

No. 10-

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IN THE  
**Supreme Court of the United States**

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WEBSTER M. SMITH,  
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,  
*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

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PETITION FOR A WRIT OF CERTIORARI

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## **QUESTION PRESENTED**

When a trial judge's restriction on the cross-examination of a prosecution witness is challenged on appeal as a violation of the Confrontation Clause, is the standard of review *de novo*, as five circuits have held, or abuse of discretion, as six other circuits (and the court of appeals here) have concluded?

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PETITION FOR A WRIT OF CERTIORARI

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Webster M. Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (App. 1a-21a) is reported at 68 M.J. 445. The opinion of the intermediate appellate court, the Coast Guard Court of Criminal Appeals (App. 23a-58a), is reported at 66 M.J. 556. The order and opinion of the trial judge denying petitioner's request to conduct the cross-examination at issue here (App. 59a-64a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on March 29, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”

## STATEMENT

This case implicates a deep circuit conflict regarding the standard of review that applies when a trial judge's restriction on the cross-examination of a prosecution witness is challenged on appeal as a violation of the Confrontation Clause. The Court of Appeals for the Armed Forces (CAAF) held here that the standard of review is abuse of discretion rather than *de novo*. Applying the former standard, the court rejected petitioner's Confrontation Clause claim by a vote of 3-2.

1. In early 2006, officials at the United States Coast Guard Academy filed sixteen specifications (the military equivalent of criminal charges) against petitioner Webster Smith, a cadet who was then a few months from graduation. *See* CAAF J.A. 89-92. Four weeks later, Academy officials lodged an additional five specifications. *Id.* at 93-95. Most of the specifications alleged that Mr. Smith had engaged in some form of sexual misconduct with one of several female cadets.<sup>1</sup>

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<sup>1</sup> At the time these charges were brought, Academy officials, like their counterparts at the other service academies, were facing

Pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 832, an investigation of the charges against Mr. Smith was conducted by an impartial officer. *See* CAAF J.A. 193-195. After completing his investigation (including hearing from all of the accusers), the investigating officer concluded that most of the charges lacked foundation. Specifically, he recommended that twelve of the twenty-one charges be dismissed outright, that two others be resolved administratively by Academy officials, and that just seven be referred for trial by general court-martial. *See* Appellate Ex. 17. As to nine of the twelve charges for which he recommended dismissal, the officer found that there were not even reasonable grounds to conclude that Mr. Smith had committed the offense. *See id.*

Disregarding several of the investigating officer's recommendations, the official overseeing the prosecution (the Academy superintendent) directed that eleven of the twenty-one charges be dismissed and that the other ten be tried by general court-martial. This was the first (and to date only) time in the Academy's 130-year history that a cadet had been court-martialed. *See, e.g.,* Jesse Hamilton, *Coast Guard Admiral Reprimanded: Ex-Academy Superintendent To Retire After Probe Finds Inappropriate Behavior*, Hartford

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intense scrutiny and pressure from the public, the media, and Congress about perceived laxity in their handling of allegations of sexual harassment and sexual assault. *See, e.g.,* David Lightman, *Academy Under Scrutiny; Coast Guard Harassment Issue Gets Attention of Congressional Panels*, Hartford Courant, May 18, 2006, at B1; Patricia Kime, *Academy Takes Heat Over Sex-Assault Cases*, Navy Times, Mar. 27, 2006, at 36; William Yardley, *Coast Guard Addresses Sex Assaults*, N.Y. Times, Feb. 28, 2006, at B7.

Courant, Feb. 27, 2007, at A1. Mr. Smith pleaded not guilty to all ten charges.<sup>2</sup>

2. Prior to trial, the military judge (the military term for the trial judge, *see* 10 U.S.C. § 826) imposed a restriction on the defense's cross-examination of a key prosecution witness, SR.<sup>3</sup> SR, a fellow cadet, accused Mr. Smith of sexually assaulting her and extorting sexual favors from her. The defense maintained that the two cadets' sexual encounter was consensual and that SR was fabricating her accusations because the encounter occurred in Chase Hall, the Academy dormitory, where sexual activity is prohibited by cadet regulations and punishable by expulsion from the Academy, *see* App. 34a, 16a n.3. To support this argument, the defense intended to elicit on cross-examination the fact that SR had previously made a false allegation of sexual assault, telling Mr. Smith (and allowing him to tell others) that a consensual sexual encounter she had had with an enlisted man was not consensual.<sup>4</sup> Like the Chase Hall encounter, the encounter with the enlisted man was prohibited by cadet regulations (and hence the UCMJ, *see* 10 U.S.C. § 892; *see also United States v. Cain*, 59 M.J. 285, 292-293 (C.A.A.F. 2004)). The defense thus planned to argue to the jury ("members" in military parlance) that SR was once again falsely accus-

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<sup>2</sup> The general court-martial had original jurisdiction under Article 18 of the UCMJ, 10 U.S.C. § 818. *See, e.g., Weiss v. United States*, 510 U.S. 163, 167 (1994).

