IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

TORRENCE A. ROBINSON,
Specialist (E-4),
United States Army,
Appellant.

USCA Dkt. No. 17-0231/AR

Crim. App. Dkt. No. 20140785

BRIEF OF *AMICUS CURIAE* PROTECT OUR DEFENDERS IN SUPPORT OF APPELLEE'S BRIEF

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Preamble

Protect Our Defenders files this *amicus* brief in support of the Appellee United States' Brief in the first granted issue: Whether the military judge erred by failing to admit constitutionally required evidence under Mil. R. Evid. 412(b)(1)(C).

Both Appellant and Appellee in their respective briefs cite to *dictum* from *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). Both parties accept the *dictum* as the correct statement of the law, but each party argues that application of the facts to the law results in its/his side winning. Protect Our Defenders respectfully asks this Court to disavow the *Gaddis dictum*, and to apply the correct law, Mil. R. Evid. 412 as it is written, to the facts in this case.

In *Gaddis*, this Court specifically held that that the Mil. R. Evid. 412(c)(3) balancing test was neither facially unconstitutional nor unconstitutional as applied. *Id.* at 250, 254,257.[1] The *Gaddis dictum* is this Court's statement that the Mil. R.

[1] This Court stated, "We hold that the balancing test in [Mil. R. Evid. 412(c)(3)] is not facially unconstitutional." *Gaddis*, 70 M.J. at 250; *see also id.* at 254. This Court fully analyzed the law and applied the facts presented to conclude that "the contested evidence was not constitutionally required, does not qualify for the M.R.E. 412(b)(1)(C) exception, and was properly excluded under M.R.E. 412." *Id.* At 257.

Evid. 413 balancing test could be unconstitutional in other circumstances not then before the Court. *Id.* at 253.

At least twenty-one service courts of criminal appeals' opinions incorrectly hold that this Court eliminated the victim's privacy balancing test. These cases demonstrate that judges throughout the military justice system are not applying Mil. R. Evid. 412 as written even though there is no binding precedent from this Court excusing faithful application of the rule. The *Gaddis dictum* applied by the judges is denying victims of military sexual assault the privacy protection Mil. R. Evid. 412 was intended to provide.

Protect Our Defenders respectfully requests this Court apply Mil. R. Evid. 412 as it is written to the facts of this case, and to reject Appellant's argument that the military judge erred by failing to admit constitutionally required evidence.

Issue Presented

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO ADMIT CONSTITUTIONALLY REQUIRED EVIDENCE UNDER MILITARY RULE OF EVIDENCE 412(b)(1)(C).

Statement of Protect Our Defenders' Interest

Protect Our Defender's honors, supports, and gives voice to the brave men and women in uniform who have been raped, assaulted or harassed by fellow service members. Military victims of sexual assault have been deeply affected by

this Court's *dictum* in *Gaddis*, and Protect Our Defenders offers case law and analysis that is not offered by the parties.

SUMMARY OF ARGUMENT

Protect Our Defenders provides a history of Mil. R. Evid. 412 both before and after *Gaddis*, and compares the military courts' holdings to the holdings in state and federal courts. While the *Gaddis* opinion states in *dictum* that the Mil. R. Evid. 412(c)(3) balancing test could be unconstitutional, federal and states courts throughout the country require exactly the balancing test that gave this Court concern. No court, outside the military, has ever held that a judge may not consider a victim's privacy. While some courts have held that a victim's privacy interest did not outweigh the probative value of the evidence in a particular case, no court has rejected such a balancing test.

A victim's privacy is a legitimate governmental interest.

In explaining its *dictum* in *Gaddis*, this Court demonstrated a fundamental misunderstanding of the "constitutionally required" exception of Mil. R. Evid. 412(b)(1)(C). It concludes evidence is "constitutionally required" before conducting the Mil. R. Evid. 412(c)(3) balancing test.[2] The correct approach is to

[2] The logic is that if the evidence is "constitutionally required," then no subsequent balancing test may preclude it. *Gaddis*, 70 M.J. at 250. This logic presumes the evidence is "constitutionally required" without explaining how to arrive at this presumption.

use the Mil. R. Evid. 412(c)(3) balancing test to determine whether the evidence is "constitutionally required." This is the approach used by federal courts.

This Court, as an Article I court, cannot declare Mil. R. Evid. 412 unconstitutional absent clear direction from the Supreme Court.

ARGUMENT

I. HISTORY OF CONSIDERATION OF VICTIM'S PRIVACY IN MILITARY COURTS.

a. Pre-*Gaddis*.

In 2007, the President changed the language of Mil. R. Evid. 412 so that it expressly required the military judge to balance the probative value of the evidence against the victim's privacy. This 2007 amendment was not a seismic change in the law, but rather reflected existing military law as expressed by this Court since at least 1996. *United States v. Sanchez*, 44 M.J. 174, 178 (C.A.A.F. 1996) ("[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."). This Court in *Sanchez* quoted *Michigan v. Lucas*, 500 U.S. 145, 149 (1991), in which the Supreme Court held that a rape shield rule that prevents a defendant from presenting relevant evidence is constitutional.

In 2004, this Court again held that the accused's right to present evidence may "bow to other legitimate interests in the criminal trial process." *United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004) (again quoting *Lucas*, 500 U.S. at

149). In *Banker*, this Court provided a logical and suitable framework for determining how to balance the constitutional rights of the accused against the privacy rights of the victim.

After the 2007 amendments to Mil. R. Evid. 412, this Court continued to require the military judge to consider the victim's privacy. *See United States v. Roberts*, 69 M.J. 23 (C.A.A.F. 2010) ("[I]f the military judge determines the evidence is relevant and material, he performs the M.R.E. 412(b)(3) balancing test (whether the probative value of the evidence outweighs the danger of prejudice to the victim's privacy) to determine whether the evidence is favorable to the accused's defense.").

There has never been a federal or state court that has held that considering a victim's privacy is unconstitutional. There has also been no federal or state case undermining the United States Supreme Court's holding in *Lucas* that protecting sexual assault victims is a legitimate state interest. In fact, as discussed below in Section II, every court that has considered this specific issue, including the United States Supreme Court, has found that a victim's privacy is a legitimate governmental interest.

b. *Gaddis.*

Despite their unanimous and unequivocal decision in *Roberts*, only a year later the same five judges of this Court decided *United States v. Gaddis*, 70 M.J.

248 (C.A.A.F. 2011). This Court held in *Gaddis* that the Mil. R. Evid. 412 (c)(3) was "not facially unconstitutional" and was not unconstitutional under the facts presented in *Gaddis*. *Gaddis*, 70 M.J. at 250, 254, 257. Nevertheless, this Court proceeded in *dictum* to provide its opinion about the constitutionality of the Mil. R. Evid. 412 (c)(3) balancing test under other facts and potential scenarios that were not before the Court.

The *Gaddis dictum* states, "If after application of M.R.E. 403 factors,[3] the military judge determines that the probative value of the proffered evidence outweighs the danger of unfair prejudice, it is admissible no matter how embarrassing it may be to the alleged victim." *Gaddis*, 70 M.J. at 256.

c. Post-*Gaddis*.

