

**DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY**

UNITED STATES

v.

██████████
18th Munitions Squadron (PACAF)
Kadena Air Base, Japan

)
)
) **VICTIM'S REQUEST TO COMPEL**
) **DEFENSE TO PROVIDE ITS MOTION TO**
) **ADMIT MRE 412 EVIDENCE TO VICTIM**
)
) **Date: 7 October 2013**
)

COMES NOW ██████████ by and through counsel, and files this request to compel the Defense to provide its motion to admit MRE 412 evidence to ██████████ and her counsel.

FACTS

1. A Special Victims' Counsel (SVC) has represented ██████████ beginning prior to the Article 32 hearing in this case. Defense has been on notice of this representation since that time.
2. On 28 September 2013, Defense provided SVC an MRE 412 Notice.
3. On 28 September 2013, Defense provided the Government with an MRE 412 Motion, but did not provide this motion to SVC.
4. Around noon on 1 October 2013, SVC submitted a Notice of Appearance to the Court, requesting informational copies of any motions relevant to ██████████ and her rights under the Military Rules of Evidence. Defense acknowledged receiving this request and understood that SVC was requesting any such motions.
5. During the early evening of 1 October 2013, SVC called Defense to inquire whether Defense was going to provide its MRE 412 Motion to SVC. Defense stated that it would not be providing the MRE 412 Motion to SVC and further stated it did not believe it had to share its theory of the case (presumably in the MRE 412 Motion) with SVC.

BURDEN

6. The burden of persuasion rests with the moving party. R.C.M. 905(c)(2)(A). The burden of proof is a preponderance of the evidence. R.C.M. 905(c)(1).

LAW

7. MRE 412(c) provides the procedures used to determine admissibility of MRE 412 evidence. MRE 412(c)(1)(B) provides that the moving party must serve the motion on the opposing party and the military judge and notify the alleged victim or representative.

8. MRE 412(c)(2) requires a judge to conduct a closed hearing where relevant evidence is offered and argument beyond the written motion is afforded. The victim is required to be given a reasonable chance to attend this hearing, to hear the evidence, to hear any arguments by both parties, and to “be heard.”

9. The right to “be heard” in a 412 hearing includes the right to have counsel present legal argument on your behalf, not just to be present as a witness. *LRM v. Kastenberg*, 72 M.J. 364, 370 (CAAF 2013). This concept is clear from statutory construction of MRE 412 as well as consistent with caselaw. *Id.*

10. The right to “be heard” is not absolute and can be reasonably limited by the judge. *Id.* at 371. In fact, a military judge can limit argument to what has been previously submitted in writing and can bar counsel from arguing in person in the hearing. *Id.*

ARGUMENT

11. Defense’s position is untenable. Relying on a strict constructionist, yet impractical, reading of MRE 412, Defense must only “notify” the alleged victim. MRE 412(c)(1)(B). In doing so, Defense has hidden the justification upon which it relies for admission of the evidence from the Victim.

12. Hiding this information is ultimately futile. Victim and counsel are afforded the opportunity to be present during an MRE 412 motion hearing. Victim and counsel will hear the defense’s argument during the hearing. Counsel, under *LRM v. Kastenberg* has a chance to make legal argument on behalf of Victim. Thus, the Defense’s unwillingness to provide its motion to the victim and counsel at the same time it provides it to the judge and government only serves to delay. Once Defense makes its argument, SVC would request time to consult with Victim and would potentially ask the Court for time to perform additional research tailored to the Defense argument for admittance.

13. Victim and counsel must know what is at issue in an MRE 412 motion hearing in order to properly prepare and in order not to waste the court’s time. A victim’s opportunity to be heard depends on the ability to prepare for the actual issues, as all other parties to the MRE 412 motion have. A victim’s counsel, with a judge’s permission, could stand up and make broad and specific arguments for each exception to MRE 412, but this is inefficient. This could easily be avoided by Defense providing a copy of its motion to SVC.

14. It is clear that the Court of Appeals of the Armed Forces intended for SVCs to receive and respond to 412 motions. If it was not contemplated, the court’s statement that a judge “may apply reasonable limitations, including restricting the victim...and their counsel to written

submissions if reasonable to do so in context” would be meaningless. *Kastenberg* at 371. There is no guarantee an SVC will be allowed to argue during the motion. Facing this, the only fair way to be heard is to have a meaningful chance to respond to the Defense’s motion, not just its notice. In order to do that, SVC and victim must be provided with that motion.

15. The right to “be heard” or make a legal argument is meaningless if you do not know what position to argue. Victim and counsel are not asking for Defense’s trial strategy. We are asking for the Defense’s reasoning for how the proposed evidence fits an exception to MRE 412 general rule of inadmissibility.

CONCLUSION

WHEREFORE [REDACTED] respectfully requests this Honorable Court compel Defense to provide a copy of its MRE 412 motion and any accompanying documents to [REDACTED] through her SVC.

Respectfully submitted on this 7 October 2013.

10/7/2013

X	
[REDACTED] Capt, USAF	
Special Victims' Counsel	
Signed by: [REDACTED]	

CERTIFICATE OF SERVICE

I certify that I delivered an electronic copy of the foregoing response to the Defense Counsel and the Military Judge, via email, on 7 October 2013.

10/7/2013

X

[Redacted Signature]

[Redacted] Capt, USAF
Special Victims' Counsel
Signed by: [Redacted]