Navigating the Rape Shield Maze: An Advocate's Guide to MRE 412

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[The witness] could not have ruthlessly destroyed that quality [chastity] upon which most other good qualities are dependent, and for which, above all others, a woman is reverenced and respected, and yet retain her credit for truthfulness unsmirched.[1]

Introduction

The opinion expressed in the quotation above—that an unchaste woman is less credible than a more virtuous woman—seems antiquated by today's standards.[2] One may disregard this belief as the outdated thinking of its era, but every criminal jurisdiction in the United States accepted it for most of the twentieth century.[3] Until the mid-1970s, evidence of an alleged victim's prior sexual behavior was usually admissible in a sexual offense trial.[4] Evidence of a rape complainant's promiscuity was not only permitted to prove consent, but also to attack the complainant's credibility.[5] Impeachment of a witness's "unchaste character" was specifically permitted by the Military Rules of Evidence, which stated:

> For the purpose of impeachment it may be shown that a witness has a bad character as to truth and veracity. After impeaching evidence of this kind is received, or after it has been shown that . . . the witness has an unchaste character . . . , proof that the witness has a good character as to truth and veracity may be introduced in rebuttal.[6]

This language invited both the prosecution and the defense to investigate every fact or rumor about the complainant's sexual history thoroughly. The belief that prior sexual behavior was relevant to truthfulness frequently resulted in the victim being placed on trial and subjected to extensive cross-examination (and re-direct examination) about embarrassing details of her private life.[7]

By the end of the 1970s, as attitudes within society[8] and judicial philosophies[9] shifted, legislatures and courts in every state had enacted statutes, composed rules of court, or written opinions designed to limit the introduction of evidence of an alleged victim's sexual history.[10] Such evidence, after all, sometimes strained even the traditional definition of relevance; it often had only a tenuous connection to the circumstances of the offense

1. State v. Coella, 28 P. 28, 29 (Wash. 1891). The word "smirch" means "to dishonor or defame." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1220 (New College ed. 1976).

2. A 1997 study by the Department of Justice found that 91% of rape and sexual assault victims were female, and that nearly 99% of the reported offenders were male. LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 8 (1997). Accordingly, this article uses the female pronoun when discussing victims and the male pronoun when discussing accused. However, Military Rule of Evidence (MRE) 412 applies equally to accused and victims of either gender. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412 (2002) [hereinafter MCM].

3. Andrew Z. Soshnick, *The Rape Shield Paradox*: *Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 NW. U. J. CRIM. L. & CRIM. 651, 696 n.35 (1987).

4. *Id.* at 696 n.5 (citing Sally Gold & Martha Wyatt, *The Rape System: Old Roles and New Times*, 27 CATH. U. L. REV. 695, 698-705 (1978)).

5. Shawn J. Wallach, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485, 486 (1997); *see also* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 597 (1997) [hereinafter SALTZBURG].

6. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. XXVII, ¶ 153b (1951).

7. United States v. Lauture, 46 M.J. 794, 797 n.4 (Army Ct. Crim. App. 1997) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. III, ¶ 153b (1969)).

8. The Women's Movement challenged and ultimately influenced society's beliefs about women and sexuality. By the 1970s, society was less likely to agree that sex outside of marriage was relevant to a woman's character. Contrary to the concern that false rape charges were easy to fabricate, society also recognized that many rape incidents actually went unreported because the victims feared that they would be harassed or embarrassed. *See* Soshnick, *supra* note 3, at 650-51; Richard A. Wayman, *Lucas Comes to Visit Iowa: Balancing Interests Under Iowa's Rape-Shield Evidentiary Rule*, 77 IOWA L. REV. 865 (1992).

9. Even before the enactment of rape shield laws, courts began to reveal increasing skepticism that evidence of victims' sexual histories carried sufficient probative value to justify extensive inquiry. EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE 574 (3d ed. 1984). *See, e.g.*, United States v. Kasto, 584 F.2d 268 (8th Cir. 1978).

being tried.[11] Practitioners and courts observed that the evidence often served no real purpose and needlessly embarrassed victims. At best, it was often of minimal probative value. At worst, it was likely to confuse and distract the fact-finders, discourage the reporting of sexual assaults, and unnecessarily waste the court's time. [12]

In 1978, Congress passed The Privacy Protection for Rape Victims Act of 1978,[13] which created Federal Rule of Evidence (FRE) 412.[14] Adoption of this "rape shield" rule into military practice as Military Rule of Evidence (MRE) 412 significantly restricted the introduction of evidence of a victim's prior sexual behavior and greatly changed the way practitioners try sexual offense cases.[15] The rape shield rule of MRE 412 is a victim-protection rule; its primary purpose is to safeguard sexual assault victims from the degrading and embarrassing disclosure of intimate details of their private lives.[16]

Practitioners have litigated MRE 412 heavily since its enactment. Courts have struggled to define key terms in MRE 412 that Congress did not define, and balance MRE 412's policies against the constitutional rights of accused. After many years of judicial interpretation, MRE 412 can seem more like a collection of case-by-case rules than a unified body of legal reasoning following a clear standard.

The purpose of this article is to help practitioners understand and apply MRE 412, and to provide a road map through its provisions and extensive case law. The article first discusses the scope and application of MRE 412. It then analyzes the three exceptions to the rule's general prohibition, emphasizing the exception for constitutionally required evidence. Then, the article discusses the courts' application of the "constitutionally required" exception, to help the practitioner coherently visualize this term's legal definition. Finally, the article provides some practical advice on the effective litigation of MRE 412 motions. While this article is intended for trial and defense counsel alike, MRE 412 is a rule of exclusion; therefore, the article is presented primarily from the perspective of the most likely proponent—the defense counsel.

