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Rule 412. Sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions.*

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subsection (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b) and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil. R. Evid. 403.

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

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Rule 412 Nonconsensual sexual offenses; relevance of victim's past behavior

Rule 412 is taken from the Federal Rules. Although substantially similar in substantive scope to Federal Rule of Evidence 412, the application of the Rule has been somewhat broadened and the procedural aspects of the Federal Rule have been modified to adapt them to military practice.

Rule 412 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. In so doing, it recognizes that the prior rule, which it replaces, often yields evidence of at best minimal probative value with great potential for distraction and incidentally discourages both the reporting and prosecution of many sexual assaults. In replacing the unusually extensive rule found in Para. 153 *b* (2)(b), MCM, 1969 (Rev.), which permits evidence of the victim's "unchaste" character regardless of whether he or she has testified, the Rule will significantly change prior military practice and will restrict defense evidence. The Rule recognizes, however, in Rule 412(b)(1), the fundamental right of the defense under the Fifth Amendment of the Constitution of the United States to present relevant defense evidence by admitting evidence that is "constitutionally required to be admitted." Further, it is the Committee's intent that the Rule not be interpreted as a rule of absolute privilege. Evidence that is constitutionally required to be admitted on behalf of the defense remains admissible notwithstanding the absence of express authorization in Rule 412(a). It is unclear whether reputation or opinion evidence in this area will rise to a level of constitutional magnitude, and great care should be taken with respect to such evidence.

Rule 412 applies to a "nonconsensual sexual offense" rather than only to "rape or assault with intent to commit rape" as prescribed by the Federal Rule. The definition of "nonconsensual sexual offense" is set forth in Rule 412(e) and "includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses." This modification to the Federal Rule resulted from a desire to apply the social policies behind the Federal Rule to the unique military environment. Military life requires that large numbers of young men and women live and work together in close quarters which are often highly isolated. The deterrence of sexual offenses in such circumstances is critical to military efficiency. There is thus no justification for limiting the scope of the Rule, intended to protect human dignity and to ultimately encourage the reporting and prosecution of sexual offenses, only to rape and/or assault with intent to commit rape.

Rule 412(a) generally prohibits reputation or opinion evidence of an alleged victim of a nonconsensual sexual offense.

Rule 412(b)(1) recognizes that evidence of a victim's past sexual behavior may be constitutionally required to be admitted. Although there are a number of circumstances in which this language may be applicable, *see,* S. Saltzburg & K. Redden, FEDERAL RULES OF EVIDENCE MANUAL 92–93 (2d ed. Supp. 1979) (giving example of potential constitutional problems offered by the American Civil Liberties Union during the House hearings on Rule 412), one may be of particular interest. If an individual has contracted for the sexual services of a prostitute and subsequent to the performance of the act the prostitute demands increased payment on pain of claiming rape, for example, the past history of that person will likely be constitutionally required to be admitted in a subsequent prosecution in which the defense claims consent to the extent that such history is relevant and otherwise admissible to corroborate the defense position. Absent such peculiar circumstances, however, the past sexual behavior of the alleged victim, not within the scope of Rule 412(b)(2), is unlikely to be admissible regardless of the past sexual history. The mere fact that an individual is a prostitute is not normally admissible under Rule 412.

Evidence of past false complaints of sexual offenses by an alleged victim of a sexual offense is not within the scope of this rule and is not objectionable when otherwise admissible.

Rule 412(c) provides the procedural mechanism by which evidence of past sexual behavior of a victim may be offered. The Rule has been substantially modified from the Federal Rule in order to adapt it to military practice. The requirement that notice be given not later than fifteen days before trial has been deleted as being impracticable in view of the necessity for speedy disposition of military cases. For similar reasons, the requirement for a written motion has been omitted in favor of an offer of proof, which could, of course, be made in writing, at the discretion of the military judge. Reference to hearings in chambers has been deleted as inapplicable; a hearing under Article 39(a), which may be without spectators, has been substituted. The propriety of holding a hearing without spectators is dependent upon its constitutionality which is in turn dependent upon the facts of any specific case.

Although Rule 412 is not *per se* applicable to such pretrial procedures as Article 32 and Court of Inquiry hearings, it may be applicable via Rule 303 and Article 31(c). *See* the Analysis to Rule 303.