<sup>3</sup> In their opinions in this case, the appellate courts referred to SR only by her initials. This petition does likewise.

<sup>4</sup> Mr. Smith testified at a pre-trial hearing that SR initially told him the encounter with the enlisted man was not consensual and later acknowledged that it was consensual. *See* App. 4a, 60a.

ing a man of assaulting her in order to evade discipline that she could otherwise face for willingly engaging in sexual activity that was barred by military regulations. *See* App. 27a-28a, 40a, 62a-63a. Noting that the three charges involving SR rested entirely on her testimony—the government offered no other evidence as to any of them—the defense contended that Mr. Smith was constitutionally entitled to inform the jury of facts that bore so directly on her credibility. *See* CAAF J.A. 180-181.

The government sought to exclude the proposed cross-examination of SR pursuant to Military Rule of Evidence 412. *See* CAAF J.A. 183-187. That rule, the nearly identical military counterpart to Federal Rule of Evidence 412, generally bars the admission of “[e]vidence offered to prove that any alleged victim engaged in other sexual behavior.” M.R.E. 412(a)(1) (2005 ed.).<sup>5</sup> The rule includes an exception, however, for “evidence the exclusion of which would violate the constitutional rights of the accused.” M.R.E. 412(b)(1)(C). This exception, which the defense invoked in seeking to conduct the proposed cross-examination of SR, *see* CAAF J.A. 180-181, “addresses an accused’s Sixth Amendment right of confrontation,” *United States v. Banker*, 60 M.J. 216, 221 (C.A.A.F. 2004). Hence, the issue for the military judge was whether the Confrontation Clause required that the proposed cross-examination be allowed.

The judge concluded that it did not. *See* App. 59a-64a. He agreed that the defense’s theory about SR’s

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<sup>5</sup> Minor amendments were made to Military Rule of Evidence 412 in 2008. The version cited herein is the one that was in effect throughout the court-martial proceedings.

prior fabrication of assault “would be a valid reason for admitting this evidence under M.R.E. 412(b)(1)(C),” i.e., pursuant to Mr. Smith’s Sixth Amendment rights. App. 63a. He nonetheless prohibited the proposed cross-examination, in part because allowing it could, he believed, “sidetrack[] the member[s]’ attention to a collateral issue,” App. 64a, and in part because the only evidence of SR’s prior false accusation came from Mr. Smith, whose credibility the judge questioned, *see* App. 63a.<sup>6</sup> The judge ultimately allowed defense counsel to reveal to the jury only that SR had lied to Mr. Smith in unspecified ways about unspecified conduct that she believed involved a violation of cadet regulations and possibly the UCMJ (but for which prosecutors had indicated they would not prosecute her). *See* App. 4a-5a, 19a & n.6; CAAF J.A. 145, 148-149.

3. Following a week-long trial, the jury acquitted Mr. Smith on six of the ten charges. *See* CAAF J.A. 173-174. It convicted on the other four, as well as on a lesser-included offense of one of the six counts of acquittal. *See id.*; App. 2a. The three convictions that pertained to sexual conduct (sodomy, indecent assault, and extortion of sexual favors) were all based on the allegations by SR, whose credibility—including motive to lie—the defense was not permitted to explore fully.

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<sup>6</sup> SR, the only other apparent source of evidence on the point, invoked her privilege against self-incrimination and thus did not testify at the pre-trial hearing on the proposed cross-examination. *See* App. 4a, 54a, 59a; CAAF J.A. 177-178. Although she dropped that invocation in order to testify at trial, the military judge did not require her, upon waiving the privilege, to address whether in fact she had made a prior false accusation so that he could revisit his ruling on the proposed cross-examination in the event she corroborated Mr. Smith’s testimony by admitting that she had.

By contrast, the jury acquitted Mr. Smith of every sex-related charge on which his accuser was subject to full cross-examination. The verdict also meant that the government had failed to prove even one of the original sex-related charges that Academy officials had leveled against Mr. Smith. All of those charges were either dismissed before trial (many as lacking any foundation, *see supra* p.3) or resulted in acquittal.

The jury sentenced Mr. Smith to six months' confinement, forfeiture of all pay and allowances, and dismissal from the Coast Guard (i.e., expulsion from the Academy). *See* App. 2a; CAAF J.A. 175. Mr. Smith served his period of confinement immediately after trial, earning release a month early for good behavior.<sup>7</sup>

4. After the Coast Guard Court of Criminal Appeals affirmed his convictions and sentence—over a lengthy dissent regarding the restriction on the cross-examination of SR, *see* App. 40a-58a—Mr. Smith petitioned CAAF for further review. CAAF granted review of the Sixth Amendment question, but following briefing and argument it affirmed by a splintered 3-2 vote. *See* App. 1a-21a.