The Rape Shield Rule: MRE 412

The Scope and Application of the Rule

Military Rule of Evidence 412 has two main components: (1) evidentiary rules; and (2) procedural requirements.[17] The basic evidentiary rule of MRE 412(a) is that in any "proceeding involving sexual misconduct," evidence offered to prove that an alleged victim engaged in other sexual behavior" or to prove "any victim's sexual predisposition," is not admissible.[18] Military Rule of Evidence 412(d) defines "sexual behavior" as "any sexual behavior not encompassed by the alleged offense."[19] "Sexual predisposition" has a broader definition and includes any evidence that may have a sexual connotation for the fact-finder; it refers to such evidence as a victim's mode of dress, speech, or lifestyle, and other evidence that does not directly relate to sexual activities or thoughts, but that may be presented as an insinuation or innuendo of sexual conduct.[20]

The protections of MRE 412 apply to any case in which "sexual misconduct" is alleged.[21] The rule does not define "sexual misconduct," but defines "nonconsensual sexual offense" to include rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.[22] Courts also apply MRE 412 to sexual offenses where consent is not a defense. Accordingly, if the

10. Soshnick, *supra* note 3, at 1.

11. MCM, *supra* note 2, MIL. R. EVID. 412(a) analysis, app. 22, at A22-35. *See, e.g.*, *Kasto*, 584 F.2d at 271.

12. MCM, *supra* note 2, MIL. R. EVID. 412(a) analysis, app. 22, at A22-35.

13. Pub. L. No. 95-540, 92 Stat. 2046.

14. *See generally* FED. R. EVID. 412. *See also* Doe v. United States, 666 F.2d 43, 46 (4th Cir. 1981) ("The text, purpose and legislative history of Rule 412 clearly indicate that Congress enacted the rule for the special benefit of the victims of rape.").

15. SALTZBURG, *supra* note 5, at 520.

16. MCM, *supra* note 2, MIL. R. EVID. 412(a) analysis, app. 22, at A22-35.

17. *See generally id.* MIL. R. EVID. 412.

18. *Id*. MIL. R. EVID. 412(a). Before the 1998 amendments to the *Manual for Courts-Martial*, MRE 412 only applied to "past sexual behavior," defined as "sexual behavior other than the sexual behavior with respect to which a nonconsensual sexual offense is alleged." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412(d) (1994) [hereinafter 1994 MCM].

19. MCM, *supra* note 2, MIL. R. EVID. 412(d).

20. *Id.*

21. *Id*. MIL. R. EVID. 412(a).

accused is charged with carnal knowledge, MRE 412 excludes introduction of evidence of the victim's sexual history, even though consent is not a defense to carnal knowledge.[23]

Not all evidence tending to have a sexual connotation is automatically subject to MRE 412. Military Rule of Evidence 412 only applies to evidence of other sexual behavior or sexual predisposition of the victim. Evidence that the alleged victim has made past false complaints of sexual offenses, for example, is not barred under MRE 412.[24] Courts have not yet specifically decided whether MRE 412 applies to evidence of prior sexual assaults upon the victim.[25] Although such incidents may be considered to be sexual acts, at least one member of the Court of Appeals for the Armed Forces has opined that the sexual assault of a victim is not sexual behavior *engaged in* by the victim as provided by MRE 412.[26]

The parties must be mindful of the purpose for which the evidence of other sexual behavior is offered, and whether that purpose brings the evidence within the policy considerations of MRE 412. Courts may exclude evidence of a victim's past behavior based on sexual innuendo, even when the evidence does not fall within the literal language of MRE 412. In *United States v. Greaves*,[27] the accused sought to introduce evidence that the victim "worked in a Japanese bar, dressed provocatively, and made good money."[28] Though the court admitted to being uncertain whether MRE 412 applied to the evidence, it applied MRE 412 and affirmed the exclusion of the evidence because it believed "that [the accused] wanted the court members to project . . . that [the victim] was in fact a prostitute."[29] An advocate who offers evidence that appears to violate MRE 412's policy purposes will face a difficult task in persuading a trial judge to admit it.

Military Rule of Evidence 412 is intended to be the primary means of limiting evidence of a sexual offense victim's sexual character and conduct.[30] Consequently, courts may use MRE 412 to exclude evidence that may be admissible under another rule of evidence.[31] The exclusionary provisions of MRE 412 apply in "any proceeding involving alleged sexual misconduct."[32] The Rule defines "any proceeding" to include courts-martial, as well as pretrial investigations pursuant to Article 32.[33] In *United States v. Fox*,[34] the Court of Military Appeals held that Rule 412 also trumps Rule for Courts-Martial (RCM) 1001,[35] which permits relaxing the rules of evidence at the sentencing phase.[36] The court reasoned that limiting MRE 412's application to the findings portion would defeat Rule 412's pur-

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22. *Id*. MIL. R. EVID. 412(e) (defining "nonconsensual sexual offenses" to include rape, forcible sodomy, or indecent assault where consent is a defense, and attempts to commit such offenses).

23. *See, e.g.*, United States v. Vega, 27 M.J. 744, 746 (A.C.M.R. 1988) (reasoning that MRE 412 was intended to be broader in scope than the federal rule and protect all sex offense victims, particularly since carnal knowledge is an offense of constructive force against children, clearly included within the intent of Rule 412). The analysis to Rule 412 also emphasizes the drafters' intent to apply Rule 412 as broadly as needed to serve the social policies that inspired it. MCM, *supra* note 2, MIL. R. EVID. 412(a) analysis, app. 22, at A22-36.

24. MCM, *supra* note 2, MIL. R. EVID. 412(b)(2) analysis, app. 22, at A22-36. The analysis states that, "evidence of prior false complaints . . . is not within the scope of MRE 412 and is not objectionable if otherwise admissible." *Id*. The proponent of such evidence however, must be able to establish that the prior complaints were actually false. *See* United States v. Velez, 48 M.J. 220, 227 (1998).

25. *See* United States v. Pagel, 45 M.J. 64 (1996).

26. *Id*. at 70 (Sullivan, J., concurring) (stating that "sexual assault . . . in my view is not 'sexual behavior' engaged in by the victim as provided in MRE 412").

27. 40 M.J. 432 (C.M.A. 1994).

28. *Id*. at 437. *Greaves* was decided before the 1998 amendments to MRE 412 specifically barred evidence of a victim's sexual predisposition. MCM, *supra* note 2, MIL. R. EVID. 412 analysis, app. 22, at A22-36. Under the current version of MRE 412, evidence that the victim "dressed provocatively" would likely be excludable as evidence of sexual predisposition. *See id*. MIL. R. EVID. 412(a).

