC, USN
1221 Bellinger Blvd, Bldg U-111
Naval Station Norfolk, VA 23511-2311
Phone Number: 757-445-6472
Email: [redacted]

"I declare under penalty of perjury under the laws of the United States of America that the foregoing information (concerning my identity) is true and correct."

_____ _____
Signature Date

NCISHQ
ATTN: FOIA (Code 00LJF)
27130 TELEGRAPH ROAD
QUANTICO, VA 22134 FOIA

FOIA EMAIL: ncisfoia@navy.mil
FAX #: (571) 305-9867

ATTACHMENT H

DEPARTMENT OF THE NAVY
HEADQUARTERS
NAVAL CRIMINAL INVESTIGATIVE SERVICE
27130 TELEGRAPH ROAD
QUANTICO VA 22134-2253

5270 2014-007059
SER00LJF/14U1456
JUL 14 2014

Maj R[redacted] C[redacted] USMC
Regional Victims Legal Counsel
66 Holcomb Boulevard, Bldg. 66
Camp Lejeune, NC 28584

Dear Major C[redacted]:

This responds to your June 4, 2014 Freedom of Information Act (FOIA) request seeking information pertaining to the investigation and disposition of a sexual assault involving [redacted] Your request was forwarded to this Service by the U.S. Marine Corps 2D Marine Division, Camp Lejeune, NC and received on June 25, 2014.

A search of our database has resulted in locating one 2013 Naval Criminal Investigative Service (NCIS) investigative report considered responsive to your request, specifically cited as NCIS Case Control Number: 21NOV13-EUNA-0347-8SMA.

Please be advised that although the investigation has closed, it has not yet been entered into our electronic database, Records Imaging Management System, at Headquarters for retention.

In view of the above, we are unable to provide you a final determination on your request within the 20 working day time frame established by the FOIA (5 U.S.C. § 552 (as amended)). Accordingly, I find that we must invoke the ten additional working day extension provision established under 5 U.S.C. § 552(a)(6)(B)(iii) and Department of the Navy regulations published at 32 C.F.R. § 701.8(g)(2).

Once the investigative report is available to this office for processing, your request will be placed in our routine queue, and all releasable information will be provided to you in approximately 8 – 12 weeks.

If you wish, you may appeal this delay by writing to the Office of the Judge Advocate General (Code 14), 1322 Patterson Avenue, S.E., Suite 3000, Washington Navy Yard, D.C. 20374-5066. Your letter should state the reasons for your appeal and, along with a copy of this letter and a copy of your original request, must be postmarked (vice received) in the above office within the 60-day appeal limit. The letter of appeal and the envelope must both bear the notation: "Freedom of Information Act Appeal".

Your appeal rights will not be prejudiced by waiting until a substantive determination has been made regarding your request.

If you have any questions regarding this matter, please contact our office at (571) 305-9092 or via electronic mail at ncisfoia@navy.mil.

Sincerely,

[redacted]

C[redacted]M. C[redacted]
LT, JAGC, USN

ATTACHMENT I

[redacted]

From: [redacted]
Sent: Friday, July 25, 2014 19:15
To: [redacted]
Cc:
Subject:
Signed By:

Sir,

I apologize for the imprecise drafting of the defense requests. My understanding was that for the sake of efficiency we would request the IO to make an availability determination only as to the requests that were objectionable to the government.

We look forward to receiving the additional documents. If necessary, we'll forward an availability request to the IO after reviewing your formal response.

V/r,

[redacted]

-----Original Message-----
From: [redacted]
Sent: Friday, July 25, 2014 12:21 PM
To: [redacted]
Cc: [redacted]
Subject: RE: US v [redacted] - Pre-32 Discovery Requests

Yes, I will. I will be filing a response/status update later today once the BOI is finished.

I will let you know now that I believe you are conflating several concepts that are distinct under the RCMs:

- "discovery" is covered by RCM 701, which contemplates referral of charges prior to any right attaching

- "production of evidence" for a court-martial is covered by RCM 703, which also contemplates referral of charges

- "production of evidence" for an Article 32 investigation is covered by RCM 405 and contemplates a request to the investigating officer to make a determination about whether certain evidence is reasonably available

I intend to conduct analysis based upon the above, and also the overarching relevance standards, when acting upon the request you filed to me. I don't think the investigating officer is under any impression that you want him to make any rulings on availability of evidence at this time.

S/F, JLF

-----Original Message-----
From: [redacted]
Sent: Friday, July 25, 2014 9:16 AM
To: [redacted]
Cc: [redacted]
Subject: RE: US v [redacted] - Pre-32 Discovery Requests

Good morning Sir,

Is the government going to produce any of the discovery requested by the defense ahead of the Article 32? The majority is information currently on file with NCIS.