In presenting his Confrontation Clause claim, Mr. Smith argued that because he was raising a constitutional challenge to the military judge's ruling, CAAF should review the ruling *de novo* rather than for abuse of discretion. In support of that argument, Mr. Smith

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<sup>7</sup> Following his release, Mr. Smith returned to his home state of Texas, where he has completed his undergraduate work, married, become a father, and remained steadily employed. Upon his return, however, Mr. Smith was also forced to register as a sex offender, as Texas law mandates lifelong registration for indecent-assault convictions.

cited cases from several circuits that employ de novo review of Confrontation Clause claims like his. Writing for a two-judge plurality, Judge Stucky rejected that position, holding that under CAAF precedent, review was only for abuse of discretion. *See* App. 5a (citing *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006), and *United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005)).<sup>8</sup>

Applying that standard, the plurality concluded that “[t]he military judge did not abuse his discretion.” App. 7a. The plurality deemed it significant that the defense had been allowed to show the jury that SR had lied to Mr. Smith about conduct that she believed could have threatened her career. *See id.* The plurality also reasoned that “[w]hile Cadet SR’s credibility was in contention, it is unclear why the lurid nuances of her sexual past would have added much to Appellant’s extant theory of fabrication.” *Id.* Finally, the plurality sought to distinguish cases cited by Mr. Smith, including this Court’s decision in *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam), that held comparable restrictions on the cross-examination of key prosecution witnesses to be unconstitutional. *See* App. 7a-8a; *see also* App. 29a-31a (court of criminal appeals majority seeking to distinguish other CAAF cases with similar holdings).

Judge Baker, also applying the abuse-of-discretion standard, concurred in the result. *See* App. 8a-10a. He

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<sup>8</sup> CAAF has long applied this standard to Confrontation Clause claims. *See, e.g., United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009); *United States v. Shaffer*, 46 M.J. 94, 98 (C.A.A.F. 1997); *United States v. Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996).

acknowledged that the military judge’s ruling might well have violated the Confrontation Clause on the theory that the jury “needed to know the nature of ‘the secret’ in order to assess beyond a reasonable doubt whether SR might succumb to pressure to protect the secret.” App. 9a. But in his view, Mr. Smith’s alternate “theory of admission [wa]s too far-fetched to pass constitutional ... muster.” *Id.*<sup>9</sup>

Judge Erdmann, joined by Chief Judge Effron, agreed that CAAF “review[s] a military judge’s decision to admit or exclude evidence for an abuse of discretion.” App. 13a (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). But they dissented from the other judges’ application of that standard. *See* App. 10a-21a. The fatal problem in their view was that “the military judge prevented the defense from presenting to the panel an explanation of the circumstances that would have provided a motive for the complainant to make a false allegation of” sexual assault. App. 10a; *see also* App. 21a (“Smith had a commonsense explanation

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<sup>9</sup> Two of Judge Baker’s articulated bases for this conclusion were factually incorrect. First, Judge Baker stated that “it was SR herself who reported her sexual contact with Appellant; this cuts against Appellant’s theory that SR would lie to conceal her own misconduct.” App. 9a. In fact, “[t]he record does not disclose whether SR voluntarily came forward or was first approached by” Coast Guard investigators. App. 52a n.8 (court of criminal appeals dissent); *see also* App. 51a-53a. Second, Judge Baker stated that “to support [Mr. Smith’s] theory of admission the members needed to know that SR had ‘lied’ to Appellant about her sexual misconduct,” and “[t]his much the military judge permitted.” App. 9a. To the contrary, the military judge did not permit the jury to hear that what “SR had ‘lied’ to Appellant about [was] sexual misconduct.” *Id.* Indeed, that prohibition was the crux of Mr. Smith’s challenge on appeal.

for SR’s claim that the sexual activity was nonconsensual and the military judge’s ruling prevented the members from considering this theory.”). Emphasizing that “this was a ‘he said-she said’ case and for the charges at issue in this appeal, the critical question for the members was the credibility of the sole prosecution witness,” App. 17a (footnote omitted), the dissenters concluded—relying on this Court’s precedent—that a Sixth Amendment violation had occurred because “[a] reasonable jury might have received a significantly different impression of [the witness’s] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination,” App. 14a-15a (alterations in original) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)); accord App. 41a (court of criminal appeals dissent) (“The excessive restrictions imposed on Appellant’s Sixth Amendment confrontation rights allowed SR to testify through non-factual euphemisms on critical issues related to the Government’s proof and her own credibility, and allowed the Government to create a substantially different impression of her truthfulness than what the defense had sought to show through the excluded evidence.”).

