

UNITED STATES MARINE CORPS  
WESTERN JUDICIAL CIRCUIT

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UNITED STATES	)	GENERAL COURT-MARTIAL
	)	
v.	)	DEFENSE MOTION
	)	FOR APPROPRIATE RELIEF
JOSHUA HAWK	)	(Motion to compel the Government to
STAFF SERGEANT	)	produce witnesses for the defense and to
U.S. MARINE CORPS	)	employ an expert toxicologist and back
	)	ground check expert)
	)	DEFENSE RESPONSE TO
	)	GOVERNMENT MRE 412 MOTION
	)	
	)	17 Nov 09

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**Nature of Motion**

The Accused now moves this Court to order the Government to answer his pending discovery requests in this case.

The Accused also moves this Court to order the Government to authorize and fund the employment of a defense toxicologist in this case.

The Accused also moves this Court to order the Government to produce the witnesses that the Government denied.

The Accused also moves this Court to order the Government provide the Accused with his requested investigator/security background check expert.

The Accused also asks that this Court deny the Government's MRE 412 motion.

**Facts**

- a. The Accused faces Article 120 charges related to a sexual assault against a Ms. Daniel Ligon that allegedly occurred on 11 September 2008 at MCRD. The Accused also faces Article 92 and 134 charges related to the Accused allegedly not filling out a security background check properly or giving complete answers to a security clearance investigator. The Accused is also charged with various Article 107 charges related to the Accused allegedly giving false official statements about the sexual assault incident as well as during the security clearance investigation.

- b. My records reflect that on or about 15 October 2009, the previous Defense Counsel, Capt Ahn, submitted its first discovery request to the Government. This request has not been formally answered according to defense records. However, the Government has produced on the Defense numerous documents that are responsive in part and unresponsive in part to the Defense request. The Defense requests a formal response to Capt Ahn's discovery request. In particular, the defense requests any Brady or other exculpatory material that may exist.
- c. On 15 October 2009, the Defense requested 28 fact and good military character witnesses. On 20 October 2009, the Government denied all but three of witnesses requested. The defense submitted supplemental witness requests for additional witnesses on 2 and 3 November 2009, respectively. In its original and follow on witness supplements, the defense provided ample explanation for why its witnesses were relevant and necessary. In a Government Witness list dated 28 October 2009, the Government listed its own witnesses and indicated that it was producing 2 defense witnesses that it previously denied: LCpls Sullivan and Reasco.
- d. On 15 October 2009, the Defense requested an alcohol toxicologist expert-consultant. The Government denied the Defense request on 21 October 2009. Many of the fact witnesses in this case, particularly the prosecutrix; had been drinking alcohol to state of intoxication on the pertinent evening in question.
- e. On 2 November 2009, the Defense requested Ms. Carol Martin as a security clearance investigator. A review of her CV indicates that Ms. Martin has extensive experience concerning security background interviews and checks in the U.S. Marine Corps, a subject for which the Accused faces several charges. The Government has not responded to this request.
- f. Regarding the MRE 412 motion, witness Ms. Sybil Mitchell saw Ms. Ligon engage in a consensual sexual encounter with SSgt Hawk hours before the alleged sexual assault incident.
- g. SSgt Carlos Mora also heard Ms. Ligon discuss the fact that she wanted a man to toss her around hours before the alleged sexual assault took place.
- h. The Government has decided to charge SSgt Hawk, at Charge III, Specification 5; with an offense related to Ms. Ligon's past sexual/romantic history with a Sgt Shannon Mahoe.
- i. Still regarding the MRE 412 motion, ET2 Garwood was the fiancé of Ms. Ligon on the night of the alleged sexual assault. He was "accidentally" called by Ms. Ligon after her sexual encounter with SSgt Hawk.

## **LAW AND ANALYSIS**

In trials by courts-martial, the Accused is afforded equal access to witnesses and evidence as the Government. United States v. Lee, 64 M.J. 213, 214 (C.A.A.F. 2006). This means that despite not having the same subpoena power as the Government, the Government needs to provide access to evidence and witnesses that are material for the preparation of SSgt Hawk's defense. However "material" is used liberally and historically courts err on the side of full disclosure to the defense to ensure that persons like SSgt Hawk can get a fair trial.

Discovery practice under Article 46 and R.C.M. 701 promotes full discovery that eliminates 'gamesmanship' from the discovery process and is quite liberal. United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004).