Since Mil. R. Evid. 403 is the only standard to be considered under *Gaddis dictum*, a Mil. R. Evid. 412 motion has in effect become a Mil. R. Evid. 403 motion. Judges throughout the military justice system are following *Gaddis* and are not giving any consideration to victims' privacy.

At the service courts of criminal appeals there are twenty-one cases where the courts state or imply that military judges may not consider a victim's privacy

[3] It is unclear why the Court accepts applying the Mil. R. Evid. 403 balancing test to "constitutionally required" evidence but not the Mil. R. Evid. 412(c)(3) balancing test even though the Mil. R. Evid. 412 balancing test instructs the judge to apply the Mil. R. Evid. 403 test after the Mil. R. Evid. 412 test. Chief Judge Effron in his concurrence correctly ordered the test, but he applied the "constitutionally required" test after both the Mil. R. Evid. 403 and 412 tests. *Gaddis*, at 259. As discussed below, state and federal case law makes it clear that rape shield rules' balancing tests are used to determine whether the evidence is "constitutionally required" and is not a separate test applied afterward.

despite the explicit requirement in Mil. R. Evid. 412(c)(3). In twelve cases, the opinions state "as clarified by *Gaddis.*" *United States v. Thompson*, 2017 CCA LEXIS 398 (N-M. Ct. Crim. App. June 13, 2017); *United States v. Anderson*, 2017 CCA LEXIS 383 (A.F. Ct. Crim. App. May 31, 2017); *United States v. Carpenter*, 2017 CCA LEXIS 273 (A.F. Ct. Crim. App. Apr. 21, 2017); *United States v. Bishop*, 2017 CCA LEXIS 71 (A.F. Ct .Crim. App. Feb. 2, 2017); *See also United States v. Davis*, 2016 CCA LEXIS 589 (A. Ct. Crim. App. Sept. 29, 2016); *United States v. Berger*, 2016 CCA LEXIS 322 (N-M. Ct. Crim. App. May 26, 2016); *United States v. Lopez*, 2016 CCA LEXIS 113 (N-M. Ct. Crim. App. Feb. 29, 2016); *United States v. Fry*, 2016 CCA LEXIS 72 (A.F. Ct. Crim. App. Feb. 4, 2016); *United States v. Clarke*, 2015 CCA LEXIS 533 (N-M. Ct. Crim. App. Nov. 30, 2015); *United States v. Villanueva*, 2015 CCA LEXIS 90 (N-M. Ct. Crim. App. Mar. 19, 2015); *United States v. Averell*, 2014 CCA LEXIS 841 (N-M. Ct. Crim. App. Nov. 6, 2014); *United States v. Perry*, 2012 CCA LEXIS 288 (N-M. Ct. Crim. App. July 31, 2012).

In four cases, the service courts apply a *per se* prohibition on considering a victim's privacy. *United States v. Sholtes*, 2017 CCA LEXIS 223 (N-M. Ct. Crim. App. Jan. 18, 2017) (describes the *Gaddis dictum* as this Court's holding); *United States v. Allen*, 2014 CCA LEXIS 216 (A.F. Ct. Crim. App. 2014) ("If the military judge, after applying Mil. R. Evid. 403, finds the probative value of the evidence outweighs the danger of unfair prejudice, 'it is admissible no matter how embarrassing it might be to the alleged victim.'") (quoting *Gaddis*, 70 M.J. at 256). *See also United States v. Hohenstein*, 2014 CCA LEXIS 179 (A.F. Ct. Crim. App.

Mar. 20, 2014); and *United States v. Evans*, 2013 CCA LEXIS 1087 (A.F. Ct. Crim. App. Dec. 3, 2013).

In another five cases, the courts refuse to consider the privacy of the victim as required by the rule. In *United States v. Lovett,* 2016 CCA LEXIS 276 (A. Ct. Crim. App. Apr. 29, 2016); *United States v. Barlow*, 2014 CCA LEXIS 166 (A.F. Ct. Crim. App. Mar. 13, 2014); and *United States v. Sousa*, 72 M.J. 643 (A.F. Ct. Crim. App. 2013), review denied, 73 M.J. 84 (C.A.A.F. 2013), the courts held that the "probative value of the evidence must be weighed against and outweigh the **ordinary countervailing interests**." (emphasis added).

In *United States v. Grimes*, 2014 CCA LEXIS 63 (A. Ct. Crim. App. Jan. 31, 2014), the court implied that consideration of the victim's privacy would be wrong, but found that the military judge did not consider privacy.

In *United States v. Lopez*, 2013 CCA LEXIS 603 (A. Ct. Crim. App. July 30, 2013), the court reversed a conviction for aggravated sexual assault because the military judge, during a court-martial held before the *Gaddis dictum,* carefully weighed the victim's privacy against the probative value of the evidence. The military judge, after weighing various pieces of evidence, ruled that some evidence was admissible while other evidence was not.

On October 19, 2011, the Joint Service Committee proposed changing Mil. R. Evid. 412 to eliminate any consideration of the victim's privacy from the balancing test. *See* Manual for Courts-Martial; Proposed Evidence Amendments,

76 Fed. Reg. 65062-65093 (Oct. 19, 2011). This proposed change and numerous other proposed changes were submitted to the President for signature in the fall of 2012. After Protect Our Defenders and other public commenters voiced opposition to the Mil. R. Evid. 412 changes, the President refused to sign the proposed executive order encompassing all the changes. The President made a deliberate decision that military judges shall continue to consider and respect victims' privacy. On May 15, 2013, the President signed the Executive Order, 2013 Amendments to the Manual for Courts-Martial, in which Mil. R. Evid. 412(c)(3) remained unchanged and still requires consideration of the victim's privacy.

The Court must consider the public's perception of the fairness of the military justice system that is not treating victims fairly because it is not considering their privacy interests as required by Mil. R. Evid. 513 and as considered in all other federal and state courts. *United States v. Boyce*, __ M.J. __ (C.A.A.F. May 22, 2017). An objective, disinterested member of the public would not perceive ignoring a victim's privacy interest as fair. *Id.* Failing to consider victims privacy is not only unfair to victims whose other sexual behavior is wrongfully considered in courts-martial, but also discourages other victims from reporting assault or participating in the court-martial process.

d. Uncertainty and Broken Promises.

Despite the fact that *Gaddis* held that consideration of the victim's privacy was constitutional and despite the President's insistence that Mil. R. Evid. 412 retain the privacy balancing test, the *Gaddis dictum* is wreaking havoc in the

military justice system. As discussed above, in at least twenty-one cases the service courts of criminal appeals have applied the *Gaddis dictum* and refused to consider victims' privacy. In likely thousands of courts-martial, military trial judges are not considering victims' privacy in direct violation of the plain requirements of Mil. R. Evid. 412(c)(3).

On October 14, 2014, Mr. William T. Barto[4] testified before the Judicial Proceedings Panel on Military Sexual Assault that military judges and practitioners have reported that *Gaddis* "has created a great deal of uncertainty about what the state of the law is concerning Mil. R. Evid. 412 and whether the victim's privacy interest . . . may ever be considered by a military judge." Judicial Proceedings Panel on Military Sexual Assault 87-88, DEPT. OF DEFENSE (Oct. 10, 2014), *available at* http://jpp.whs.mil/public/docs/05-Transcripts/20141010_Transcript_Final.pdf.