29. *Greaves*, 40 M.J. at 437.

30. United States v. Vega, 27 M.J. 744, 746 (C.M.R. 1988); SALTZBURG, *supra* note 5, at 598.

31. SALTZBURG, *supra* note 5, at 598.

32. MCM, *supra* note 2, MIL. R. EVID. 412(a).

33. *Id*. R.C.M. 405(i). Military Rule of Evidence 1101(d) also makes MRE 412 applicable in proceedings for search authorizations and pretrial restraint. *Id*. MIL. R. EVID. 1101(d).

34. 24 M.J. 110 (C.M.A. 1987).

35. *Id*. at 112.

36. MCM, *supra* note 2, R.C.M. 1001(c)(3).

pose of protecting victims from needless embarrassment and unwarranted invasions of privacy.[37]

Exceptions to the General Rule of Exclusion

Notwithstanding the general rule of exclusion, MRE 412 provides three categories of exceptions.[38] The first exception allows the defense to introduce evidence of other sexual behavior to prove that another person is the source of physical evidence, such as semen or an injury. The second exception permits the accused to introduce evidence of the victim's past sexual behavior with him to prove consent.[39] Both exceptions are narrowly tailored, and their application is relatively clear. The third exception, for constitutionally required evidence,[40] is much broader, and far more difficult to define and apply.

Military Rule of Evidence 412(b)(1) states that evidence that meets the requirements of an exception to Rule 412 is admissible only if it is "otherwise admissible under these rules."[41] Thus, the first step in analyzing whether the evidence fits within an MRE 412 exception is to determine the character and form of the proposed evidence and its admissibility under the other rules of evidence. For example, the proponent may wish to present testimony from Person *X* that he overheard Person *Y* say the victim engaged in an extramarital affair. This evidence would be objectionable as hearsay.[42] The proponent would not be able to reach the question of admissibility under MRE 412 unless he could first qualify the testimony under a hearsay exception or exemption.[43]

Finally, even evidence that is admissible under all of the other rules of evidence and meets at least one MRE 412 exception must still survive the heightened scrutiny of MRE 412's own balancing test.[44] Under MRE 412(c)(3), evidence of the victim's other sexual behavior is only admissible if it is relevant, *and* if its probative value *outweighs the danger that it will cause unfair prejudice*.[45] This is a significantly higher standard than the more familiar MRE 403 balancing test, which provides that evidence may be excluded if its probative value is "substantially outweighed" by dangers such as unfair prejudice, confusion of the issues, misleading the members, undue delay, and waste of time.[46]

Exception A—Source of Semen, Injury, or Other Physical Evidence

The first exception, MRE 412(b)(1)(A) (Exception A), states that "evidence of specific instances of sexual behavior by the alleged victim" is admissible if "offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence."[47] Evidence that someone other than the accused is the source of injury or semen is usually admissible, subject to the need for the evidence's probative value to outweigh the danger that it will cause unfair prejudice.[48] The temporal and circumstantial distance between the other sexual behavior and the charged incident will likely determine how the court will rule. For example, evidence that someone other than the accused injured the victim during sexual intercourse four months before an alleged rape is generally not relevant to establish an alternate source of injury.[49]

Exception B—Prior Sexual Behavior With the Accused

The second exception, MRE 412(b)(1)(B) (Exception B), permits the introduction of evidence to prove the alleged vic-

37. *Fox*, 24 M.J. at 112; *accord* United States v. Whitaker, 34 M.J. 822 (A.F.C.M.R. 1992).

38. MCM, *supra* note 2, MIL. R. EVID. 412(b).

39. *Id*. MIL. R. EVID. 412(b)(1)(A)-(B).

40. *Id*. MIL. R. EVID. 412(b)(1)(C).

41. *Id*. MIL. R. EVID. 412(b)(1).

42. *See id*. MIL. R. EVID. 801 (defining "hearsay" as an out-of-court statement, "other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

43. *Id*. MIL. R. EVID. 801(d)-804. *See, e.g*., United States v. Velez, 48 M.J. 220, 227 (1998).

44. MCM, *supra* note 2, MIL. R. EVID. 412(c)(3).

45. *Id*.

46. *Id*. MIL. R. EVID. 403.

47. *Id*. MIL. R. EVID. 412(b)(1)(A).

48. *See id*.; SALTZBURG, *supra* note 5, at 599.

49. *See, e.g.*, United States v. Pickens, 17 M.J. 391 (C.M.A. 1984).

tim's consent. This provision states that evidence of "specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct . . . offered by the accused" is admissible "to prove consent."[50] This exception permits the introduction of evidence of previous sexual activity between the accused and the victim. Again, the evidence must survive the MRE 412(c) balancing test.[51] A court is likely to consider the time span between the prior and charged events—and their factual similarity—to be the key factors. Therefore, the accused will likely be permitted to present evidence that he had a ten-year sexual relationship with the victim immediately before the alleged misconduct to prove that the victim consented to the alleged sexual assault. However, evidence that the accused and the victim had sexual intercourse ten years before the charged incident will likely be excluded as too remote to be relevant or helpful.[52]

Exception C—Constitutionally Required Evidence

Military Rule of Evidence 412 is not a rule of absolute privilege; its drafters did not intend for it to deprive an accused of his constitutional right to present a relevant defense.[53] Military Rule of Evidence 412(b)(1)(C) (Exception C) states that "evidence the exclusion of which would violate the constitutional rights of the accused" is admissible if otherwise admissible under the other rules of evidence.[54] The remainder of this article attempts to untangle and clarify the application of these thirteen words—some of the most litigated language in the *Manual for Courts-Martial*.[55]