Are there objections to any of the requests?

V/r,

[redacted]

-----Original Message-----
From: [redacted]
Sent: Monday, July 21, 2014 1:39 PM
To: [redacted]
Cc: [redacted]
Subject: US v [redacted] - Pre-32 Discovery Requests

Good afternoon Sir,

Attached are the defense's pre-Article 32 discovery requests. Please be in touch with any questions. Thanks.

V/r,

[redacted]

[redacted]

From: [redacted]
Sent: Wednesday, October 08, 2014 20:25
To: [redacted]
Cc: [redacted]
Subject: FW: U.S. v. [redacted]
Attachments: U.S. v[redacted]eferred Charge Sheet dtd 22 Sept 14_Redacted.pdf
Signed By: [redacted]

[redacted]

Please find the requested discovery attached.

S/F

[redacted]
Trial Counsel
LSST - Kaneohe Bay
[redacted]

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PRIVACY ACT WARNING. This message may also contain information protected by the Privacy Act of 1974 and other law or regulation pertaining to the safeguarding of Personally-Identifiable Information (PII). Improper disclosure of the contents of this email may give rise to civil and/or criminal penalties.

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED *(First MI Last)*	2. EDIPI	3a. RANK/RATE	3b. PAY GRADE	4. BRANCH OF SERVICE
[redacted]	[redacted]	CPL	E-4	USMC

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. PEBD	b. EAS
[redacted]	[redacted]	

7. PAY PER MONTH			8. NATURE OF RESTRAINT	9. DATES IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL	NONE	
[redacted]	NONE	[redacted]		

10. CHARGE(S) AND SPECIFICATION(S)

CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 80

Specification: Attempted Larceny

In that Corporal R[redacted]H[redacted]id, on the island of Oahu, Hawaii, between on or about 1 January 2013 and on or about 1 July 2013, attempt to steal United States currency, of a value of less than $500, the property of another person.

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 112a

Specification 1: Wrongful Use

In that Corporal R[redacted]H[redacted]did, on the island of Oahu, Hawaii, between on or about 1 January 2014 and on or about 31 January 2014, wrongfully use cocaine.

Specification 2: Wrongful Use

In that Corporal R[redacted]H[redacted]did, on the island of Oahu, Hawaii, between on or about 1 February 2014 and on or about 16 February 2014, wrongfully use 3,4-methylenedioxymethamphetamine (MDMA), a schedule I controlled substance.

CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 121

Specification: Wrongful Appropriation

In that Corporal R[redacted]H[redacted]III did, on the island of Oahu, Hawaii, between on or about 1 January 2013 and on or about 1 July 2013, wrongfully appropriate a purse, of some value less than $500, the property of another person.

SEE SUPPLEMENTAL PAGE

III. PREFERRAL

11a. NAME OF ACCUSER	b. RANK/RATE	c. ORGANIZATION OF ACCUSER
[redacted]	LCpl	HQBN, MCBH, KANEOHE BAY, HI
d. SIGNATURE [redacted]		e. DATE 12 Sep 2014

AFFIDAVIT: The above named accuser personally appeared before me on 12 Sep 2014, and signed the foregoing charge(s) and specification(s) under oath that he is a person subject to the Uniform Code of Military Justice and that he either has personal knowledge of (or has investigated) the matters set forth below and that they are true to the best of his knowledge and belief.

[redacted]
TYPED NAME OF OFFICER

HQBN, MCBH, KANEOHE BAY, HI
ORGANIZATION OF OFFICER

CAPTAIN, U.S. MARINE CORPS
GRADE & SERVICE

TRIAL COUNSEL
OFFICIAL CAPACITY TO ADMINISTER OATHS
(See R.C.M. 307(b)—must be commissioned officer)

[redacted]
SIGNATURE

CHARGE IV: VIOLATION OF THE UCMJ, ARTICLE 128

Specification 1: Assault Consummated by a Battery

In that Corporal R[redacted] H[redacted] did, on the island of Oahu, Hawaii, on or about 16 February 2014, unlawfully:

a) pull Lance Corporal S[redacted]S. K[redacted]'s body onto his lap with his hands, and

b) kiss her on the mouth with his lips.

Specification 2: Assault Consummated by a Battery

In that Corporal R[redacted] H[redacted] did, on the island of Oahu, Hawaii, on or about 16 February 2014, unlawfully grab Lance Corporal S[redacted] S. K[redacted]'s arm with his hand.

