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Trial Judiciary Notes

A View from the Bench

Military Rule of Evidence (MRE) 412 and Sentencing

Colonel Michael J. Hargis
Military Judge, 4th Judicial Circuit
U.S. Army Trial Judiciary, Fort Carson, Colorado

Introduction

Military Rule of Evidence (MRE) 412 covers the admission of evidence regarding a victim's sexual background, the so called "rape shield," and is primarily discussed during the merits phase of a courts-martial.¹ There appears to be some confusion whether MRE 412 applies to the sentencing phase of a court-martial. Bottom line up front—it applies.²

General Methodology

When analyzing the admissibility of any potential sentencing evidence, the starting point is always Rule for Courts-Martial (RCM) 1001(b) for the government and RCM 1001(c) for the defense.³ No evidence is admitted during sentencing unless it first passes through the gates of RCM 1001.⁴ However, once through the RCM 1001 gates, the evidence must also be admissible under the MRE, unless those Rules have been rendered inapplicable.⁵ A typical example would be a defense objection to government evidence: "It may be aggravation under RCM 1001(b)(4), Judge, but it still inadmissible under MRE 403."

MRE 412 Methodology: RCM 1001

Clearly, the "pigeon holes" for the defense in RCM 1001(c) are much larger than the particularized government ones in RCM 1001(b). "Mitigation" is defined as anything that would serve to lessen the punishment—pretty broad.

Assume the accused has been convicted of an offense to which MRE 412 applies, for example, rape and carnal knowledge.⁶ On sentencing, the defense seeks to offer evidence that prior to the offense of which the accused has been convicted, the victim was (extremely) sexually active. Admissible? It depends.

First, does it make it past the RCM 1001(c) gate? Likely not. The unchaste character of the victim is not a matter that might legitimately serve to lessen the punishment. For a nonconsensual offense like rape, the Court of Military Appeals in *Fox* said: "Certainly, an unchaste woman has just as much right to be protected from nonconsensual sexual assaults or abuse

¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412 (2005) [hereinafter MCM].

² *United States v. Fox*, 24 M.J. 110 (C.M.A. 1987); MCM, *supra* note 1, MIL. R. EVID. 101(a), 1101; Rule for Courts-Martial (R.C.M.) 1001(b); R.C.M. 1001(c)(3). Note that the Navy-Marine Court of Criminal Appeals in *United States v. White*, 62 M.J. 639 (N-M. Ct. Crim. App. 2006), litigated the application of MRE 412 to sentencing in a carnal knowledge case. Although factually different from the situation we address here, that they applied MRE 412 to sentencing in a carnal knowledge case is the point to be learned from that case.

³ MCM, *supra* note 1, R.C.M. 1001(b), (c).

⁴ See *United States v. Tanner*, 63 M.J. 445 (2006) (holding that on sentencing, admissibility is analyzed under RCM 1001 and not under MRE 404(b). Unless the evidence is first admissible under RCM 1001, it is not admissible on sentencing. See *id.* at 448.

⁵ MCM, *supra* note 1, R.C.M. 1001(c)(3).

⁶ Remember that although the heading to MRE 412 says "Nonconsensual sexual offenses", that Rule does apply to the "consensual" offense of carnal knowledge. See *United States v. Banker*, 60 M.J. 216, 220 (2004).

as a chaste woman.”⁷ A similar argument to that made in *Fox* would apply for a carnal knowledge offense as the reason consent is not a defense to carnal knowledge is because the victim, due to age, is legally incapable of consenting.⁸

MRE 412 Methodology: MRE 412

Assume that by some manner, the evidence survives the RCM 1001(c) screening. Does it pass MRE 412 muster? If the evidence offered by defense shows that the alleged victim “engaged in other sexual behavior” it is barred by MRE 412, unless it falls within one of the exceptions in MRE 412(b).⁹

Is the evidence offered to prove the accused is not “the source of semen, injury or other physical evidence?” No. So the evidence of the victim’s sexual history is not admissible under MRE 412(b)(1)(A).

Is the evidence offered to prove consent? No. We are in the sentencing phase. For rape (where consent is a defense), the accused has been convicted and consent is no longer an issue. For carnal knowledge, consent was never an issue. Thus, the evidence is not admissible under MRE 412(b)(1)(B).