The dissenters also disagreed with the plurality that the cross-examination allowed by the military judge was sufficient, explaining that “[w]ith this limited information about SR’s secret, the members were left to speculate whether the secret was a minor disciplinary infraction or a more serious charge, but they had no idea that the proffered evidence directly implicated SR’s motive and credibility.” App. 19a-20a; see also App. 45a-46a (court of criminal appeals dissent) (citing *Davis v. Alaska*, 415 U.S. 308, 316-317 (1974), and *Olden*, 488 U.S. at 232 (per curiam)). As to the plurality’s stated doubt about the need for the “lurid nu-

ances” of SR’s secret, App. 7a, the dissenters explained that what was important about the proposed cross-examination, and what its focus would have been, was “not the lurid nuances of the victim’s sexual past . . . , but rather the allegation that SR had previously lied about a sexual encounter under similar circumstances.” App. 18a (internal quotation marks omitted).<sup>10</sup>

### REASONS FOR GRANTING THE PETITION

CAAF’s holding regarding the appropriate standard for appellate review of Confrontation Clause claims like Mr. Smith’s conflicts with the holdings of several other courts of appeals. The conflict is established and the issue is both recurring and important. Moreover, this case is a good vehicle for resolving the conflict, both because the issue was raised throughout the case and because CAAF’s splintered decision applying abuse-of-discretion review shows that the use of that relatively lax standard may well have determined the outcome here. Finally, CAAF’s use of an abuse-of-discretion standard is wrong, as Mr. Smith had a right to plenary appellate review of his constitutional claim raising a mixed question of law and fact. Under these circumstances, this Court’s review is warranted.

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<sup>10</sup> In addition to defending the merits of the military judge’s ruling, the government raised a jurisdictional objection before CAAF, contending that Mr. Smith’s petition for discretionary review by that court was untimely. CAAF unanimously rejected that argument. *See* App. 2a-3a (plurality opinion), 10a (dissent), 8a-10a (Baker, J., concurring in the result) (implicitly rejecting the jurisdictional argument by addressing the merits).

**I. CAAF’S STANDARD-OF-REVIEW HOLDING IMPLICATES AN ESTABLISHED CIRCUIT CONFLICT ON AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW**

**A. The Courts Of Appeals Are Deeply Divided Over What Standard Of Review Applies To Confrontation Clause Claims Like Mr. Smith’s**

CAAF employed abuse-of-discretion review in resolving Mr. Smith’s Sixth Amendment challenge to the military judge’s restriction on the defense’s cross-examination of SR. *See, e.g.*, App. 5a. That approach conflicts with the holdings of five circuits, which consider comparable Confrontation Clause claims de novo, reserving abuse-of-discretion review for non-constitutional challenges. For example, the Seventh Circuit has stated that “[o]rdinarily, a district court’s evidentiary rulings are reviewed for abuse of discretion. However, when the restriction [on cross-examination] implicates the criminal defendant’s Sixth Amendment right to confront witnesses against him, ... the standard of review becomes de novo.” *United States v. Smith*, 308 F.3d 726, 738 (7th Cir. 2002) (citation omitted). The First, Fifth, Eighth, and Tenth Circuits have adopted the same approach. *See, e.g.*, *United States v. Vega Molina*, 407 F.3d 511, 522 (1st Cir. 2005); *United States v. Jimenez*, 464 F.3d 555, 558-559 (5th Cir. 2006); *United States v. Bentley*, 561 F.3d 803, 808 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 1275 (2009); *United States v. Montelongo*, 420 F.3d 1169, 1173 (10th Cir. 2005).<sup>11</sup>

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<sup>11</sup> In *United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc), the Ninth Circuit stated that it was adopting an approach that “br[ought it] in line with [these five] sister circuits,”

Six other circuits, by contrast—the Second, Third, Fourth, Sixth, Eleventh, and District of Columbia Circuits—take the same approach that CAAF does, applying abuse-of-discretion review even when a restriction on the cross-examination of a prosecution witness is attacked on constitutional grounds.<sup>12</sup> The Sixth Circuit, for example, stated in one case that “[defendant] argues that his right to confrontation was violated when the trial court ‘unfairly’ limited his cross-examination of [a] government witness .... We review the district court’s restriction on a defendant’s right to cross-examine witnesses for abuse of discretion.” *United States v. Franco*, 484 F.3d 347, 353 (6th Cir. 2007). Cases from the other circuits in this group are to the same effect. *See, e.g., United States v. Rosa*, 11 F.3d 315, 335 (2d Cir. 1993); *United States v. Silveus*, 542 F.3d 993, 1005 (3d Cir. 2008); *United States v. Shelton*, 200 F. App’x 219, 221 (4th Cir. 2006) (citing *United States v. Scheetz*,

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*id.* at 1101 n.6 (citing a case from each of the five). The court’s actual holding, however, was that abuse-of-discretion review is proper for some constitutional challenges, specifically those addressing “a limitation on the scope of questioning within a given area” rather than “the exclusion of an [entire] area of inquiry.” *Id.* at 1101.