It should be noted as a matter related to Rule 412 that the 1969 Manual's prohibition in Para. 153 *a* of convictions for sexual offenses that rest on the uncorroborated testimony of the alleged victim has been deleted. Similarly, an express hearsay exception for fresh complaint has been deleted as being unnecessary. Consequently, evidence of fresh complaint will be admissible under the Military Rule only to the extent that it is either nonhearsay, *see* Rule 801(d)(1)(B), or fits within an exception to the hearsay rule. *See* subdivisions (1), (2), (3), (4), and (24) of Rule 803.

1993 Amendment. R.C.M. 405(i) and Mil. R. Evid. 1101(d) were amended to make the provisions of Rule 412 applicable at pretrial investigations. Congress intended to protect the victims of nonconsensual sex crimes at preliminary hearings as well as at trial when it passed Fed. R. Evid. 412. *See* Criminal Justice Subcommittee of the House Judiciary Committee Report, 94th Cong., 2d Session, July 1976.

1998 Amendment. The revisions to Rule 412 reflect changes made to Federal Rule of Evidence 412 by section 40141 of the Violent Crime Control and Law Enforcement Act of 1994, Pub L. No. 103-322, 108 Stat. 1796, 1918-19 (1994). The purpose of the amendments is to safeguard the alleged victim against the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.

The terminology "alleged victim" is used because there will

frequently be a factual dispute as to whether the sexual misconduct occurred. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct."

The term "sexual predisposition" is added to Rule 412 to conform military practice to changes made to the Federal Rule. The purpose of this change is to exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. It is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the accused believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless an exception under (b)(1) is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or lifestyle is inadmissible.

In drafting Rule 412, references to civil proceedings were deleted, as these are irrelevant to courts-martial practice. Otherwise, changes in procedure made to the Federal Rule were incorporated, but tailored to military practice. The Military Rule adopts a 5-day notice period, instead of the 14-day period specified in the Federal Rule. Additionally, the military judge, for good cause shown, may require a different time for such notice or permit notice during trial. The 5-day period preserves the intent of the Federal Rule that an alleged victim receive timely notice of any attempt to offer evidence protected by Rule 412, however, given the relatively short time period between referral and trial, the 5-day period is deemed more compatible with courts-martial practice.

Similarly, a closed hearing was substituted for the in camera hearing required by the Federal Rule. Given the nature of the in camera procedure used in Military Rule of Evidence 505(i)(4), and that an *in camera* hearing in the district courts more closely resembles a closed hearing conducted pursuant to Article 39(a), the latter was adopted as better suited to trial by courts-martial. Any alleged victim is afforded a reasonable opportunity to attend and be heard at the closed Article 39(a) hearing. The closed hearing, combined with the new requirement to seal the motion, related papers, and the record of the hearing, fully protects an alleged victim against invasion of privacy and potential embarrassment.

2007 Amendment: This amendment is intended to aid practitioners in applying the balancing test of Mil. R. Evid. 412. Specifically, the amendment clarifies: (1) that under Mil. R. Evid. 412, the evidence must be relevant for one of the purposes highlighted in subdivision (b); (2) that in conducting the balancing test, the inquiry is whether the probative value of the evidence outweighs the danger of unfair prejudice to the victim's privacy; and (3) that even if the evidence is admissible under Mil. R. Evid. 412, it may still be excluded under Mil. R. Evid. 403. The proposed changes highlight current practice. *See U.S. v. Banker*, 60 M.J. 216, 223 (2004) ("It would be illogical if the judge were to evaluate evidence 'offered by the accused' for unfair prejudice to the accused. Rather, in the context of this rape shield statute, the prejudice in question is, in part, that to the privacy interests of the alleged victim). *See also Sanchez*, 44 M.J. at 178 ("[I]n determining admissibility there must be a weighing of the probative value of the evidence against the interest of shielding the victim's privacy").

Moreover, the amendment clarifies that Mil. R. Evid. 412 applies in all cases involving a sexual offense wherein the person against whom the evidence is offered can reasonably be characterized as a "victim of the alleged sexual offense." Thus, the rule applies to: "consensual sexual offense," "nonconsensual sexual offenses;" sexual offenses specifically proscribed under the U.C.M.J., e.g., rape, aggravated sexual assault, etc.; those federal sexual offenses DoD is able to prosecute under clause 3 of Article 134, U.C.M.J., e.g., 18 U.S.C. § 2252A (possession of child pornography); and state sexual offenses DoD is able to assimilate under the Federal Assimilative Crimes Act (18 U.S.C. § 13).

In 2011, the Court of Appeals for the Armed Forces expressed concern with the constitutionality of the balancing test from Rule 412(c)(3) as amended in 2007. *See United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011), *United States v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011).