Mr. Barto observed that military judges are "in a bit of a conundrum" because judges may: 1) follow Mil. R. Evid. 412 as written and risk being overturned; 2) follow Mil. R. Evid. 412 as written but do not mention that the victim's privacy was considered; or 3) disregard Mil. R. Evid. 412 as written and follow the *Gaddis dictum.* "None of these options are desirable." *Id.* at 88. He further testified that he could not "defend" the reasoning of *Gaddis* and *Ellerbrock*,

[4] Mr. Barto was an attorney in the Criminal Law Division, Office of the Judge Advocate General, Headquarters, Department of the Army, where he served as the Director, Advocacy Training and Programs, and has previously served as a Military Judge, Chief of the Criminal Law Division, and Appellate Judge on the Army Court of Criminal Appeals.

and that they "represent a real curiosity at best, and perplexity at worst to the practitioner in the field." *Id.* at 116.

At the same Judicial Proceedings Panel meeting, Colonel John Baker[5] testified that "it is important that we provide our practitioners a little more guidance" concerning the Mil. R. Evid. 412 balancing test. *Id.* at 90.

Most military sexual assaults are not reported.[6] Victims do not believe they will be treated fairly by the military justice system.[7] Victims are promised by the President and the Military Rules of Evidence that their privacy will at least be considered. But the military justice system is breaking this promise without any finding by this Court that considering a victim's privacy is unconstitutional. The reason this promise is being broken is this Court's *dictum* in *Gaddis*.

e. Rules of Construction Concerning Constitutionality

The *Gaddis dictum* is being treated by the entire military justice system as a holding. It clearly is not a holding since *Gaddis*'s plain language says that Mil. R.

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[5] COL Baker, USMC, was the Deputy Director, Judge Advocate Division, Military Justice & Community Development and a member of the Joint Services Committee, and has also served as a military judge.

[6] DEPARTMENT OF DEFENSE FISCAL YEAR 2012 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, at 12, *available at:* http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.

[7] 2010 Workplace and Gender Relations Survey of Active Duty Members: Overview Report on Sexual Assault, DEFENSE MANPOWER DATA CENTER REPORT NO. 2010-025, March 2011, at vi, *available at:* http://www.sapr.mil/public/docs/research/DMDC_2010_WGRA_Overview_Report_of_Sexual_Assault.pdf .

Evid. 412(c)(3) is constitutional as applied in that case and facially. Applying the basic rules of constitutional avoidance, this Court should not have offered its *dictum* in *Gaddis*.

This Court heeded the constitutional avoidance principal in *United States v. Fry* when it "remain[ed] mindful of the Supreme Court's warning that '[c]ourts should think carefully before expending "scarce judicial resources" to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'" *United States v. Fry*, 70 M.J. 465 (C.A.A.F. 2012) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011) (quoting *Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009)). The *Gaddis dictum* had no effect on the outcome of the *Gaddis* case.

This Court must avoid ruling upon constitutional issues when the case can be decided upon non-constitutional grounds. *Ashwander v. TVA*, 297 U.S. 288 (1936) (Brandeis, J., *concurring*); and *Fry*, 70 M.J. at 468. The Supreme Court will decide constitutional questions only if "absolutely necessary," and it will not rule any broader than required by the "precise facts of the case to which it is applied." *Ashwander*, 297 U.S. at 347. If there is a non-constitutional ground on which the case can be decided, then the Supreme Court will not decide the case upon constitutional grounds. *Id.*

Applying this Court's holding in *Fry*, this Court should not have opined on the possibility of unconstitutionality of Mil. R. Evid. 412 under facts not then before the Court. It should have decided the issue before it, and no more.

II. VICTIM PRIVACY IS A LEGITIMATE GOVERNMENTAL INTEREST.

Protect Our Defenders asks this Honorable Court to eliminate the uncertainty the *Gaddis dictum* created by recognizing in this case that the Mil. R. Evid. 412 privacy balancing test is constitutional.[8] In deciding the constitutionality of the Mil. R. Evid. 412 balancing test, the fundamental issue an Article III court would consider is whether protection of a victim's privacy is a legitimate interest of the criminal trial process.

The *Gaddis* majority quoted applicable Supreme Court precedent:

> "[T]he right to present relevant testimony is not without limitation. The right may, in appropriate cases, **bow to accommodate other legitimate interests** in the criminal trial process." *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (citation and quotation marks omitted); see also *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 302-03, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)."

Gaddis, 70 M.J. at 252 (emphasis added); *see also Michigan v. Lucas*, 500 U.S. 145 (1991) (cited elsewhere in *Gaddis*, and upholding a rape shield law), and *Holmes v. South Carolina*, 547 U.S. 319 (2006) (also cited by the *Gaddis* majority).

Although the *Gaddis* majority quotes applicable law, it fails to address whether protection of a victims' privacy is a "legitimate interest in the criminal trial process." It comes tantalizingly close as it cites further Supreme Court

[8] As discussed below, this Court, as an Article I court, does not have the power to rule the Mil. R. Evid. 412 balancing test is unconstitutional.

precedent and the Manual for Courts-Martial in finding that consideration of a victim's privacy is neither arbitrary nor disproportionate:

> "[R]ape-shield statutes like M.R.E. 412 do not violate an accused's right to present a defense unless they are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' See *Scheffer*, 523 U.S. at 308 (citation and quotation marks omitted). M.R.E. 412 is a 'rape-shield' law intended 'to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses.' Drafters' Analysis app. 22 at A22-35. **The M.R.E. 412 balancing test is neither arbitrary nor disproportionate to this purpose. Therefore, the test is not facially unconstitutional."**

Gaddis, 70 M.J. at 253-254 (emphasis added).

Chief Judge Effron's concurring opinion correctly analyzed this issue. After laying out the President's numerous options in response to *Banker*, Judge Effron explained that the President, in his role as Commander-in-Chief, chose to consider the victim's privacy. *Gaddis*, 70 M.J. at 260. He concluded:

> "The President chose the third option, setting forth a balancing test that expressly addresses the interests of alleged victims. The President remains free to retain that approach or to amend the rule in any fashion consistent with Article 36, UCMJ, the balance of the UCMJ, and the Constitution. **The policy question of whether to address victim interests through the balancing test in the rule is a matter for the President and Congress to decide. Until the rule is changed, it remains in effect**, subject to our obligation to interpret the rule in accordance with the Constitution and applicable legislation."

Gaddis, at 260 (Emphasis added).

The *Gaddis* majority relied upon the same Supreme Court cases that were cited by *Sanchez* and *Banker,* including *Michigan v. Lucas*, 500 U.S. 145 (1991); *Olden v. Kentucky*, 488 U.S. 227 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Delaware v. Fensterer*, 474 U.S. 15 (1985); *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973); and *Washington v. Texas*, 388 U.S. 14 (1967). The *Gaddis* majority did not cite to any military or civilian court's reinterpretation or new understanding of these established cases that provided the basis and justification for considering victim privacy in *Sanchez, Banker* and *Roberts.* Accordingly, the new interpretation by the *Gaddis* majority of these established precedents is unexplained and unexplainable.

