

24 October 2014

Madam Chair and Panel Members,

Thank you for allowing me the opportunity to follow up with written remarks for your consideration. On 10 October 2014, I listened to nearly all of the individuals who testified – many of who do not practice within the military justice system and some who have only limited experience with the military justice process. Throughout the day, I heard many misstatements about how Article 120 allegations are handled throughout the court-martial process. I would like to start by encouraging you to actually observe an entire court-martial with charges in violation of Article 120. I am confident you will find that MRE 513 has not been rendered meaningless and that military judges do an excellent job of balancing the personal privacy interests of the alleged victim with the constitutional rights of the accused.

Madam Chair, you mentioned multiple times how concerned you were with the Court of Appeals for the Armed Forces' finding in *US v. Ellerbrock*. As every trial counsel and defense counsel mentioned, while the holding recognized the important stakes that an accused faces, the opinion has not changed the way military judges safeguard protected information. In my opinion, that one court decision is not a sufficient reason to change a rule of evidence that is working.

Mr. Stone commented that mistake of fact as to consent should no longer be a defense and gave an example of an alleged victim saying no several times before saying yes. In my experience, this is not how mistake of fact as to consent is applied in a court-martial. In fact, our instructions state mere acquiescence does not equate to consent. Critically, before the mistake of fact defense as to consent even applies, the court-martial members must determine that the accused (1) actually was mistaken that the other person was consenting, and (2) this mistake was *reasonable*. In determining whether the mistake was reasonable, the members are instructed that they must view the facts and circumstances from the perspective of a sober individual. In other words, the standard that applies is what an ordinary, prudent, sober person would have believed under all of the circumstances. This can be a very difficult standard for the defense to meet, but it is a defense that ensures that the accused receives a fair trial.

In July, I defended an Airman against an allegation of sexual assault (charged under an incapacitation theory). This case illustrates how the reasonable mistake of fact defense is applied in the military justice system and highlights its critical importance. The case was initiated after the alleged victim called and texted my client, and asked him to come over to her dormitory room for a "threesome" with her suitemate. He drove to her dorm room. By all accounts, when he arrived the alleged victim was happy to see him. The witness testimony ranged from observing my client and this woman kissing and hugging all the way to taking each other's clothes off. The alleged victim had consumed alcohol that evening, but not in front of my client. Everyone else left shortly after he arrived. The accused and the alleged victim engaged in what he believed to be consensual sex – something they had discussed multiple times before. In my view, it is absolutely critical that a reasonable mistake of fact as to consent remain as a defense. Under the facts in this case, my client reasonably believed the sex was consensual based on their previous conversations to engage in sex, her calling him to come over, her kissing him when he arrived, her hugging him, and her taking off his clothes. It is most certainly relevant that he believed she was consenting.

At the Article 32 hearing, a military judge, sitting as the investigating officer recommended the case not be referred to trial. Nevertheless, it was. My client, whose life had been placed on hold for a year, was acquitted at trial by a military judge within 30 minutes.

This case also illustrates how MRE 412 operates. Specifically, witnesses observed the alleged victim and her female suitemate kissing each other throughout the evening. I was not permitted question any witness about this conduct during the trial. The alleged victim had also made accusations against multiple other Airmen because she was told by a psychologist that, if she consumed alcohol and could not remember what happened, it was not a consensual act. I wanted to go into some of these accusations because I think her belief that if she had consumed any alcohol at all prior to engaging in a sexual act she was unable to consent would have been relevant to the fact finder. In my opinion, this evidence should have been admissible to show her bias.

Further, in this particular case, (and without providing too much detail), the alleged victim had sought mental health treatment in the aftermath of making these allegations. Although I sought these records as part of my preparation, the military judge declined to provide them to the defense. I believe this demonstrates that MRE 513 is not being rendered meaningless in Air Force courts-martial.

My client in this case is a decorated combat veteran, with two bronze stars, one with valor, and following his acquittal has returned to Afghanistan and is once again putting his life on the line for our freedoms. I write about this case as an example of how mistake of fact as to consent, MRE 513, and MRE 412 actually play out in a trial. This case is also a good reminder that simply being accused of a crime does not make the accused guilty of that crime. Not every accused is guilty—Airmen are legitimately and justifiably acquitted of these offenses every week.

In conclusion, I do not believe MRE 412 and 513 are broken, and neither is their application.

Thank you.

A handwritten signature in black ink that reads "Andrea M. Hall". The signature is written in a cursive, flowing style.

ANDREA M. HALL, Maj, USAF  
Senior Defense Counsel