

Subj: WRITTEN STATEMENT OF CDR STEPHEN C. REYES, JAGC, USN FOR THE
JUDICIAL PROCEEDINGS PANEL

Members of the Judicial Proceedings Panel, I would like to thank you for the opportunity to present comments on the application of Military Rules of Evidence 412 and 513 within the Navy's practice. I am the Director of the Navy's Defense Counsel Assistance Program (DCAP). And as the Director, I am responsible for providing training and consultation services to all of the Navy's core defense counsel stationed throughout the world. In exercising my duties, I have gained valuable insight from counsel throughout a diverse geographic area. I believe that MRE 412 and 513 provide robust protections to the victim's privacy interest, while at the same time striking the appropriate balance with the defendant's constitutional right to Due Process.

As written, M.R.E. 412 and 513 lists safeguards to the victim's interest. First, the rules are by design exclusionary rules that prevent the admission of specific types of evidence. Thus, the defense always has the burden to convince the military judge that an exception applies. Second, despite the constitutional preference for a public trial, these hearing are closed to the public so as to avoid embarrassment or harassment of the victim, and the records of the hearings are sealed.

Further, the protections provided by these rules are evinced by the daily practice in the Navy. Military judges consistently hold trial defense counsel to its burden. In short, a talismanic reference to the relevancy of the evidence is not enough to either introduce the 412 evidence or obtain the victim's medical records. For 513 evidence, the defense must meet the factors set out in *United States v. Klemick*, 65 M.J. 576 (N-M. Ct. Crim. App. 2006), in order for the military judge to conduct an *in camera* review. Under *Klemick*, the defense must provide a specific factual basis for the information; demonstrate that the information is not cumulative; and that they have made reasonable efforts to obtain the material from another source. It is not the practice in the Navy for the military judge to obtain the medical records prior to the defense overcoming this burden. And even if some evidence was admitted under 412 or 513, the military judge has and often exercises discretion to limit the scope of examination or the extent that counsel can introduce such evidence. In other words, even when evidence is admitted the military judge can fashion appropriate limitations ensuring that the defendant's right to a fair trial is balanced with the victim's interest.

But most importantly, the victim is assigned and represented by a competent and trained judge advocate who has a professional obligation to ensure that the victim is provided effective representation. This point cannot be understated. The addition of a lawyer advocate into the proceeding fundamentally alters the trial's landscape. By way of analogy, in its right to counsel cases, the Supreme Court repeatedly emphasized the role that the "guiding hand of counsel" plays in the assertion of a right. Cf. *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v.*

Wainwright, 372 U.S. 335 (1963). Here, the government has provided the victim with this guiding hand. And the Special Victim's Counsel (SVC), is not without an arsenal. Specifically, the SVC is granted standing to present both written and oral argument at the 412 and 513 hearing. Further, as highlighted by the famous case *LRM v. Kastenberg*, 72 M.J. 364 (2013), the SVC may seek an extraordinary writ to the service court or to the Court of Appeals for the Armed Forces for appropriate redress.

Finally, I would like to respond to the comments made about the CAAF's opinion in *United States v. Gaddis*, 70 M.J. 248 (2011) which dealt with the constitutional exception requirement under M.R.E. 412 and the victim's privacy interest. First, contrary to the testimony, *Gaddis* is not *dicta*. In practice, military judges are applying its holding when analyzing M.R.E. 412 evidence. Nonetheless, this does not entail that the victim's interests are thrown aside. As noted above, as applied the rule provides significant protections: the judge must still consider the danger of the unfair prejudice in admitting the evidence and if the evidence was admitted the military judge can limit the scope of examination. Second, in *Gaddis*, the court upheld the military judge's exclusion of the 412 evidence. And third, the resounding principle that *Gaddis* recognized is that the victim's privacy interest cannot override the defendant's constitutional right. Although this principle may be anathema to the opinion of others, I find it to be a correct interpretation given the fact that it is the accused that is on trial and must defend against the allegations. As stated during the hearing, in our system of government there is a hierarchy of rights. And in that hierarchy, the Constitution prevails above all.

Thank you for the time and opportunity to communicate with the panel.

Very Respectfully,
/s
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