Every court that has considered the specific issue of whether victim privacy is a legitimate governmental issue has unequivocally found that it is. *Lucas*, 500 U.S. at 150 (the rape shield statute "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy"); *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012) (analyzed in detail below); *Richmond v. Embry*, 122 F.3d 866, 874 (10th Cir. 1997); *Dolinger v. Hall*, 302 F.3d 5, 11 (1st Cir. 2002); *Stephens v. Miller*, 13 F.3d 998, 1002 (7th Cir. 1994) (observing that rape victims "deserve heightened protection against . . . unnecessary invasions of privacy"); *Barbe v. McBride*, 521

F.3d 443, 450 n.13 ("one such legitimate interest is in protecting sexual abuse victims from 'unnecessary invasions of privacy'").[9]

Gagne v. Booker warrants further analysis on this issue because of its extraordinary facts and the extraordinary consideration of the case by the entire Sixth Circuit Court of Appeals. The eighteen judges in the Sixth Circuit produced eight separate opinions. The legitimacy of a victim's privacy was recognized by the court's main opinion, *Gagne*, 680 F.3d at 516, a concurring opinion, *Id.* at 518 ("In this case, it is undisputed that legitimate State interests support the enforcement of Michigan's Rape Shield Statute"), a concurring in judgment only opinion, *Id.* at 521 ("Rape-shield statutes represent legitimate state interests."), and a dissenting opinion, *Id.* at 527 ("The question before us today, however, is not whether the statute presents a legitimate state interest, which I believe it does."). It seems that one of the two things the entire court agreed upon was that a victim's privacy was a legitimate state interest.

[9] At least two state statutes explicitly require courts to balance the victim's privacy (Alaska Stat. § 12.45.045 and N.J. Rev. Stat. § 2C:14-7). Many other state courts have included victims' privacy in their balancing test (*State v. Marks*, 262 P.3d 13 (Utah App. 2011); *LaPoint v. State*, 225 S.W.3d 513 (Tex. Crim. App. 2007); *State v. Caswell*, 320 N.W.2d 417 (Minn. 1982); *State v. Frost*, 686 A.2d 1172 (N.H. 1996); *State v. Budis*, 593 A.2d 784 (N.J. 1991); and *State v. Arnold*, 2015 Tenn. Crim. App. LEXIS 4 (Jan. 7, 2015).

The acceptance of balancing victims' privacy by federal and state courts was recently made clearer by the civilian criminal defense attorney selected by this Court to make a presentation at the 2017 Continuing Legal Education and Training Program. Elizabeth L. "Liz" Lippy, Assistant Director of the Trial Advocacy Program at American University Washington College of Law, presented *Balancing a Defendant's Constitutional Rights and Victim's Rights in the Realm of Rape Shield Law* to the program attendees. The presentation fully analyzes the *Gaddis dictum* and compares it to how other courts address victim privacy. Lippy Presentation, slides 23-28 (attached as Exhibit A). The presenting civilian criminal defense discussed *Gaddis's* holding and *dictum*, and cited numerous cases from civilian criminal courts that explicitly balance the victim's privacy interests. *Id.*, at slide 27. She concluded with a discussion of the policy implications of the *Gaddis dictum*, including not applying the rule as written, encouraging fishing expeditions, and discouraging participation by victims. *Id.*, at slide 28.

III. EVERY COURT APPLYING FEDERAL OR STATE RAPE SHIELD RULES USE THE PRIVACY BALANCING TEST TO DETERMINE WHETHER EVIDENCE IS CONSTITUTIONALLY REQUIRED.

No civilian court has ever held that considering a victim's privacy is unconstitutional. As discussed above, victims' privacy is a legitimate governmental interest because it promotes the reporting of sexual assault,

encourages victims' continued participation in the prosecution of sex crimes, and protects victims from embarrassment and degradation.

In a footnote in *Gaddis*, this Court incorrectly asserts that the current federal rule does not include a balancing test to determine whether the three exceptions applied. *Id.* at 255 n. 3.[10] Federal courts continue to determine whether evidence is "constitutionally required" by conducting a balancing test that weighs the probative value of the evidence against the privacy interests of the victim. See *United States v. Pumpkin Seed*, 572 F.3d 552 (8th Cir. 2009); *Barbe v. McBride*, 521 F.3d 443 (4th Cir. 2008); *Dolinger v. Hall*, 302 F.3d 5 (1st Cir. 2002); *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997); *United States v. Seibel*, 2011

[10] The Fed. R. Evid. 412 has never, from 1978 until today, contained any language that required a balancing test for the "constitutionally required" exception. The original language in the Fed. R. Evid. 412(b)(1) stated, "admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted." Subdivisions (c)(1) and (c)(2) do not contain a balancing test. Subdivision (c)(3) contains the balancing test, and that test is applied only to subdivision (b)(2).

The purpose of the "constitutionally required" exception in subsection (b)(1) was "intended to obviate attacks on the facial constitutionality of Rule 412(b)." *United States v. Nez*, 661 F.2d 1203, 1205 (10th Cir. 1981). As discussed below, the 1994 amendments to Fed. R. Evid. 412 did not affect the balancing test being used to determine whether evidence was constitutionally required. From the beginning, "constitutionally required" was shorthand for weighing the legitimate state interests, including victim interests, against the probative value of the evidence.

The purpose of the 1994 amendments were to expand the scope of Federal Rule 412 by including within its reach civil cases. H.R. Rep. No. 103-711 (1994). In making this expansion, the rule could not use the shorthand "constitutionally required" language because the Constitution never requires admission of Rule 412 evidence in civil cases. Therefore, the federal rule needed to use the balancing test language.

U.S. Dist. LEXIS 88607 (D.S.D. August 9, 2011); *Grant v. Demskie*, 75 F.Supp. 2d 201 (S.D. N.Y. 1999); *United States v. Powell*, 226 F.3d 1181 (10th Cir. 2000); *Petkovic v. Clipper*, 2016 U.S. Dist. LEXIS 94532 (N.D. Oh. 2016); *Buchanan v. Harry*, 2014 U.S. Dist. LEXIS 66665 (E.D. Mich. 2014); *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012).

The above cases are not comprehensive. There are more cases. What cannot be found is a single case (outside of the military justice system) that prohibits weighing the probative value of the evidence against a victim's privacy interests.

This Court suggested in *Gaddis* that it erred in *Banker* because it applied to Mil. R. Evid. 412 the language in the Fed. R. Evid. 412(b)(2) for civil cases. This Court's analysis of Fed. R. Evid. 412 is wrong. First, the federal rule for exceptions in civil cases does not use the term "privacy." Second, the federal rule requires the probative value of the evidence to "**substantially** outweigh the danger of harm to the victim." Fed. R. Evid. 412(b)(2)(emphasis added). If this Court in *Banker* was basing its opinion on the "federal analogue . . . that applies to civil cases," then it would have required that the probative value **substantially** outweigh the danger of **harm** to the victim. This Court did not do this. The *Banker* Court applied *Lukas* to justify consideration of a victim's privacy. *Lucas* was sufficient

precedent to support this Court's holding in *Banker*, and citing other federal case law was unnecessary. However, this Court in *Banker* could have cited *Dolinger v. Hall*, 302 F.3d 5 (1st Cir. 2002); *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997).