Providing broad discovery at an early stage reduces pretrial motions practice, surprise, and delay at trial. Roberts, citing Manual for Courts-Martial, United States (2002 ed.), Analysis of Rules for Courts-Martial A21-32. "The military rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice. To this end, the discovery practice is not focused solely upon evidence known to be admissible at trial." Roberts at 325, referencing United States v. Stone, 40 M.J. 420, 422 (C.M.A. 1994) (citing United States v. Lloyd, 301 U.S. App. D.C. 186, 992 F.2d 348, 351 (D.C. Cir. 1993)). "The parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of this liberal mandate." United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004).

"We also have interpreted these rules to ensure that discovery and disclosure procedures in the military justice system, which are designed to be broader than in civilian life, provide the accused, at a minimum, with the disclosure and discovery rights available in federal civilian proceedings." United States v. Williams, 50 M.J. 436, 440 (C.A.A.F. 1999).

**a. The Government's non-answer of the defense discovery requests**

Regarding the production of documents and other tangible objects, RCM 701(a)(2) says that the defense shall be permitted after service of charges to inspect any tangible object or place in the possession or control of "military authorities." Given the Government has subpoena power as discussed in RCM 703(f), the Government has near possession or control over any object or place requested by the defense in its discovery requests. Accordingly, the Government should produce the outstanding discovery requested by the defense (provide a formal response to the Defense Discovery Request dated 15 October 2009 and produce any Brady or other exculpatory material that it has a duty to actively search for).

**b. The Government should produce the defense witnesses (also response to the Government MRE 412 Motion to Exclude)**

Under RCM 703(b) each party is entitled to witnesses whose testimony would be relevant and necessary.

The defense requested many military and civilian witnesses in this case in a witness request that contained a brief summary of anticipated witness testimony. The Defense believes that this proffered testimony meets the requirement of RCM 703. The Government responded that it was denying them because the Defense failed to explain how they were relevant.

The Defense argues that these witnesses were relevant and necessary and asks this Court to order their production. See RCM 703. In support of this motion, the witnesses will testify at the motions hearing and explain their relevancy.

Regarding witness Sgt Shannon Mahoe (a witness requested by the Defense that the Government denied), that witness is relevant because the Accused is charged with lying about what Sgt Mahoe allegedly told him regarding Mahoe's previous alleged romantic relationship with Ms. Ligon. See Charge Sheet, Charge IV, Specification 5. MRE 412 does not apply in this case because the Government has chosen to charge SSgt Hawk with a charge whose element concerns the past sexual history of Daniel Ligon. Element 2 of Article 107: That the...statement was false in certain particulars.

“(T)here are three exceptions to M.R.E. 412. First, evidence of specific instances of sexual conduct is admissible to prove that a person other than the accused was the source of semen, physical injury, or other physical evidence. M.R.E. 412(b)(1)(A). Second, evidence of specific instances of sexual behavior by the alleged victim with the accused may be offered to prove consent. M.R.E. 412(b)(1)(B) expressly contemplates that such evidence might be offered by an "accused to prove consent or by the prosecution.”” United States v. Banker, 60 M.J. 216, 221-222 (C.A.A.F. 2004), citing MRE 412.

Given this, consensual sexual encounters between Ms. Ligon and SSgt Hawk clearly are admissible under MRE 412 if otherwise relevant.

“Evidence the exclusion of which would violate the constitutional rights of the accused is also admissible as the third exception to the rule. M.R.E. 412(b)(1)(C). This exception addresses an accused's Sixth Amendment right of confrontation and Fifth Amendment right to a fair trial. Weinstein's Federal Evidence, § 412.03[4] [a] (2d ed. 2003). The text itself, however, is presented in the form of legal conclusion rather than analytic framework. As a result, where evidence is offered pursuant to this exception, it is important for defense counsel to detail an accused's theory of relevance and constitutional necessity.” United States v. Banker, 60 M.J. 216, 221-222 (C.A.A.F. 2004).

“In order to overcome the exclusionary purpose of M.R.E. 412, an accused must demonstrate why the general prohibition in [M.R.E.] 412 should be lifted to admit evidence of the sexual behavior of the victim.” Baker, citing United States v. Moulton, 47 M.J. 227, 228 (C.A.A.F. 1997). “In particular, the proponent must demonstrate how the evidence fits within one of the exceptions to the rule.” Id. “In light of the important and potentially competing constitutional and privacy claims incumbent in M.R.E. 412, the rule requires a closed hearing to consider the admission of the evidence. Among other things "the victim must be afforded a reasonable opportunity to attend and be heard" at

this closed hearing. M.R.E. 412(c)(2).” United States v. Banker, 60 M.J. 216, 221-222 (C.A.A.F. 2004), citing MRE 412.