<sup>12</sup> The dissenters stated in this case that under the abuse-of-discretion standard, conclusions of law are reviewed de novo. App. 13a. The authority they cited for that statement, however, *United States v. Ayala*, involved a suppression ruling rather than a restriction on cross-examination. *See* 43 M.J. at 298. To petitioner’s knowledge, no CAAF case states that the abuse-of-discretion standard repeatedly applied by the court when reviewing restrictions on defendants’ cross-examination includes de novo review of legal conclusions. Nor did the plurality or the concurring judge here indicate that any aspect of their review was conducted de novo.

293 F.3d 175, 184 (4th Cir. 2002)); *United States v. Orisnord*, 483 F.3d 1169, 1178 (11th Cir. 2007); *United States v. Graham*, 83 F.3d 1466, 1474 (D.C. Cir. 1996).<sup>13</sup>

In short, CAAF’s use of an abuse-of-discretion standard in this case perpetuates a clear—and recognized—conflict in the circuits. *See United States v. Larson*, 495 F.3d 1094, 1100 & n.5 (9th Cir. 2007) (en banc) (resolving “an intra-circuit conflict regarding the standard of review for Confrontation Clause challenges to a trial court’s limitations on cross-examination” while acknowledging a parallel “disagreement among the circuits”).

### **B. The Question Presented Is Recurring And Important, And This Case Is A Good Vehicle For Deciding It**

The circuit conflict at issue here warrants resolution by this Court. As indicated by the cases cited in the previous section, the constitutionality of restrictions on cross-examination arises frequently in criminal

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<sup>13</sup> A few unpublished decisions from some of the circuits in this group have reviewed restrictions on cross-examination de novo, notwithstanding (and without acknowledging) the contrary precedent cited in the text. *See, e.g., United States v. Allen*, 353 F. App’x 352, 354 (11th Cir. 2009) (per curiam); *United States v. Askanazi*, 14 F. App’x 538, 540 (6th Cir. 2001) (per curiam). Other cases, addressing other types of Confrontation Clause claims, have proclaimed in dicta that all such claims are subject to de novo review—again without confronting the cases cited in the text. *See, e.g., United States v. Jass*, 569 F.3d 47, 55 (2d Cir. 2009) (*Bruton* claim: “We review [a]lleged violations of the Confrontation Clause ... *de novo*[.]” (alteration and omission in original) (quoting *United States v. Vitale*, 459 F.3d 190, 195 (2d Cir. 2006))), *cert. denied*, 130 S. Ct. 2128 (2010); *United States v. Hardy*, 586 F.3d 1040, 1043 (6th Cir. 2009) (similar for admission of affidavit).

prosecutions, and in every part of the country. Those cases also show that the conflict over the standard for appellate review of such restrictions is established; there is thus no benefit to be gained by giving the lower courts additional time to consider the issue. Moreover, the question presented is important, because the standard of review can determine the outcome of an appeal. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991) (“[T]he difference between a rule of deference and the duty to exercise independent review is much more than a mere matter of degree.” (internal quotation marks omitted)); see also, e.g., *News-Press v. United States Dep’t of Homeland Sec.*, 489 F.3d 1173, 1187 (11th Cir. 2007) (“In even moderately close cases, the standard of review may be dispositive of an appellate court’s decision.”); 1 Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* § 1.02, at 1-16 (3d ed. 1999). That is particularly true when one standard is highly deferential: CAAF, for example, has stated that “the abuse of discretion standard is a strict one,” satisfied only when “[t]he challenged action [is] arbitrary, fanciful, clearly unreasonable, or clearly erroneous,” *United States v. McElhanev*, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks omitted). Finally, disuniformity created by the conflict directly affects a fundamental individual right. Some defendants in criminal cases enjoy less protection of the critical right to confront their accusers because of the fortuity of where their trials were held—or, as to cases decided by CAAF, because they have chosen to wear the nation’s uniform.

This case presents a good vehicle to resolve the circuit conflict. To begin with, Mr. Smith’s standard-of-review argument was both pressed and passed upon in the court of appeals, see Pet’r’s CAAF Br. 12-13; App.

5a, rendering the issue suitable for review by certiorari. See, e.g., *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). In addition, CAAF's rejection of Mr. Smith's argument may well have determined the ultimate outcome. Even applying highly deferential review, CAAF was narrowly divided as to the constitutionality of the military judge's ruling in this case. If even one of the three judges who deemed that ruling not to be an abuse of discretion were to conclude, upon reviewing without deference, that it was inconsistent with the Sixth Amendment, Mr. Smith would prevail.<sup>14</sup>

## II. CAAF'S STANDARD-OF-REVIEW HOLDING IS WRONG

This Court's review is also warranted because CAAF's use of an abuse-of-discretion standard to review Mr. Smith's Confrontation Clause claim was erroneous. The military judge's ruling that Mr. Smith challenged presented a mixed question of law and fact. When a constitutional right is involved, as here, this Court has repeatedly held de novo review of such mixed questions appropriate. The decisions from this Court that CAAF and other courts have relied on to justify abuse-of-discretion review are inapposite.