In *Gagne*, the court stated that *Lucas* "stands for the proposition that the trial court must balance a state's interest in excluding certain evidence under the rape shield statute against a defendant's constitutionally protected interest in admitting that evidence, on a case-by-case basis -- neither interest is superior *per se*."[11] *Gagne*, 680 F. 3d at 514. As discussed above, the entire *Gagne* court agreed that victims' privacy was a legitimate governmental interest. The only issue the entire court agreed upon was that balancing the victim's privacy was appropriate. The dissenters only disagreed with how the outcome of the balancing should have been decided. *Id.* at 514-515 (main opinion); *Id.* at 519 (concurring opinion); *Id.* at 520

[11] This Court in *Gaddis* appears to assert that probative evidence that outweighs the normal Mil. R. Evid. 403 factors must be admitted "no matter how embarrassing it might be to the alleged victim." *Gaddis*, 70 M.J. at 256. This assertion is at odds with the requirement to balance the government's legitimate interest (victim privacy) against the defendant's constitutional interests on a case by case basis because neither interest is "*per se*" superior. *See also, Dolinger*, 302 F.3d at 15; and *Barbe*, 521 F.3d at 457 ("the [Supreme] Court rejected the use of any *per se* evidence rule favoring either the prosecution or the defense, and specified that a state court must determine, on a case-by-case basis whether application of the rule "is 'arbitrary or disproportionate' to the State's legitimate interests.").

(concurring in judgment only opinion); *Id.* at 527 (dissenting opinion) ("I believe the probative value of this evidence outweighed the prejudice").

Mil. R. Evid. 412 "was adopted from the Federal Rules of Evidence, which incorporated the Privacy Protection for Rape Victims Act of 1978 [Public Law 95-540, 92 Stat. 2046 (1978).]" *United States v. Hollimon*, 12 M.J. 791 (A.C.M.R. 1982). As indicated by its name, the purpose of this Act was to protect victims' privacy. It seems absurd that a rule intended to protect victims' privacy would preclude consideration of victims' privacy.

This Court concluded in *Gaddis* that the "explanation in *Banker* -- suggesting that balancing constitutionally required evidence against the privacy interest of the victim before admitting it is necessary to further the purpose of the rule . . . is simply wrong." This Court's conclusion in *Gaddis* is simply wrong.

IV. THIS COURT IN *GADDIS* INCORRECTLY APPLIED PRINCIPLES OF STATUTORY CONSTRUCTION.

This Court concluded in *Gaddis* that the Mil. R. Evid. 412 victim privacy balancing test "is neither arbitrary nor disproportionate" to shielding victims of sexual assault, and it further concludes that the test is not facially unconstitutional. *Gaddis*, at 253-254. This Court proceeded to complain that because of the "confusing structure of M.R.E. 412, the test **has the potential** to lead military judges to exclude constitutionally required evidence merely be-cause its probative

value does not outweigh the danger of prejudice to the alleged victim's privacy, which would violate the Constitution." *Id.* at 254 (emphasis added) (citing *Dickerson v. United States*, 530 U.S. 428, 437, 444).[12] This Court repeatedly expressed concerns about "confusion." *Id.* at 250 (current version of Mil. R. Evid. 412 "is needlessly confusing"); *Id.* at 254 ("confusing structure"); *Id.* at 256 (changes to Mil. R. Evid. 412 have "done nothing but add additional layers of confusion and uncertainty").

Regardless of any confusion caused by Mil. R. Evid. 412, this Court had an obligation to interpret the rule in a manner that would render the rule constitutional. "If its language permits, a statute should be interpreted so that a constitutional danger zone is avoided." *United States v. Calley*, 46 C.M.R. 1131, 1194 (A.C.M.R. 1973); *Yates v United States*, 354 US 298, 319 (1957); *Thompson v Mazo*, 421 F.2d 1156 (D.C. Cir. 1970).

[12] *Dickerson* (at the locations cited by this Court) stands for the proposition, "Congress may not legislatively supersede [the Supreme Court's] decisions interpreting and applying the Constitution." As discussed above, the "Supreme Court has never held that rape-shield statutes do not represent a legitimate state interest, nor has it ever held that highly probative evidence will necessarily outweigh that interest. Quite to the contrary, the Court held in *Lucas*, 500 U.S. at 152-53, that the trial court must balance the state's interest against the defendant's interest." *Gagne*, 680 F.3d at 516.

The Supreme Court in *Lucas* specifically upheld the constitutionality of a rape shield statute. This Court cites no Supreme Court case or any other case holding otherwise because there is no such case.

This Court is obligated to construe Mil. R. Evid. 412 to avoid constitutional] problems if it is fairly possible to do so. *United States v. Quick*, 74 M.J. 332, 341 (C.A.A.F. 2015) (C.J. Baker concurring) (quoting *Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (citing *I.N.S. v. St. Cyr*, 533 U.S. 289, 299 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))) (internal quotation marks omitted).

Instead of constructing Mil. R. Evid. 412 as potentially leading military judges to exclude constitutionally required evidence, this Court should have eliminated the confusion by constructing Mil. R. Evid. 412 in a manner that would not lead to an unconstitutional result. Just as this Court found that the Mil. R. Evid. 403 balancing test could be used to exclude evidence, this Court should have interpreted Mil. R. Evid. 412 in the same manner. The privacy balancing test in Mil. R. Evid. 412 should be interpreted as the means to determine whether the evidence is constitutionally required just like the balancing test in Mil. R. Evid. 403. This Court should not have found Mil. R. Evid. 412 to be "potentially" unconstitutional unless and until it considered other possible constitutional constructions of the rule. The *Gaddis dictum* expressed an opinion that Mil. R. Evid. 412 could be unconstitutional in scenarios not then before the Court. This Court violated fundamental judicial principles by applying a hypothetical construction of Mil. R. Evid. 412 that should be applied in those hypothetical scenarios without considering other constitutional constructions of the rule.

This Court should reiterate former Chief Judge Effron's point that consideration of a victim's privacy is still the law.

V. NO MILITARY JUDGE OR COURT HAS AUTHORITY TO RULE ANY LAW OR RULE IS UNCONSTITUTIONAL.

In addition to the practical rule that no court, including the Supreme Court, should rule that a statute or rule is unconstitutional unless it is absolutely necessary, this Court, as an Article I court, is with even less authority to declare that a law or rule is unconstitutional. Congress, pursuant to its authority under Article I, Section 8 of the Constitution, gave the President authority to promulgate rules of evidence. 10 U.S.C.A. § 836 (Article 36), President May Prescribe Rules. The President, pursuant to his authority as Commander in Chief under Article II, Section 2 of the Constitution and Article 36, promulgated Mil. R. Evid. 412. In Mil. R. Evid. 412, the President required military judges to weigh the victim's privacy when determining whether to admit certain evidence.

This Court does not have the authority under the Constitution to rule that the Mil. R. Evid. 412(c)(3) balancing test is unconstitutional. This Honorable Court's duty as an Article I court is to interpret and apply military law. "Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders." Manual for

Courts-Martial, Part I, Preamble, Paragraph 3, Nature and Purpose of Military Law. Military law under the Constitution is vested with the Congress and the President. *United States v. Muwwakkil*, 74 M.J. 187 (C.A.A.F. 2015) (Judge Stuckey, concurring slip opinion at 2) (citing *Weiss v. United States*, 510 U.S. 163, 177 (1994)).