Accordingly, evidence of Ms. Danielle Ligon’s past relationship with Sgt Shannon Mahoe should be admitted because the Government has chosen to charge SSgt Hawk with a charge directly relating to that offense (See referred charge sheet, charge III, specification 5). Also, SSgt Hawk’s consensual sexual encounters with Ms. Ligon which occurred during the night in question (as will be testified to by defense requested witnesses SSgt Mora and Ms. Sybil Mitchell) should also be admitted at trial regardless of MRE 412. In particular, Ms. Mitchell will testify that Ms. Ligon took SSgt Hawk’s hand and placed it down her pants inside Locker Room club at MCRD, San Diego. SSgt Mora will testify, contrary to the fact section in the Government motion (ie Ms. Ligon doesn’t know how she ended up in the car), that it was Ms. Ligon who requested to be alone with SSgt Hawk in the car on the night on question.

Regarding the Government motion’s mention of the past boyfriend of Ms. Ligon, an ET2 Jordan Garwood; that witness will testify that Daniel Ligon mistakenly called him on the night of the incident after the sexual encounter with SSgt Hawk and said “Amy?” Amy was the name of Ms. Ligon’s companion who was out partying with SSgt Hawk, Ms. Ligon and SSgt Mora on the night of the alleged sexual assault incident. This testimony by ET2 Garwood goes to show that the alleged victim has a motive to lie and fabricate her version of events. The defense theory is that Ms. Ligon invented the sexual assault story in order to cover up her mistake of contacting ET2 Garwood. ET2 Garwood will also discuss his opinion of Ms. Ligon’s character for truthfulness. ET2 Garwood’s relationship with Ms. Ligon when the incident took place (ET2 Garwood was Ms. Ligon’s fiancé) is also relevant because it goes to show a motive for why Ms. Ligon is now saying that sexual assault occurred vice a consensual sexual encounter with SSgt Hawk. Ms. Ligon invented the sexual assault story to cover for the fact that she just cheated on her fiancé’ and in a moment of intoxication or fluster accidentally called him.

There is also testimony from SSgt Carlos Mora who will testify that “Daniel leaned over to me and was complaining about her boyfriend cutting her off from having sex. She said she just wanted to meet somebody who was going to toss her around. I believe Amy heard her say this. I told Daniel that it wasn’t smart to be saying that to guys.” Given that SSgt Hawk is charged with sexually assaulting Ms. Ligon only hours after she said this, evidence of her statement to SSgt Mora should be admissible and also evidence that Ms. Ligon liked to have rough sex with men should be admissible. MRE 412(b)(C) specifically says that the following evidence is otherwise admissible under these rules: evidence the exclusion of which would violate the constitutional rights of the accused. SSgt Hawk should be allowed to present this evidence as it tends to show that the encounter he had with Ms. Ligon was entirely consensual.

**c. The Government should produce an expert witness toxicologist**

“(A)an accused service member has a limited right to expert assistance at government expense to prepare his defense.” United States v. Ndanyi, 45 M.J. 315, 319 (C.A.A.F. 1996).

“(T)his government- funded expert assistance need only be provided when the accused shows that such assistance is "necessary.”” United States v. Ndanyi, 45 M.J. 315, 319 (C.A.A.F. 1996).

“(The) three step test for determining whether such government-funded expert assistance was necessary, as follows: There are three aspects to showing necessity. First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.” United States v. Ndanyi, 45 M.J. 315, 319 (C.A.A.F. 1996).

Here, SSgt Hawk has been charged with an Article 107 offense related to him discussing his recollection of events on 11 September 2008. Never mind the fact that the Government cannot prove that SSgt Hawk said anything false to investigators; the two elements at issue for that charge are (3) that the accused knew (the statement) to be false at the time...of making it and (4) that the false...statement was made with intent to deceive.

In this case, there is evidence that SSgt Hawk had been drinking on 11 September 2008. Alcohol affects the ability of the human mind to accurately remember events at times. Even if SSgt Hawk said a statement that later turned out to be incorrect, a UCMJ Article 107 offense did not occur unless SSgt Hawk knew his statement was false when he made it and he made the statement with the intent to deceive. Because alcohol impairs the ability of the mind to recall and recollect events, it is vital for SSgt Hawk’s defense that an alcohol expert toxicologist presents that evidence to a fact finder. Additionally, neither SSgt Hawk nor his defense counsel are qualified to offer such expert opinion about how alcohol effects the ability of the memory to recall events accurately.

Additionally, SSgt Hawk is charged with an Article 120 UCMJ offense for sexually assaulting a female civilian that was inebriated. An absolute defense to this crime is mistake of fact as to consent. There is evidence from all the fact witnesses that the female in question had been drinking alcohol that evening and was possibly quite intoxicated. There is also evidence that SSgt Hawk had been drinking alcohol that evening and was quite intoxicated. A toxicologist can explain how Ms. Ligon’s memory may be faulty that evening because of the alcohol. A toxicologist could also explain how maybe Ms. Ligon thought she was not consenting but in reality because of her state of intoxication, to a reasonable person like SSgt Hawk she appeared to be consenting. A similar argument holds true for SSgt Hawk, which is why an alcohol toxicologist expert is needed.