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<sup>14</sup> The military context in which this case arises does not affect its suitability as a vehicle to answer the question presented. Although servicemembers' constitutional rights can be more circumscribed than those of their civilian counterparts when morale, good order and discipline, or other military interests so require, see *Parker v. Levy*, 417 U.S. 733, 758 (1974), that is not the case here. CAAF has never articulated a military-specific rationale for employing abuse-of-discretion review in cases like this (nor did the government offer one below), and in fact no military interest would be undermined if CAAF reviewed constitutional challenges to restrictions on defendants' cross-examination without deference.

**A. Under This Court's Precedent, Mixed Questions Of Law And Fact Are Reviewed De Novo When Constitutional Rights Are Involved**

The military judge's restriction on the cross-examination of SR involved a quintessential "mixed question[] of law and fact—*i.e.*, [a] question[] in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the ... standard." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). Under this Court's cases, such questions are reviewed de novo when, as here, they implicate constitutional rights. As a plurality explained in *Lilly v. Virginia*, 527 U.S. 116 (1999), the Court's "prior opinions ... indicate that ... with ... fact-intensive, mixed questions of constitutional law, ... [i]ndependent review is ... necessary ... to maintain control of, and to clarify, the legal principles' governing the factual circumstances necessary to satisfy the protections of the Bill of Rights," *id.* at 136 (alteration and last two omissions in original) (quoting *Ornelas v. United States*, 517 U.S. 690, 697 (1996)); *see also United States v. Bajakjian*, 524 U.S. 321, 337 n.10 (1998) (employing de novo review because the pertinent issue "calls for the application of a constitutional standard to the facts of a particular case"); *Pullman-Standard*, 456 U.S. at 290 n.19 ("There is also support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court." (citations omitted)); *United States v. Frederick*, 182 F.3d 496, 499 (7th Cir. 1999) (Posner, J.) (noting that this Court has embraced de novo review of mixed questions involving "certain constitutional issues"); *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir. 1984) (en banc) ("The pre-

dominance of factors favoring de novo review is even more striking when the mixed question implicates constitutional rights.” (citing *Ker v. California*, 374 U.S. 23 (1963)).<sup>15</sup>

The Court has thus held that de novo review—though with deference typically given to associated factual findings—is appropriate for a wide variety of trial court rulings that implicate constitutional rights. These include rulings on: whether a hearsay statement bears sufficient indicia of “trustworthiness” to satisfy the Confrontation Clause, *see Lilly*, 527 U.S. at 136 (plurality opinion); whether a fine is unconstitutionally excessive, *see Bajakjian*, 524 U.S. at 336 n.10; whether police had probable cause or reasonable suspicion to conduct a search, *see Ornelas*, 517 U.S. at 699; whether a defendant was “in custody” for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), *see Thompson v. Keohane*, 516 U.S. 99, 112-113 (1995); whether a confession was voluntary, *see Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) (citing *Miller v. Fenton*, 474 U.S. 104, 110 (1985)); whether defense counsel was constitutionally ineffective, *see Strickland v. Washington*, 466 U.S. 668, 698 (1984); whether a pre-trial identification proce-

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<sup>15</sup> Where constitutional rights are not implicated, “deferential review of mixed questions of law and fact is warranted when it appears that the district court is ‘better positioned’ than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine.” *Salve Regina Coll.*, 499 U.S. at 233; *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (adopting deferential review of rulings under Federal Rule of Civil Procedure 11); *Pierce v. Underwood*, 487 U.S. 552, 558 n.1 (1988) (citing other examples); *Pullman-Standard*, 456 U.S. at 290 n.19 (citing examples of both approaches).

dure was unconstitutionally suggestive, *see Sumner v. Mata*, 455 U.S. 591, 597 (1982) (per curiam); whether a defendant waived his right to counsel, *see Brewer v. Williams*, 430 U.S. 387, 403-404 (1977); and several First Amendment questions, *see Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685-686 n.33 (1989) (citing cases).<sup>16</sup>

The Court's rationale for these various holdings supports de novo review here. *First*, the Court has repeatedly observed in these cases that "the [relevant] legal rules ... acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the le-

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<sup>16</sup> Although some of these cases involved review of state-court judgments, their standard-of-review holdings apply equally to federal cases like this one. *See Lilly*, 527 U.S. at 136 (plurality opinion) (relying on *Ornelas*, a federal criminal case, to support its standard-of-review holding in a state criminal case); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) ("[S]urely it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of intermediate federal courts."). That is true even for decisions from this Court on federal habeas review of a state-court judgment. While those cases' standard-of-review holdings generally do not apply in the habeas context post-AEDPA, *see Williams v. Taylor*, 529 U.S. 362, 411 (2000) (citing 28 U.S.C. § 2254(d)(1)), they remain valid and instructive for cases on direct review (state or federal). *See Ornelas*, 517 U.S. at 697 (citing *Miller*, a state-habeas case, to support its standard-of-review holding in a direct-review case); *see also, e.g., United States v. LeBrun*, 363 F.3d 715, 719 (8th Cir. 2004) (en banc) ("*Thompson's* rationale [in the habeas context] requires that on direct appeal we review the district court's custody determination de novo."); *United States v. Erving L.*, 147 F.3d 1240, 1245 (10th Cir. 1998) (similar, citing *Derrick v. Peterson*, 924 F.2d 813, 818 (9th Cir. 1991)).