In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) and in *Stern v. Marshall*, 564 U.S. 2 (2011), the Supreme Court made it clear that Congress violated Article III of the Constitution when it authorized Article I courts to decide certain claims that are constitutionally entitled to Article III adjudication. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1939 (2015). The Constitution vests the "judicial Power of the United States" in Article III courts. U.S. Const., Art. III, § 1. A basic principle of our constitutional scheme is that "one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996).[13]

Congress passes laws that it believes are constitutional. It cannot delegate to an Article I court the power to declare as unconstitutional its own acts or the acts

[13] Interestingly, the Supreme Court in *Loving* was considering a law and the Rules for Courts-Martial that were changed in response to the Court of Military Appeals' decision in *Matthews.* The Supreme Court identified as a preliminary question the issue of whether the Constitution requires application of the Supreme Court's death penalty jurisprudence to courts-martial. *Loving*, 517 U.S. at 755. The Court does not rule upon this issue because the Government did not contest it, and the Court assumed the existing precedent on this issue applied to courts-martial. *Id.* at 755.

of the President in executing the laws. Congress and the President may exercise self-restraint by refusing to pass a law or promulgate a rule that it or he believes is unconstitutional; however, Congress may not delegate to an Article I court the power to overrule the Congress's or President's exercise of their constitutional powers. Only an Article III court may do so.

The President, as Commander in Chief, has determined that victims of sexual assault shall have their privacy considered under Mil. R. Evid. 412. This Court is not the Commander in Chief, and it cannot overrule the President when he is exercising this constitutional power.

Military courts have no power to substantively change military law. The deference Article III courts give to the President and Congress is at its "apogee" when the President is acting under his authority as commander in chief or Congress is acting pursuant to its powers to regulate the land and naval forces. *Weiss*, 510 U.S. at 177. This deference to the Congress and President appears to be absent from military courts.

CONCLUSION

Wherefore, Protect Our Defenders respectfully requests this Court to apply the Mil. R. Evid. 412 as written to the facts in this case, and to state clearly that Mil. R. Evid. 412(c)(3) requirement to balance the victim's privacy interests remains the law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES

I certify that this brief complies with the maximum length authorized by Rule 26(d) because this brief contains 6,648 words. This brief complies with the typeface and type style requirements of Rule 37 because it was prepared using Microsoft Word with Times New Roman 14-point font.

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CERTIFICATE OF FILING AND SERVICE

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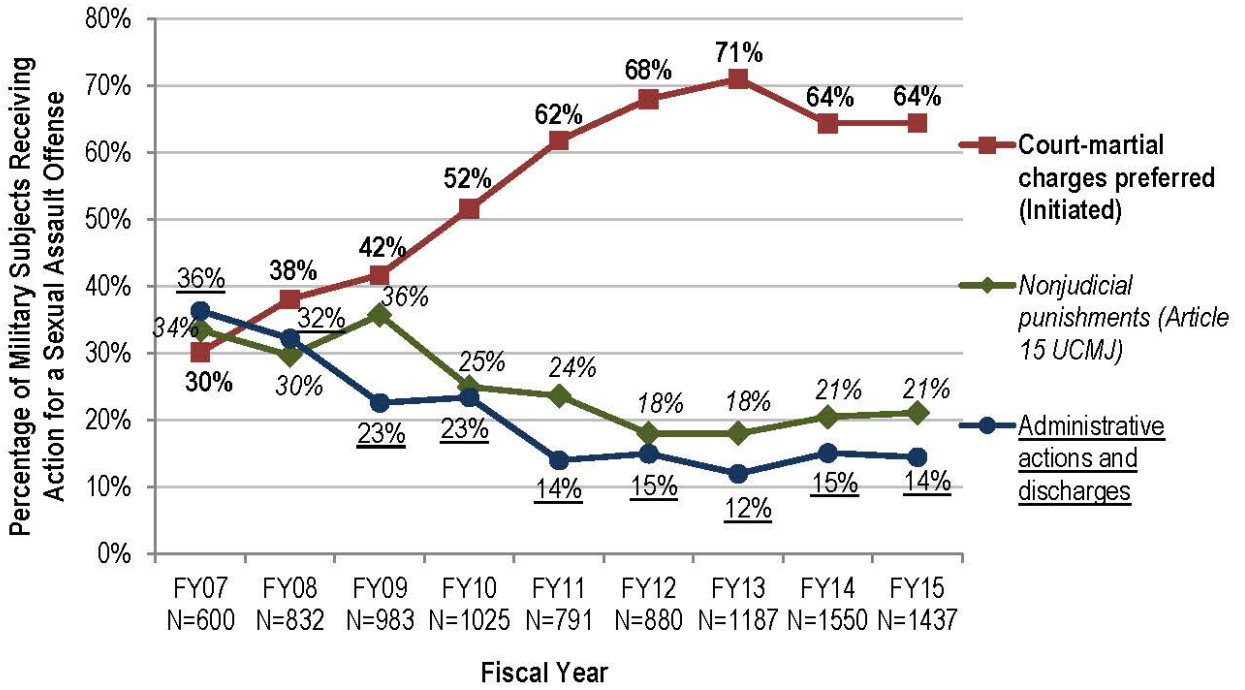
BALANCING A DEFENDANT'S CONSTITUTIONAL RIGHTS AND VICTIM'S RIGHTS IN THE REALM OF RAPE SHIELD LAW

By Elizabeth L. Lippy, Esquire

SEXUAL ASSAULT DILEMMA IN THE SERVICES

- Sexual Assault Prevention and Response (SAPR) Training
- 50% Increase in Reports of Military Sexual Assaults – N.Y. Times (May 1, 2014)
  - SAPRO reported a 2% decrease from 2014-2015 of unrestricted reports, but a 2% increase of restricted reports
- Sexual Assault Prevention and Response Office Statistics from 2011 to 2014:
  - Final dispositions rose 55%;
  - Convictions rose 127%
- National Center for the Prosecution of Violence Against Women – 8% of reports are false
  - 2015 – 3% of allegations unfounded by Command/Legal Review



Notes:

1. Percentages are of subjects found to warrant disciplinary action for a sexual assault offense only. This figure does not include other misconduct (false official statement, adultery, etc.)
2. Percentages listed for some years do not sum to 100% due to rounding.