Exception C mandates the admissibility of constitutionally required evidence, but does not explain what evidence the constitution requires.[56] The constitutional foundations of Exception C are the Sixth Amendment right to confrontation and the Fifth Amendment right to due process.[57] An accused has a right to present evidence in his defense, so long as that evidence is relevant, material, and favorable to the defense.[58] Excluding defense impeachment evidence against a key witness may be constitutional error if it is reasonably likely that the evidence could have "tipped the credibility balance" in the case to the defense's favor.[59] But an accused's right to present relevant evidence is not uninitiated, and in appropriate cases, may "bow to accommodate other legitimate interests of the criminal trial process" or societal interests.[60] The Supreme Court has held that "[r]ape victims deserve heightened protection against surprise, harassment and unnecessary invasions of privacy."[61] Restrictions on the accused's constitutional rights, however, must not be arbitrary or disproportionate to the purposes they are designed to serve.[62] "In determining admissibility, there must be a weighing of the probative value of the evidence against the interest of shielding the victim's privacy,"[63] which means that the trial judge must conduct a balancing test.[64] The defense has the burden of demonstrating why the protections of MRE 412 should be lifted to allow admission of the otherwise proscribed evidence.[65]

50. MCM, *supra* note 2, MIL. R. EVID. 412(b)(1)(B). Note that the remainder of MRE 412 also applies to evidence offered by the prosecution. *Id*.

51. *Id*. MIL. R. EVID. 412(c).

52. SALTZBURG, *supra* note 5, at 599.

53. United States v. Dorsey, 16 M.J. 1, 4 (C.M.A. 1983) (citing Davis v. Alaska, 415 U.S. 308 (1974)); MCM, *supra* note 2, MIL. R. EVID. 412(a) analysis, app. 22, at A22-35.

54. *Id*. MIL. R. EVID. 412(b)(1)(C).

55. Many of the factual and legal questions practitioners regularly face in the context of Exception C also apply to Exceptions A and B. This is important to remember because if the prospective evidence is not admitted under one of the first two exceptions, the argument that the evidence is "constitutionally required" will often be the proponent's fallback position.

56. MCM, *supra* note 2, MIL. R. EVID. 412(b)(1)(C); SALTZBURG, *supra* note 5, at 600.

57. Michigan v. Lucas, 500 U.S. 145 (1991); *Davis*, 415 U.S. at 308.

58. United States v. Valenzuela-Bernal, 458 U.S. 858 (1982); United States v. Avery, 52 M.J. 496, 498 (2000); *Dorsey*, 16 M.J. at 5. *See* SALTZBURG, *supra* note 5, at 600 (citing California v. Trombetta, 467 U.S. 479 (1984); Faretta v. California, 422 U.S. 806 (1975)).

59. United States v. Hall, 56 M.J. 432, 437 (2002).

60. *Lucas*, 500 U.S. at 149 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)); Rock v. Arkansas, 483 U.S. 44, 55 (1987). *See also* United States v. Velez, 48 M.J. 220, 226 (1998) (explaining that "while relevance is required, it is not a sufficient basis alone to establish a constitutional violation").

61. United States v. Sanchez, 44 M.J. 174, 178 (1996) (quoting *Lucas*, 500 U.S. at 150).

62. *Lucas*, 500 U.S. at 151.

63. *Sanchez*, 44 M.J. at 178 (citing *Lucas*, 500 U.S. at 149-50).

64. MCM, *supra* note 2, MIL. R. EVID. 412(c)(3).

Applying Exception C in a trial court, therefore, requires practitioners and judges to balance victim-protection against the constitutional rights of the accused. It is far easier to balance those interests in a particular case than to articulate a simple or clear standard of admissibility under Exception C. In theory, the evidence must be relevant, material, and favorable to the defense, [66] and its probative value must outweigh the danger of unfair prejudice.[67] In practice, whether evidence is constitutionally required is determined on a case-by-case basis.[68] This means that understanding the limits of Exception C requires the practitioner to (1) know its extensive case law; and (2) know how to distinguish, analyze, and apply the closely related concepts of relevance, materiality, and favorableness to the defense. In many cases, distinguishing these concepts will be difficult, but the advocate who is prepared to argue each of them individually may gain a decisive advantage over the opponent who does not.

Relevance and Materiality

Relevance is the key to admissibility under Exception C.[69] Relevance under MRE 412 is no more than a specific application of the general principles of relevance in Rules 401 and 403; the proffered evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[70] Traditionally, relevance referred to the tendency of evidence to make a fact more or less probable, while materiality referred to the fact's degree of consequence to the determination of the action.[71] Today, "relevance" has swallowed "materiality" within the single definition of relevance found at MRE 401.[72] This means that the advocate must be able to articulate (1) what evidence he intends to offer; (2) how the evidence makes the fact more or less probable; and (3) how that fact, if proven, is of consequence to the determination of the accused's guilt. The best way for practitioners to craft successful arguments for relevance is to examine cases that presented courts with similar facts and arguments. The extensive Exception C precedent cannot cover every factual variation, but it does alert counsel to the location of the logical fault lines.

Courts usually reject theories of relevance that appear to be veiled attacks on the victim's sexual morality or general predisposition to sex. Ordinarily, sexual behavior by the victim with others, even under related circumstances, is not admissible to prove consent to sexual behavior with the accused.[73] Evidence that the victim had worked as a prostitute or is sexually promiscuous is of minimal relevance to her credibility or consent. [74] In *United States v. Fox*, [75] the defense sought to introduce evidence of the victim's past sexual behavior at the sentencing phase of the trial. The defense theorized that the victim's prior (consensual) sexual experiences mitigated the traumatic impact of the accused's assault on her. The court held that this evidence was not relevant or material to the determination of an appropriate sentence for the accused,[76] but *did* permit the accused to testify as to his own state of mind about the victim's receptiveness to sex in general and sex with him in particular. The court held that the accused's beliefs about the victim's predisposition had some relevance to the question of his state of mind, and that his state of mind at the time of the offense was material to the question of an appropriate sentence.[77] This illustrates the importance of articulating one's theory of relevance carefully; a court

65. United States v. Moulton, 47 M.J. 227, 228 (1997).

66. *Id*.; *see also* United States v. Greaves, 40 M.J. 432, 438 (C.M.A. 1994); United States v. Williams, 37 M.J. 352, 359 (C.M.A. 1993); United States v. Elvine, 16 M.J. 14 (C.M.A. 1983); United States v. Dorsey, 16 M.J. 1, 5 (C.M.A. 1983). Courts have articulated several definitions of "constitutionally required." United States v. Lauture, 46 M.J. 794, 799 (Army Ct. Crim. App. 1997).