gal principles.” *Ornelas*, 517 U.S. at 697, *quoted in, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001); *accord Miller*, 474 U.S. at 114. The same is true of the Sixth Amendment “rules” that apply to restrictions on the cross-examination of prosecution witnesses. *Second*, the Court has stated in the search-and-seizure context that a

policy of sweeping deference would permit, “[i]n the absence of any significant difference in the facts,” “the Fourth Amendment’s incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.” Such varied results would be inconsistent with the idea of a unitary system of law.

*Ornelas*, 517 U.S. at 697 (alterations in original) (quoting *Brinegar v. United States*, 338 U.S. 160, 171 (1949)). Again, the same is true as to the Confrontation Clause.

More generally, this Court has explained that plenary appellate review of constitutional mixed questions “reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.” *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-511 (1984); *see also id.* at 503 (“When the standard governing the decision of a particular case is provided by the Constitution, this Court’s role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance.”). That is surely true of a defendant’s right to confront the witnesses against him through cross-examination: This Court has labeled cross-examination “the greatest legal engine ever invented for the discovery of truth.”

*California v. Green*, 399 U.S. 149, 158 (1970) (internal quotation marks omitted). It has also deemed the right of confrontation to be “one of the fundamental guarantees of life and liberty,” *Kirby v. United States*, 174 U.S. 47, 55 (1899), and so “fundamental and essential to a fair trial” as to be incorporated against the States, *Pointer v. Texas*, 380 U.S. 400, 403 (1965). And it has stated that an impermissible restriction on a defendant’s right of cross-examination is “constitutional error of the first magnitude.” *Davis v. Alaska*, 415 U.S. 308, 318 (1974). Deferential review of trial-court rulings is insufficient to safeguard such a critical constitutional right.<sup>17</sup>

Finally, this Court’s cases support the specific approach espoused by Mr. Smith and adopted by several circuits, whereby non-constitutional challenges to restrictions on cross-examination are reviewed for abuse of discretion while constitutional challenges are reviewed *de novo*. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Court adopted the same approach for punitive damages awards. “If no constitutional issue is raised” regarding the excessiveness of such an award, the Court stated, “the role of the appel-

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<sup>17</sup> Decisions outside the mixed-question context reinforce the conclusion that *de novo* review is appropriate here. For example, in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), this Court construed a statutory provision mandating abuse-of-discretion review of certain individual immigration decisions. *See id.* at 485-486 & n.6 (discussing 8 U.S.C. § 1160(e)). The Court held that the statute did not preclude judicial review of due process challenges to the broader immigration program—and part of its rationale was that “the abuse-of-discretion standard ... does not apply to constitutional or statutory claims, which are reviewed *de novo* by the courts.” *Id.* at 493.

late court ... is merely to review the trial court's [excessiveness] 'determination under an abuse-of-discretion standard.'" 532 U.S. at 433 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)). By contrast, the Court went on to hold (relying on *Ornelas* and *Bajakajian*), "courts of appeals should apply a *de novo* standard of review when passing on ... the constitutionality of punitive damages awards." *Id.* at 436.

What all these cases recognize is the anomaly of employing an abuse-of-discretion standard when the issue is whether or not a particular ruling violated a constitutional right. Such a standard suggests that a district court has "discretion" to commit a constitutional violation, and that appellate judges could uphold a ruling even if they believe that such a violation occurred. *See, e.g., Elcock v. Kmart Corp.*, 233 F.3d 734, 743 (3d Cir. 2000) ("Of course, an abuse of discretion means much more than that the appellate court disagrees with the trial court."). That is plainly wrong.

### **B. The Cases Relied On By Courts That Employ Abuse-Of-Discretion Review Do Not Support That Approach**

The circuits that have reviewed Confrontation Clause challenges to restrictions on cross-examination deferentially have not addressed the cases discussed in the previous section. They have instead relied on other decisions by this Court that supposedly endorse abuse-of-discretion review. That reliance is misplaced.