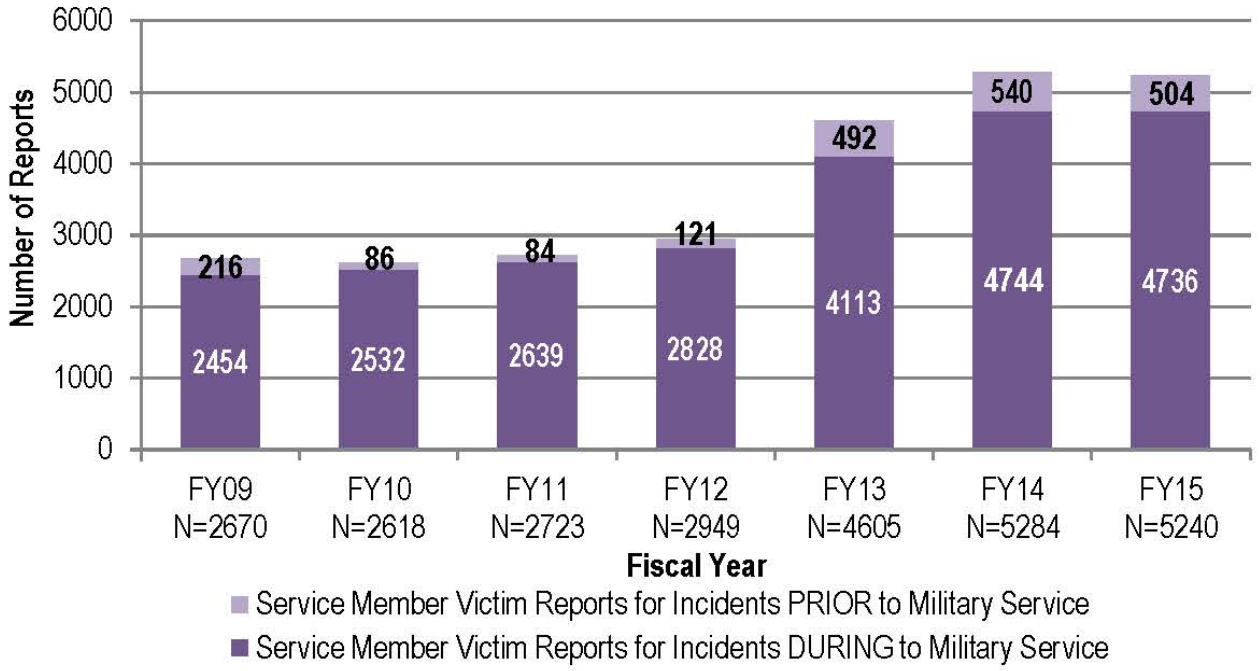
Figure 11: Breakdown of Disciplinary Actions Taken Against Subjects for Sexual Assault Offenses, FY07 – FY15

412 OVERVIEW

- Comparative analysis with FRE
- What constitutional rights are implicated?
- What can be introduced?
- How is it decided?
- Interpretations of 412(c) post-*Gaddis*
- Policy Implications

PURPOSE AND POLICY OF 412

- Protect the victim from humiliation
- "Rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. *Michigan v. Lucas*, 500 U.S. 145 (1991).
- Shield a victim's privacy
- Encourage disclosure of offenses
  - "By affording victims protection in most instances, the rule encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders." *Notes of Advisory Committee on proposed 1994 amendment,* F.R.E. 412.


6000
5000
4000
3000
2000
1000
0
Number of Reports
216
86
84
121
492
540
504
2454
2532
2639
2828
4113
4744
4736
FY09 N=2670
FY10 N=2618
FY11 N=2723
FY12 N=2949
FY13 N=4605
FY14 N=5284
FY15 N=5240
Fiscal Year
Service Member Victim Reports for Incidents PRIOR to Military Service
Service Member Victim Reports for Incidents DURING to Military Service

FEDERAL RULE OF EVIDENCE 412

- General bar to prior sexual conduct of the victim
- (b) Exceptions:
  - (1) Criminal Cases. The court may admit the following evidence in a criminal case:
    - (A) – Physical source;
    - (B) – Priors with the defendant to show consent; and
    - (C) – EVIDENCE WHOSE EXCLUSION WOULD VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS

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- General bar to prior sexual conduct of the victim
- (b) Exceptions:
  - (A) – Physical source;
  - (B) – Priors with the defendant to show consent; and
  - (C) – EVIDENCE THE EXCLUSION OF WHICH WOULD VIOLATE THE CONSTITUTIONAL RIGHTS OF THE ACCUSED

CONSTITUTIONAL RIGHTS

- What rights?
  - Confrontation Clause of the 6th Amendment – right to confront and cross-examine one's accuser
  - Compulsory Process Clause of the 6th Amendment – right to present a defense
  - Due Process Clause of 5th and 14th Amendment
- How are Rape Shield Laws constitutional?
  - Courts have held that "[t]he right to present relevant testimony is not without limitation. The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. Thurs, trial judges retain wide latitude to limit reasonably a criminal defendant's right to cross-examine a witness 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." See *Michigan v. Lucas*, 500 U.S. 145, 149 (1991).

WELL-ACCEPTED AREAS

- Examining the motivation of the complaining witness;
- Proving the sexual knowledge or sophistication of the complaining witnesses;
- Showing a pattern or practice of sexual behavior; and
- Credibility issues.

MOTIVATION OF THE VICTIM

- *Olden v. Kentucky*, 488 U.S. 227 (1988) – The 6th Amendment confrontation rights require the ability to cross-examine a complainant to test for bias and motive to falsify charges based on relationships
  - *However, that right may be limited regarding how many details to delve into*
- *Davis v. Alaska*, 415 U.S. 308 (1974) – Familial tensions between parent and child may be admissible
- *Other types of motivations that have been ruled admissible include:*
  - *Disputes over disciplinary rules*
  - *Disapproval or rejection of a relationship*
  - *Fears that a companion will react in violence or anger*

SEXUAL KNOWLEDGE OF THE VICTIM

- In cases involving minors, Defendants may assert the right to introduce evidence of other sexual acts of the victim to prove the source of knowledge of vocabulary or sophistication
- States are split regarding the admissibility under this theory but most courts limit the extent of evidence
- Cases allowing evidence – *U.S. v. Bear Stops*, 997 F.2d 451 (8th Cir. 1993)(constitutional error in excluding evidence of prior sexual abuse of six-year-old victim to refute or explain sexual sophistication); *State v. Rolon*, 777 A.2d 604 (Conn. 2001)(excluding proof of prior assaults was constitutional error as proof was critical to allowing defendant to rebut the inference that he is the source of the child's knowledge)
- Cases excluding evidence – *U.S. v. Never Misses A Shot,* 781 F.3d 1017 (8th Cir. 2015)(upholding exclusion of evidence that minor victim was previously assaulted, holding that admitting such proof would mean that "every child victim that has been molested by someone other than the defendant would be subject to questioning on these matters; court can shield victim from "embarrassment and shame"); *State v. Jones*, 490 N.W.2d 787 (Iowa 1992)(abuse five years earlier was too remote to be probative).

PATTERN OR PRACTICE OF VICTIM

- May have a constitutional right to prove a pattern of distinctive, consensual sexual behavior by the alleged victim that is highly similar to the facts of the incident being charged.
  - *Gagne v. Booker*, 596 F.3d 335 (6th Cir. 2010)
- Must be similar
- Must be enough to create a pattern

CREDIBILITY

- Constitutional entitlement to bring out facts that conflict with the picture presented by the prosecution?
- Examples of admissibility:
  - Sexual orientation makes it unlikely victim would consent (*State v. Williams*, 487 N.E. 2d 560 (Ohio 1986);
  - Refuting suggestions that victim was sexually inexperienced or virginal (*U.S. v. Powell*, 226 F.3d 1181 (10th Cir. 2000);
  - Refuting the prosecutor's picture of victim's relationship with the defendant (*State v. Reiter*, 672 P.2d 56 (Or. App. 1983);
  - Refuting explanation of why the accusations came forward in the way that they did (*State v. Lantz*, 607 P.2d 197 (Or. App. 1980);
  - Prior inconsistent statement regarding sexual history.