Is the evidence constitutionally required under MRE 412(b)(1)(C)? The defense will have to show that it is relevant, material and favorable, just like any other MRE 412 evidence.¹⁰ Unless the government opens the door by either stating or

⁷ United States v. Fox, 24 M.J. 110, 112 (C.M.A. 1987).

⁸ The court noted in *Fox* that the unchaste character of the victim *might* make it through the RCM 1001(c) gate if the government had argued the victim was somehow traumatized or injured by the sexual contact. *See id.* at 112. This would logically arise more in the carnal knowledge situation. Then, the evidence would not be considered mitigation, but would be rebuttal evidence under RCM 1001(c)(1): “[M]atters in rebuttal of any material presented by the prosecution . . .” MCM, *supra* note 1, R.C.M. 1001(c)(1).

⁹ MCM, *supra* note 1, MIL. R. EVID. 412. This is a rule of exclusion, rather than inclusion, subject to the three exceptions in MRE 412(b)(1). *See Banker*, 60 M.J. at 222.

¹⁰ The framework for analysis under MRE 412 is clearly set forth by the Court of Appeals for the Armed Forces in *Banker*:

[T]he military judge applies a two-part process of review to determine if the evidence is admissible. M.R.E. 412(c)(3). First, pursuant to M.R.E. 401, the judge must determine whether the evidence is relevant. . . . Where the military judge determines that evidence is relevant, the judge employs a second analytic step by conducting a balancing test to determine whether “the probative value of such evidence outweighs the danger of unfair prejudice[.]” M.R.E. 412(c)(3). . . .

Although this two-part relevance-balance analysis is applicable to all three of the enumerated exceptions, evidence offered under the constitutionally required exception is subject to distinct analysis. Under M.R.E. 412(b)(1)(C), the accused has the right to present evidence that is “relevant, material, and favorable to his defense.” While the relevancy portion of this test is the same as that employed for the other two exceptions of the rule, if the evidence is relevant, the military judge must then decide if the evidence offered . . . is material and favorable to the accused's defense, and thus whether it is “necessary.”

In determining whether evidence is material, the military judge looks at “the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue.”

After determining whether the evidence offered by the accused is relevant and material, the judge employs the M.R.E. 412 balancing test in determining whether the evidence is favorable to the accused's defense. While the term “favorable” may not lend itself to a specific definition, we believe that based on Supreme Court precedent and our own Court's rulings in this area, the term is synonymous with “vital.” (citation omitted).

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Thus, M.R.E. 412(c)(3) requires the military judge to determine “on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice[.]” M.R.E. 412(c)(3). 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.

As a result, when balancing the probative value of the evidence against the danger of unfair prejudice under M.R.E. 412, the military judge must consider not only the M.R.E. 403 factors such as confusion of the issues, misleading the members, undue delay, waste of time, needless presentation of cumulative evidence, but also prejudice to the victim's legitimate privacy interests.

. . . .

In applying M.R.E. 412, the judge is not asked to determine if the proffered evidence is true; it is for the members to weigh the evidence and determine its veracity. Rather, the judge serves as gatekeeper deciding first whether the evidence is relevant and then whether it is otherwise competent, which is to say, admissible under M.R.E. 412.

implying the victim was somehow traumatized by the carnal knowledge, it will be difficult for the defense to carry this burden.¹¹

Even if the defense is able to make it over those hurdles, the evidence must still clear MRE 412(c)(3) and MRE 403.¹²

Conclusion

Counsel should not assume MRE 412 does not apply in sentencing. However, there are many steps to satisfy before seeking admission of MRE 412 evidence on sentencing. Pretrial preparation and analysis is key to admitting MRE 412 evidence, as it is for all phases of the trial.

Banker, 60 M.J. at 222-4 (citations omitted). *Id.* at 223 n.3. “[Military Rule of Evidence] 412 does not wholly supplant M.R.E. 403 since the military judge may exclude evidence on M.R.E. 403 grounds even if that evidence would otherwise be admissible under M.R.E. 412.”

¹¹ Thus, note 6 to Instruction 3-45-2 in *U.S. Dep’t of Army, Pam. 27-9, Military Judges’ Benchbook* may be misleading. The circumstances under which the unchaste character of the victim would be admissible on sentencing would be limited. U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES’ BENCHBOOK 451 (15 Sept. 2002).

¹² MCM, *supra* note 1, MIL. R. EVID. 412 (c)(3) (“that the probative value of such evidence outweighs the danger of unfair prejudice”); MIL. R. EVID. 403 (“probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”).