67. MCM, *supra* note 2, MIL. R. EVID. 412(c)(3); *Greaves*, 40 M.J. at 438.

68. United States v. Buenaventura, 45 M.J. 72, 79 (1996), *quoted in* United States v. Carter, 47 M.J. 395 (1998).

69. *Carter*, 47 M.J. at 398.

70. MCM, *supra* note 2, MIL. R. EVID. 401, 403. *See Dorsey*, 16 M.J. at 5.

71. MCM, *supra* note 2, MIL. R. EVID. 401 analysis, app. 22, at A22-33.

72. *Id*.; *see generally id.* MIL. R. EVID. 401.

73. *See* United States v. Sanchez, 44 M.J. 174, 179 (1996); United States v. Hicks, 24 M.J. 3, 10 (C.M.A. 1987); United States v. Lauture, 46 M.J. 794, 799 (Army Ct. Crim. App. 1997).

74. United States v. Greaves, 40 M.J. 432, 437 (C.M.A. 1994); United States v. Hollimon, 12 M.J. 791, 793 (C.M.A. 1982) (citing United States v. Kasto, 584 F.2d 268 (8th Cir. 1978)). *But see* MCM, *supra* note 2, MIL. R. EVID. 412(b)(1) analysis, app. 22, at A22-36 (suggesting that where a hypothetical complainant, a prostitute, had threatened to fabricate a rape allegation against the accused unless he paid her an additional sum, the admissibility of evidence that the victim was a prostitute may be constitutionally required).

75. 24 M.J. 110, 111-12 (C.M.A. 1987).

76. *Id*. at 112.

may hold that the same facts are relevant under one theory but irrelevant under another.

Courts have accepted the validity of other specific theories of relevance, and counsel who offer evidence of other sexual behavior under one of these theories are the most likely to prevail. Evidence of other sexual behavior by the victim may be admissible when it demonstrates a motive for the victim to fabricate the allegation against the accused.[78] The victim's motive to lie may be "to explain a pregnancy, injury, or in the case of a minor, an all-night absence from home."[79] A victim's desire to protect her relationship with her boyfriend or husband and to explain why she was with another individual may also create a motive to fabricate.[80] Prior sexual behavior may be relevant when it is so similar, distinctive, and unusual that it corroborates the accused's version of the alleged events or suggests contrivance on the part of the victim.[81] In cases involving young victims, evidence of specific acts may be admissible to show a source of unusually advanced sexual knowledge.[82]

"Simply stating a valid theory of relevance is not sufficient to make evidence admissible, however."[83] To be relevant, the evidence must rationally support the theory, and the theory must be significant to the outcome of the case.[84] In other words, the proponent must demonstrate that the proffered evidence tends to prove the existence of the fact asserted.[85] If, for example, the proponent intends to prove that the victim has a motive to fabricate a rape allegation against the accused, the fact that she had had an extramarital affair with a third person two years previously would probably not be helpful to prove the existence of that motive.[86]

Favorableness to the Defense

The proponent who establishes that the proffered evidence is relevant and material must also prove that it is "favorable to the defense." In a sense, this term is misleading; it suggests a tactical decision that logically should be the province of the defense counsel. It would be more accurate to say that the evidence must be "important" or "vital" enough to the defense to have constitutional significance and overcome the policy interests of MRE 412.

Courts have used many different words to define "favorable" evidence.[87] Simply stated, evidence is favorable to the defense when it is important to the defense's theory, in the context of all of the evidence that both sides will present at trial.[88] Some courts have stated that the evidence must be "critical" or "necessary, critical, or vital" to the defense case.[89] As this suggests, the strength of the government's case against the accused is an important factor in the favorableness of the evidence, and the strength of the defense's other evidence is another. In *United States v. Williams*,[90] the Court of Military Appeals held

77. *Id*. The court explained its reasoning as follows:

> If a person begins a sexual misadventure believing that the object of his attentions will be a willing and cooperative partner, then pursues this behavior even after he becomes aware that his partner is unwilling, his conduct *may* be viewed as less culpable than that of one who, at the outset, knows that his advances are unwelcome.

Id. This part of the holding in *Fox* is questionable in light of subsequent amendments to MRE 412 that specifically exclude evidence of the victim's sexual predisposition. MCM, *supra* note 2, MIL. R. EVID. 412 analysis, app. 22, at A22-36.

78. Olden v. Kentucky, 488 U.S. 227 (1988); *Sanchez*, 44 M.J. at 178; United States v. Williams, 37 M.J. 352 (C.M.A. 1993); United States v. Dorsey, 16 M.J. 1, 4 (C.M.A. 1983).

79. *Sanchez*, 44 M.J. at 179 (quoting FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 20-32.32(b), at 837 (1991)).

80. *See Sanchez*, 44 M.J. at 178; *Williams*, 37 M.J. at 352.

81. *See* United States v. Velez, 48 M.J. 220, 226-27 (1998); *Sanchez*, 44 M.J. at 179.

82. United States v. Buenaventura, 45 M.J. 72, 79 (1996) (citing United States v. Gray, 40 M.J. 77, 79-80 (C.M.A. 1994); United States v. Hurst, 29 M.J. 477, 481 (C.M.A. 1990)).

83. United States v. Lauture, 46 M.J. 794, 799 (Army Ct. Crim. App. 1997).

84. *Id*.

85. United States v. Dorsey, 16 M.J. 1, 5 (C.M.A. 1983).

86. *See Lauture*, 46 M.J. at 794.

87. *Id*. at 799 (listing some of the words courts have used to define "constitutionally required" evidence, and applying some of the same words—such as "vital" and "critical"—to define favorableness of the evidence to the defense).

88. *Dorsey*, 16 M.J. at 6.