PROCEDURE TO DETERMINE ADMISSIBILITY/ FRE 412(C)

- (1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:
  - (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
  - (B) do so at least 14 days before trial unless the court, for good cause sets a different time;
  - (C) serve the motion on all parties; and
  - (D) notify the victim or, when appropriate the victim's guardian or representative.
- (2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the hearing must be and remain sealed.

FEDERAL RULE OF EVIDENCE 412(C)

- (1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:
  - (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
  - (B) do so at least 14 days before trial unless the court, for good cause sets a different time;
  - (C) serve the motion on all parties; and
  - (D) notify the victim or, when appropriate the victim's guardian or representative.

MILITARY RULE OF EVIDENCE 412(C)

- (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.

FEDERAL RULE OF EVIDENCE 412(C)

- (2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the hearing must be and remain sealed.

MILITARY RULE OF EVIDENCE 412(C)

- (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. ..

FEDERAL RULE OF EVIDENCE 412(C)

MILITARY RULE OF EVIDENCE 412(C)

- (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.

THE BIG DIFFERENCE

FRE 412(C)

- File 14 days before trial
- 412(c) is silent regarding balancing test
  - HOWEVER, see FRE 412(b)(2) Civil Cases – in a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

MRE 412(C)

- 5 days beforehand
- The balancing test in 412(c)(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' 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.

TOUGH ACT TO BALANCE

Accused's Constitutional Rights

Victim's Privacy Rights & 403

MRE 412(C) HISTORY

- Victim's privacy rights are a legitimate interest– *U.S. v. Sanchez*, 44 M.J. 174 (C.A.A.F. 1996) and *U.S. v. Banker*, 60 M.J. 216 (C.A.A.F. 2004)
  - Banker two part tango – 1. relevance under 401
    - 2. conduct balancing test to determine whether the probative value of such evidence outweighs the danger of unfair prejudice.
    - EXCEPT under 412(B)(1)(c) – which is subject to a distinct 3 step analysis – 1. relevance; 2. whether the evidence is "relevant, material, and favorable to the defense" and therefore "necessary"; 3. whether probative value outweighs dangers
    - Specifically held that the 412 balancing test not only included 403 factors, but also prejudice to the victim's legitimate privacy interests.

STATUTORY AMENDMENT

- 2007 – the President changed the language of 412 to reflect the *Banker* and *Sanchez* and clarified that:
  - Under MRE 412, the evidence must be relevant for one of the purposes in division (b);
  - 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
  - Even if the evidence is admissible under 412, it may still be excluded under 403.
- Post amendment – *U.S. v. Roberts.* 69 M.J. 23 (C.A.A.D. 2010) – "[I]f the military judge determines the evidence is relevant and material, he performs the M.R.E. 412(b)(3) balancing test (whether the probative value of the evidence outweighs the danger of prejudice to the victim's privacy) to determine whether the evidence is favorable to the accused's defense."

U.S. V. GADDIS

- *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011)
- "We hold that the balancing test in M.R.E. 412(c)(3) is not facially unconstitutional. However, its current iteration – which purports to balance the "alleged victim's privacy" against the probative value of the evidence – is needlessly confusing and could lead a military judge to exclude constitutionally required evidence. The "alleged victim's privacy" interests cannot preclude the admission of evidence "the exclusion of which would violate the constitutional rights of the accused."
- Determined that the purpose of the rule is proportionately served by the general rule of exclusion as well as the prior version of the balancing test that "the probative value of such evidence outweighs the danger of unfair prejudice."

GADDIS, CONT'D

- Discussed 3 options of how the balancing test would be applied
  - 1. considering the privacy interest of the victim will yield a constitutionally valid result when applied to evidence that is both constitutionally required and whose probative value outweighs the danger of unfair prejudice;
  - 2. considering the privacy interest of the victim will yield a constitutionally valid result when applied to evidence that is not constitutionally required and whose probative value does not outweigh the danger of unfair prejudice
  - 3. the only time would be unconstitutional is when a judge excludes evidence, the exclusion of which would violate constitutional rights because the probative value did not outweigh the danger of unfair prejudice to the alleged victim's privacy.

GADDIS ASSUMPTIONS

- Indicated that the balancing act from *Banker* incorrectly applied the FRE civil case balancing test.
- "…balancing constitutionally required evidence against the privacy interest of the victim before admitting it is necessary to further the purpose of the rule,… is simply wrong."
- That, as written, the balancing test is a nullity with respect to (b)(1)(c) and that the military judge should only weigh 403 factors

POST-GADDIS

- Judge Effron's concurring opinion – "The policy question of whether to address victim interests through the balancing test in the rule is a matter for the President and Congress to decide. Until the rule is changed, it remains in effect, subject to our obligation to interpret the rule in accordance with the Constitution and applicable legislation." *Gaddis*, 70 M.J. at 260 (concurring opinion by C.J. Effron).
- Statutory change proposals – in 2011 – the Joint Service Committee proposed changing 412, but said proposal was not signed by the President; Further, 5/15/13 – an Executive Order was signed amending the manual for Courts-Martial but no changes to 412
- Conundrum – 1. follow 412 as written and risk being overturned; 2. follow MRE 412 as written but do not mention privacy rights; 3. disregard 412 as written and follow the *Gaddis* dictum.
- Military cases are no longer weighing the privacy interests of the victim

GADDIS INTERPRETATION OF VICTIM RIGHTS V. OTHER COURTS INTERPRETATIONS

- Every court that has considered the specific issue of whether victim privacy is a legitimate governmental issue has found that it is
  - *Michigan v. Lucas,* 500 U.S. 145 (1991); *Olden v. Kentucky*, 488 U.S. 227 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Delaware v. Fensterer*, 474 U.S. 15 (1985); *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973); and *Washington v. Texas*, 388 U.S. 14 (1967).
- Although FRE has never contained language of privacy rights in the balancing test, federal courts determine what is constitutionally required by conducting a balancing test that weighs the probative value v. privacy interests.
  - See *United States v. Pumpkin Seed*, 572 F.3d 552 (8th Cir. 2009); *Barbe v. McBride*, 521 F.3d 443 (4th Cir. 2008); *State v. Green*, 260 S.E.2d 257, 261 (W. Va. 1979); *Dolinger v. Hall*, 302 F.3d 5 (1st Cir. 2002); *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997); *United States v. Seibel*, 2011 U.S. Dist. LEXIS 88607 (D.S.D. August 9, 2011); *Grant v. Demskie*, 75 F.Supp. 2d 201 (S.D. N.Y. 1999); *United States v. Powell*, 226 F.3d 1181 (10th Cir. 2000); *Petkovic v. Clipper*, 2016 U.S. Dist. LEXIS 94532 (N.D. Oh. 2016); *Buchanan v. Harry*, 2014 U.S. Dist. LEXIS 66665 (E.D. Mich. 2014); and *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012).

POLICY IMPLICATIONS

- Failing to include a victim's privacy rights
- Not applying the rule as written
- Discovery hearings/fishing expeditions
- Discouraging disclosure
- The role of the SVC with 412 hearings

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