PLEASE FILL OUT AND RETURN TO THE TRIAL SERVICES SECTION BY
<u>12 SEPTEMBER 2014</u>

<u>DO NOT STAPLE ANYTHING TO CHARGE SHEETS!!!!</u>
(TO INCLUDE THIS DOCUMENT)

<u>AFTER BLOCK 14 IS SIGNED AND DATED</u>
SERVE A COPY OF THE REFERRED CHARGE SHEET ON THE ACCUSED.

I [redacted] CERTIFY THAT ON
(Accused)

20140922 I RECEIVED A COPY OF MY CHARGE SHEET
(Date)

REFFERING ME TO TRIAL BY SPECIAL COURTS-MARTIAL.

[redacted]
WITNESS PRINT

[redacted]
ACCUSED SIGNATURE

[redacted]
WITNESS SIGN/DATE

IV. SERVICE OF PREFERRED CHARGES

12. On 17 SEP 14, I caused the Accused to be informed of the charge(s) against him and of the name(s) of the accuser(s) known to me. (See R.C.M. 308)

[redacted]
TYPED NAME OF IMMEDIATE COMMANDER

HQBN, MCBH, KANEOHE BAY, HI
ORGANIZATION OF IMMEDIATE COMMANDER

MAJOR, U.S. MARINE CORPS
GRADE & SERVICE

[redacted]
SIGNATURE

V. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1106 hours, 17 SEP 14 at HQBN, MCBH, KANEOHE BAY, HI
DESIGNATION OF COMMAND

[redacted]
TYPED NAME OF OFFICER

FOR THE COMMANDING OFFICER

MAJOR, U.S. MARINE CORPS
GRADE & SERVICE

OPERATIONS OFFICER
OFFICIAL CAPACITY OF OFFICER SIGNING

[redacted]
SIGNATURE

VI. REFERRAL OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
MCBH, KANEOHE BAY, HI	MARINE CORPS BASE HAWAII	SEP 17 2014

REFERRED FOR TRIAL TO THE **SPECIAL** COURT-MARTIAL CONVENED BY **SPCMCO 1-14 DATED 27 AUGUST 2014.**

SUBJECT TO THE FOLLOWING INSTRUCTIONS: **NONE.**

[redacted]
TYPED NAME OF OFFICER

COMMANDING OFFICER
OFFICIAL CAPACITY OF OFFICER SIGNING

COLONEL, U.S. MARINE CORPS
GRADE & SERVICE

[redacted]
SIGNATURE

VII. SERVICE OF REFERRED CHARGES

15. On , I (caused to be) served a copy hereof on (each of) the above named Accused(s).

[redacted]
TYPED NAME OF OFFICER

CAPTAIN, U.S. MARINE CORPS
GRADE & SERVICE

SIGNATURE

From: [redacted]
To: [redacted]
Cc: [redacted]
Subject: Re: M.R.E. 412 Motion
Date: Friday, July 25, 2014 18:09:15

[redacted]

[redacted]

Sent from my BlackBerry 10 smartphone on the verizon Wireless 4G LTE network.
From: [redacted]
Sent: Friday, July 25, 2014 5:33 PM
To: [redacted]
Cc: [redacted]
Subject: Re: M.R.E. 412 Motion

If the government wishes to voluntarily give [redacted], we will not object. We will not participate in providing defense information to a entity which is not a party in interest.
We define a party in interest as the United States and the Accused.

Regards,

[redacted]

[redacted]

Sent from my BlackBerry 10 smartphone on the verizon Wireless 4G LTE network.
From: [redacted]
Sent: Friday, July 25, 2014 5:07 PM
To: [redacted]
Cc: [redacted]
Subject: RE: M.R.E. 412 Motion

Good morning Gentlemen,

In order to appropriately reply to this motion, I require discovery. Specifically, I need to see the text messages referred to in Defense's Motion and I need to see the portion of the NCIS ROI which references an NJP my client supposedly received.

Without this information I cannot adequately craft a response to the Defense's Motion which would

protect my client's interests.

Please email me the requested documents and any other documents or attachments the defense intends to present as evidence in support of its motion or provide an explanation as to why they will not be produced.

If the documents will not be produced, I request the IO order they be produced to me so that I may adequately represent my client's interests.

V/r,

[redacted]

-----Original Message-----
From: [redacted]
Sent: Friday, July 25, 2014 5:30 AM
To: [redacted]
Subject: M.R.E. 412 Motion

Attached is the defense M.R.E. 412 motion for Article 32 purposes.

Regards,

[redacted]