89. *Lauture*, 46 M.J. at 799 (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973); United States v. Sanchez, 44 M.J. 174 (1996)).

that evidence of the victim's extramarital affair with a third person was necessary to the defense that the victim consented to sex with him, then fabricated her allegation to explain to her paramour why she was with the accused. The court reasoned that the government's case was less than overwhelming, and concluded that the testimony might have shifted the outcome in the defendant's favor.[91]

Other factors that influence favorableness include whether the evidence undermines the credibility of a crucial government witness, such as the only eyewitness to an allegation;[92] whether the evidence is exculpatory or corroborates the accused's testimony;[93] and whether alternative evidence is available to achieve the same benefit.[94] Accordingly, if the proponent can present other key exculpatory evidence without the sexual behavior evidence, the evidence of other sexual behavior will probably not be held to be favorable. For example, if the defense has several options available with which to attack the victim's credibility, any MRE 412 evidence would be less favorable in light of the entire defense case.[95] If, on the other hand, the sexual behavior evidence is the only available means to impeach the credibility of the victim, the evidence becomes more important, and thus more favorable.[96]

One more substantive barrier still stands between the proponent and admission of the evidence—the special balancing test of MRE 412(c)(3), which states that the probative value of the evidence must outweigh the danger that it will cause unfair prejudice.[97] Although there is some authority for weakening, if not omitting, this balancing test for Exception C evidence,[98] courts continue to apply MRE 412(c)(3) to all three of the exceptions to MRE 412, including Exception C.[99] Practitioners should therefore be prepared to argue that the probative value of the evidence outweighs the danger that it will create unfair prejudice.

Procedural Rules

The second part of MRE 412 is a detailed set of procedural rules.[100] The proponent must know and follow these requirements; failure to comply with them may result in exclusion of the evidence.[101]

A party intending to introduce evidence under MRE 412 must first provide notice by filing a written motion at least five days before the entry of pleas.[102] The proponent must serve the motion on the opposing party and the military judge, and must also notify the alleged victim.[103] The motion must include an offer of proof specifically describing the evidence the proponent intends to introduce and stating the purpose for offering the evidence.[104] Although the proponent need not make a proffer when the substance and materiality of the evidence are obvious,[105] this course of action carries the obvious risk that the

90. 37 M.J. 352, 361 (C.M.A. 1993)

91. *Id.* at 361.

92. *Dorsey*, 16 M.J. at 6.

93. *See* United States v. Velez, 48 M.J. 220, 223 (1998) (rejecting defense evidence of the victim's prior sexual behavior when the defense was that the alleged sexual contact never happened).

94. *Dorsey*, 16 M.J. at 7.

95. *Velez*, 48 M.J. at 227.

96. *See* United States v. Lauture, 46 M.J. 794, 799 (Army Ct. Crim. App. 1997).

97. MCM, *supra* note 2, MIL. R. EVID. 412(c)(3).

98. United States v. Williams, 37 M.J. 352, 360 n.7 (C.M.A. 1993). The court in *Williams* stated that:

> In *United States v. Dorsey*, 16 M.J. 1, 8 (CMA 1983), this Court did not consider itself bound to apply the balancing test required under [MRE] 412(c)(3), yet applied the test nonetheless. Once again, under a literal interpretation of [MRE] 412(b)(1), this Court is not required to apply a balancing test for undue prejudice independent of any requirements under [MRE] 403.

Id.

99. *See* United States v. Greaves, 40 M.J. 432, 438 (C.M.A. 1994); United States v. Harris, 41 M.J. 890 (Army Ct. Crim. App. 1995). Recent case law suggests that this issue remains unsettled. United States v. Carter, 47 M.J. 395, 397 (1998) (Sullivan, J., concurring).

100. *See* MCM, *supra* note 2, MIL. R. EVID. 412(c).

101. Michigan v. Lucas, 500 U.S. 145, 152-53 (1991). Although counsel's failure to provide notice may be so flagrant as to warrant exclusion of the evidence, the better practice is to view MRE 412's notice requirement with flexibility. Accordingly, a continuance or delay is the preferred remedy given the potential importance of the evidence. SALTZBURG, *supra* note 5, at 603.

102. MCM, *supra* note 2, MIL. R. EVID. 412(c)(1)(A).

military judge will *not* agree that the evidence is obviously material, and deny the motion. Not every permissible course is a wise one; the counsel who fails to proffer what evidence he intends to introduce throws away his first opportunity to sway the military judge. The proponent should therefore clearly and specifically identify the evidence he seeks to admit to make the clearest possible case for its relevance, materiality, and favorableness to the defense.

If the proffer suggests the existence of evidence that meets one of the three MRE 412 exceptions, the military judge *must* conduct a closed hearing before admitting the evidence under MRE 412.[106] If the proffer does not meet this minimal standard, no hearing is required.[107] The parties may call witnesses, including the victim, and may offer relevant oral or written evidence. The alleged victim must be afforded a reasonable opportunity to attend the hearing and to be heard.[108]

Practice Tips

Military Rule of Evidence 412 is balanced in favor of the exclusion of evidence; advocates who seek to admit evidence under this rule must be prepared to overcome significant obstacles. Although the strength of the evidence is beyond practitioners' control, counsel can strengthen their arguments by understanding and skillfully applying the law to their facts.

Consider the following hypothetical.[109] The accused, *A*, is charged with rape. The alleged victim, *V*, says she met *A* at his apartment on the evening of the alleged assault. When *V* attempted to leave, *A* forcibly prevented *V* from leaving and raped her. Several hours before the alleged rape, *V* was with another man, a friend of *A*, at the friend's apartment. *A* knew that *V* had had sex with his friend at that time. Knowing this, *A* accused *V* of being a "whore" because she had just had sex with his friend and then wanted to have sex with *A*. That evening, *V* reported that *A* had raped her.

A intends to testify at trial that he accused *V* of having an affair with his friend, and about *V*'s reaction to *A*'s accusation. The defense also intends to call *A*'s friend to testify that he had a sexual liaison with *V* earlier on the same evening as the alleged assault.