If SSgt Hawk had either a government or a civilian alcohol toxicologist expert, this expert could talk about how Danielle Ligon likely manifested consent according to an

objective, reasonable person standard. The Defense requests such an expert to develop this testimony and the defense specifically requests that the Government find such an expert witness because the defense has been unable to find a suitable expert in this subject area.

**d. The Defense investigator/background expert should be produced.**

“(A)n accused servicemember has a limited right to expert assistance at government expense to prepare his defense.” United States v. Ndanyi, 45 M.J. 315, 319 (C.A.A.F. 1996).

“(T)his Court articulated a three step test for determining whether such government-funded expert assistance was necessary, as follows: There are three aspects to showing necessity. First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.” United States v. Ndanyi, 45 M.J. 315, 319 (C.A.A.F. 1996).

In this case, the investigator is needed to uncover potentially exculpatory witnesses that will say that the Accused did not engage in a non consensual sexual relationship with Ms. Ligon.

The defense investigator has skills and time to investigate this case that neither the Accused, nor his attorney possess. The investigator will use investigative techniques to find exculpatory witnesses and will also use resources to conduct background checks in a manner and way that the defense does not know how to do. Given that NCIS has already served this function for the Government (in addition to the investigation by trial counsel), it is reasonable that the Accused be afforded the same opportunity.

It is also important to note that the defense investigator, Carol Martin, is requested additionally as an expert consultant with regards to security background checks. SSgt Hawk is charged with several charges related to not properly completing his security background check. The process of security background checks is a complicated matter governed by several federal laws, regulations and military orders that SSgt Hawk’s attorneys are not as well familiar with as one of the Government’s witnesses (a Mr. Claude Carris). Accordingly, having a consultant like Ms. Martin assist the case (she is very familiar with this subject) would allow SSgt Hawk to formulate a defense for why he properly completed his security back ground application and subsequent interview.

**EVIDENCE AND BURDEN OF PROOF**

a. . The defense will submit these documents in support of its motion:

A Defense Witness Request Hawk

B 2nd Supplement Defense Witness Request Hawk

C 3rd Supplement Defense Witness Request Hawk DRAFT

D Defense Discovery Request Hawk  
E Defense Expert Request Hawk toxicologist  
F Defense Expert Request Hawk Clearance expert consultant  
G Gov Response to expert request – Hawk  
H Gov Response to witness request – Hawk  
I Gov Witness List - Hawk 091029  
J CV of Ms. Carol Martin

In support of its motion, the Defense asks the government to produce the below witnesses at the motions hearing:

Johnny Sadberry  
Ms. Daniel Ligon  
NCIS agent Baxter  
SSgt Louis Jenkins  
SgtMaj Jackson  
Sybil Mitchell  
Joe Everall  
Jordan Garwood  
Ted Baldyga  
MSgt Jeffrey McDonald  
1stSgt Spencer Beacham  
1stSgt Robert McDermott  
SgtMaj Robert Young  
MGySgt John Rolaf  
SgtMaj Ken Stickland  
MSgt Carines, SSgt Shoemer  
NCIS Special Agent Rendon  
PFC Zamora Dennis  
PFC Eloy Rendon  
PFC Tanneberg Casey  
PFC Roth Chad  
SSgt Troncocci  
Ms. Carol Martin  
Mr. Claude Carris

b. Burden of proof: the burden of proof in proving all facts in support of this motion falls upon the moving party, the defense. The burden standard is a preponderance of the evidence to prove the validity of all facts. See R.C.M. 905.

### **RELIEF REQUESTED**

Oral argument is requested. The defense requests that this Court order as such:

- a. the Government will answer his pending discovery requests in this case.



- b. the Government will authorize and fund the employment of a defense toxicologist in this case.
- c. the Government will produce the witnesses that the Government denied.
- d. the Government will provide the Accused with his requested investigator/security background check expert.
- e. the Government's MRE 412 motion is denied

Date: 17 November 2009

/s/

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C. P. HUR  
Captain, USMC  
Detailed Defense Counsel

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Court Ruling

The motion is granted. The Court rules that:

- a. the Government will answer his pending discovery requests in this case.
- b. the Government will authorize and fund the employment of a defense toxicologist in this case.
- c. the Government will produce the witnesses that the Government denied.
- d. the Government will provide the Accused with his requested investigator/security background check expert.
- e. the Government's MRE 412 motion is denied

Date:

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MILITARY JUDGE