Tip #1—Use a Valid Theory for Admission of the Sexual Behavior Evidence

The proponent must have a valid purpose for presenting evidence of an alleged victim's other sexual behavior.[110] As previously discussed, courts have accepted several specific theories of relevance; these include evidence of a victim's motive to fabricate,[111] evidence of a source other than the accused of sexual knowledge beyond the victim's tender years,[112] evidence of mistaken identification of the accused by the victim,[113] and evidence of the victim's unusual and distinctive behavior that verifies the accused's version of the charged incident.[114] This is not an exclusive list, and proponents should analyze the case law and available evidence and seek to apply other legitimate alternatives. Practitioners should also be familiar with—and avoid—theories of relevance that courts have specifically rejected.[115]

The proponent must articulate the purpose for offering the evidence and be prepared to explain and argue each step of the

103. *Id.* MIL. R. EVID. 412(c)(1)(B). One commentator expresses concern about the use of the term "opposing party" and to whom this term is intended to refer—the staff judge advocate, chief of military justice, or trial counsel. SALTZBURG, *supra* note 5, at 602. Service on any of these government counsel will usually be sufficient, however.

104. MCM, *supra* note 2, MIL. R. EVID. 412(c)(1)(A).

105. United States v. Means, 24 M.J. 160, 162 (C.M.A. 1987) (citing United States v. Peters, 732 F.2d 1004 (1st Cir. 1984)).

106. MCM, *supra* note 2, MIL. R. EVID. 412(c)(2); SALTZBURG, *supra* note 5, at 602-03.

107. United States v. Sanchez, 44 M.J. 174, 177 (1996) ("To require a hearing when the offer has not met the threshold requirements would undermine the rationale for MRE 412(a) and (b)—to protect the victims against humiliating, embarrassing and harassing questions.").

108. MCM, *supra* note 2, MIL. R. EVID. 412(c)(2).

109. The hypothetical and the arguments that follow are taken from *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983). The arguments in the dissent favor exclusion of the evidence. *Id*. at 8-13 (Cook, J., dissenting).

110. *See, e.g.*, United States v. Greaves, 40 M.J. 432, 439 ("The defense counsel failed to demonstrate the specific evidence that he would introduce or to articulate a theory of admissibility.").

111. *See, e.g.*, United States v. Williams, 37 M.J. 352 (C.M.A. 1993); *Dorsey*, 16 M.J. at 1.

112. *See, e.g.*, United States v. Pagel, 45 M.J. 64 (1996); United States v. Gray, 40 M.J. 77 (C.M.A. 1994).

113. *See, e.g.*, United States v. Buenaventura, 45 M.J. 72, 79 (1996).

114. *See, e.g.*, United States v. Sanchez, 44 M.J. 174 (1996).

analysis for the judge. Never assume that the purpose for offering evidence is obvious to the judge. If the proponent gives the judge a vague and indefinite proffer, the judge may conclude that the real purpose for offering the evidence is a "smear attempt to paint the victim in a bad light."[116]

In the hypothetical case of *A*, the proponent's theory is that the evidence shows that *V* has a motive to fabricate the claim of rape. He will argue that it is reasonable to infer that *V*, confronted with *A*'s accusations, felt guilty about her own conduct, became angry with *A*, and wanted revenge against him. He will also argue that it is reasonable to infer that *V* fabricated a claim that *A* had raped her out of vindictiveness against *A*. The evidence of *V*'s vengeful reaction is supported by the truth underlying *A*'s accusation about the affair. The truth of the allegations will be established through testimony of *A*'s friend, and perhaps through cross-examination of *V* herself.

Contrast the argument above with one that simply states that evidence of *V*'s affair with *A*'s friend is admissible because "it goes to her credibility." Given such a meager proffer, the military judge is unlikely to admit the evidence.

Tip #2—The Purpose Must Be Consistent With the Case Theory

The proponent must understand—and be prepared to articulate—how the evidence supports the defense theory of the case. If the purpose for offering evidence does not advance that theory, the evidence will likely be found to be irrelevant.

In the hypothetical case of *A*, the defense theory is that *V* fabricated the rape claim to get revenge against *A*. *A*'s counsel could argue that the evidence of *V*'s affair with *A*'s friend—and the resulting argument between *V* and *A*—provides the motive for the false claim. That is, *A* knew about the affair and angrily confronted *V* with this knowledge, which gave *V* a motive to fabricate the rape accusation against *A*. If the proponent makes this argument for admission of the evidence of the affair, it will support the defense theory and is relevant to the case.

Contrast this argument to the argument made by the defense counsel in *United States v. Velez*.[117] In *Velez*, the defense counsel argued that the other sexual behavior created a motive for the victim to fabricate the accusation. However, instead of using the evidence to directly support this argument, the defense counsel actually offered the evidence to prove that the victim had a pattern of repeatedly placing herself in sexual situations and then making questionable complaints to the authorities.[118] Finally, his theory of the case was that the alleged incident never occurred—a theory that was not supported by the evidence of the other sexual behavior. Not surprisingly, the court held that the victim's prior sexual behavior was irrelevant and inadmissible.[119]

Tip #3—Argue That the Evidence Is "Relevant, Material, and Favorable"

To be constitutionally required, evidence must be "relevant, material and favorable to the defense."[120] The proponent, therefore, should argue how the proffered evidence satisfies each of these components of the standard independently. These components can be logically difficult to separate from each other; arguments for relevance and materiality are almost certain to overlap with each other, and may also overlap with the argument for favorableness. Practitioners should still analyze and argue the standard for Exception C methodically, one component at a time. This requires counsel to have a strong command of the facts and evidence in their cases, as well as the law.

Having already discussed the relevance and materiality of the hypothetical evidence of *V*'s affair with *A*'s friend, *A*'s counsel would next argue that its admission is favorable to the defense. Assume that the government's case consists entirely of *V*'s testimony that *A* raped her. The government's case would be far from overwhelming, and *V*'s credibility would be a critical issue in the case. The proffered evidence is directly related to *V*'s motive to lie, and therefore, to her credibility. Furthermore, *A*'s friend will testify about the affair he had with *V* on the night of the alleged incident. By doing so, this witness will also partially corroborate *A*'s version of the facts. Accordingly, a court is likely to find that the evidence is favorable to the defense.

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115. *See, e.g.*, United States v. Hicks, 24 M.J. 3 (C.M.A. 1987). The defense counsel's stated purpose for presenting evidence of the victim's prior sexual behavior was to show that she was "not pure as the driven snow." *Id*. at 9. The trial judge stated that this was not a permissible basis to introduce evidence under MRE 412, and asked the civilian defense counsel, "Can you make it relevant, please, sir?" *Id*. at 10. The defense counsel responded, "No, Your Honor, I cannot." *Id*. The trial judge then said, "Then it's not admissible." *Id*. The court held that this offer failed to even minimally demonstrate that the evidence was relevant. *Id*.

116. United States v. Velez, 48 M.J. 220, 228 (1998).

117. *Id*.

118. *Id*. at 226.

119. *Id*. at 228.

120. United States v. Greaves, 40 M.J. 432, 438 (C.M.A. 1994). *See also* United States v. Williams, 37 M.J. 352 (C.M.A. 1993); United States v. Dorsey, 16 M.J. 1, 5 (C.M.A. 1983); United States v. Lauture, 46 M.J. 794, 799 (Army Ct. Crim. App. 1997).

Tip #4—Have a Plan for Presenting the Evidence

The proponent should plan what facts he must prove to establish his theory and how he will prove each of those facts. Alternatives include cross-examining the victim, calling additional witnesses, or presenting documentary evidence. If the proponent will need any other evidence, he must be certain that it is available and accessible. At a minimum, the proponent must be able to explain clearly to the military judge exactly what evidence he will present at trial. Whenever possible, however, he should be ready to actually present the witnesses and evidence at the motion hearing.[121]

In *United States v. Carter*,[122] the defense counsel vigorously argued for the admission of evidence that the victim had a sexual relationship with her female roommate at the time of the alleged rape.[123] The defense counsel intended to use this evidence to show that the victim had a motive to fabricate her claim that the accused raped her. According to the defense theory of the case, the victim had consensual sex with the accused, but claimed that the sex was without her consent when her roommate learned of it. The defense counsel argued that the victim's desire to protect the relationship with her roommate motivated her to fabricate her allegation. When the military judge stated that he was willing to hear the testimony, the defense could not identify a witness who could testify that the purported relationship existed.[124] Practitioners who move to admit evidence under MRE 412 must plan for success by preparing their evidence for trial.

Tip #5—Use Experts

There is no exclusive list of permissible theories of admissibility under MRE 412. Not all evidence will fit squarely into one of the limited categories supported by existing case law. A proponent may need to offer a new theory to fit the available evidence. The theory must not be speculative, however. For example, the proponent may seek to argue that the victim transferred another memory to the accused. Transference, cross-modal memory, and integration are all examples of theories that will require expert testimony to establish their validity with a sufficient degree of certainty and reliability.[125] Experts will be essential to establish the validity of less accepted or more obscure theories and to apply them to the facts of the case.[126] Even widely accepted scientific theories can be difficult for military judges and finders of fact to understand; an articulate expert can give clarity and credibility to the defense argument.

Tip #6—Prepare Alternatives

The proponent should be prepared to give up some ground, if necessary. Most cases need not be all-or-nothing propositions. Accordingly, the proponent should prepare to suggest other alternatives in the event the court does not admit all of the proffered evidence. Getting some of the evidence admitted is preferable to getting none at all. The proponent may be able to formulate a "fallback position" that accomplishes the proponent's main objective without using the evidence of sexual behavior. In the hypothetical case of *V* and *A*, for example, *A*'s counsel wishes to show that *V* had a motive to fabricate her allegation that *A* raped her. If the military judge does not allow *A*'s counsel to present evidence of *V*'s affair with *A*'s friend, he should then ask the military judge to admit evidence of *A*'s accusation about the affair, and *V*'s reaction to *A*'s accusation. If the judge denied this request, *A*'s counsel should clarify the extent to which he could offer evidence of the argument between *A* and *V* and attempt to paint a picture of the emotional intensity of *A*'s anger, without mentioning the reason for the argument. Finally, *A*'s counsel should be alert for the prosecution or a witness to open a door that would allow him to use the evidence for impeachment or rebuttal.[127]

The military judge is responsible for specifying what evidence may be presented and how it may be presented.[128] The judicial process involves risk, and the proponent should be prepared to suggest alternatives for presenting the evidence that is most important to his theory of the case. Practitioners on both sides should prepare to suggest limiting instructions to prevent the trier of fact from misusing the evidence. The practitioner who is prepared to give up some ground is in a better position to hold the ground that is most important to his objective.

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121. Although MRE 412 also applies to Article 32 proceedings, RCM 405 states that the defense "shall be given wide latitude when cross-examining witnesses." MCM, *supra* note 2, R.C.M. 405(h)(1)(A). A prudent practitioner will remember that the Article 32 hearing may be the best opportunity to explore any potential MRE 412 evidence and build a foundation for success at an MRE 412 hearing, or on cross-examination at trial.

122. 47 M.J. 395 (1998)

123. *Id.* at 397.

124. *Id.*

125. *See* United States v. Buenaventura, 45 M.J. 72, 81 (1996) (Crawford, J., dissenting); United States v. Sanchez, 44 M.J. 174 (1996).

126. *See generally* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993).

127. *See* MCM, *supra* note 2, MIL. R. EVID. 613.

128. *Id.* MIL. R. EVID. 412(c)(3).

Conclusion

Military Rule of Evidence 412 creates substantial obstacles to the admission of evidence of prior sexual behavior. Courts are reluctant to lift its protections unless the proponent can clearly explain why one of the three listed exceptions applies. Proponents should not expect that crossing the barriers of MRE 412 will be easy, and their opponents should not believe that MRE 412 is impermeable. Both parties may feel lost in a maze of balancing tests, standards, and procedural roadblocks, but successfully arguing an issue under the MRE 412 requires particularly careful attention to the rules, the case law, and the policies behind them. The advocate who understands the law clearly—and who can use this understanding to analyze his argument for the military judge methodically—will have the advantage.