To begin with, several circuits have based their choice of deferential review on language in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). *See, e.g., Rosa*, 11 F.3d at 335; *United States v. Mussare*, 450 F.3d 161, 169 (3d Cir. 2005). But what the Court said in the rele-

vant portion of *Van Arsdall* is that “trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on ... cross-examination 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.” 475 U.S. at 679. That statement reveals nothing about the proper appellate standard of review. It instead addresses the substance of the Confrontation Clause, and in particular it rejects the notion that that clause, as a substantive matter, proscribes any restrictions on defendants’ cross-examination. This is clear from the immediately preceding sentence, in which the Court stated that “[i]t does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel’s inquiry into the potential bias of a prosecution witness.” *Id.* It is also clear from the next few paragraphs, where the Court went on to find that a Confrontation Clause violation had occurred—without ever referring to abuse of discretion. *See id.* at 679-680.<sup>18</sup>

The Sixth Circuit has also relied on this Court’s statement in *General Electric Co. v. Joiner*, 522 U.S. 136, 141 (1997), that “abuse of discretion is the proper

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<sup>18</sup> The Ninth Circuit similarly relied on *Van Arsdall* in holding that the standard of review depends on the details of the defendant’s Confrontation Clause challenge, i.e., that de novo review applies when the trial court “exclu[des] ... an [entire] area of inquiry,” but not when it limits “the scope of questioning within a given area.” *Larson*, 495 F.3d at 1101. As just discussed, however, *Van Arsdall* addressed only the substance of the confrontation guarantee. The Ninth Circuit’s holding, moreover, improperly conflates substance with the standard of review.

standard of review of a district court’s evidentiary rulings.” See *United States v. Schreane*, 331 F.3d 548, 564 (6th Cir. 2003) (citing *Joiner* for the proposition that “[a]n appellate court reviews all evidentiary rulings—including constitutional challenges to evidentiary rulings—under the abuse-of-discretion standard”). *Joiner* was not a criminal case, however, and thus did not implicate the Confrontation Clause. Moreover, the relevant ruling in *Joiner* was not a constitutional one but rather a ruling on the exclusion of expert testimony under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See *Joiner*, 522 U.S. at 138-139. The same is true of the cases *Joiner* cited to support its statement that evidentiary rulings are reviewed for abuse of discretion; each likewise concerned a non-constitutional ruling by the trial judge. See *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (balancing under Federal Rule of Evidence 403 in regard to admission of defendant’s prior conviction); *United States v. Abel*, 469 U.S. 45, 54-55 (1984) (same in regard to admission of government rebuttal testimony); *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879) (admission of expert testimony). In light of the mixed-question precedent from this Court discussed in the previous section, *Joiner*’s reference to “evidentiary rulings” is most sensibly read to refer only to non-constitutional rulings. *Joiner* is thus consistent with Mr. Smith’s contention that non-constitutional challenges to restrictions on cross-examination should be reviewed for abuse of discretion while constitutional claims should be reviewed de novo.

CAAF’s deferential review in cases like this, meanwhile, traces to *Geders v. United States*, 425 U.S. 80 (1976), and *Alford v. United States*, 282 U.S. 687 (1931). See, e.g., *United States v. Williams*, 37 M.J. 352, 361

(C.M.A. 1993) (citing *Geders*); *United States v. Hooper*, 26 C.M.R. 417, 426 (C.M.A. 1958) (citing *Alford*). Neither case supports deferential review of constitutional challenges. The Court in *Alford* did review a restriction on cross-examination for abuse of discretion, see 282 U.S. at 694, but nothing in its opinion indicates that the defendant's attack on the restriction was constitutionally based. Indeed, the opinion never mentions either the Sixth Amendment generally or the Confrontation Clause in particular. Not until decades later did this Court state that *Alford*'s holding included a "constitutional dimension," *Davis*, 415 U.S. at 318 n.6 (citing *Smith v. Illinois*, 390 U.S. 129, 132-133 (1968))—and in doing so it plainly recognized the inconsistency between that "constitutional dimension" and *Alford*'s use of abuse-of-discretion review, see *id.* ("Although ... we reversed [in *Alford*] because of abuse of discretion and prejudicial error, the constitutional dimension of our holding in *Alford* is not in doubt." (emphasis added)).

*Geders* provides even less support for CAAF's use of deferential review. The Court in *Geders* did not review a restriction on cross-examination, nor say that such restrictions are reviewed for abuse of discretion. It stated that a trial judge's determination regarding "the order in which parties will adduce proof"—a non-constitutional matter—"will be reviewed only for abuse of discretion." 425 U.S. at 86. In the next sentence the Court, citing *Glasser v. United States*, 315 U.S. 60, 83 (1942), noted that, "[w]ithin limits, the judge may ... control the scope of examination of witnesses," *Geders*, 425 U.S. at 86-87. But while *Glasser* did review a restriction on cross-examination for abuse of discretion, as with *Alford* there is no indication in *Glasser* (the relevant portion of which totals only three sentences) that the defendant had raised a constitutional challenge.

*See Glasser*, 315 U.S. at 83.<sup>19</sup> Again, then, this Court’s precedent is consistent with the approach used by five courts of appeals and urged by Mr. Smith here. In any event, to the extent these cases reflect any uncertainty on the question presented, that is an additional factor weighing in favor of review.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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<sup>19</sup> The Court in *Geders* also cited *United States v. Nobles*, 422 U.S. 225 (1975), but *Nobles* did not involve the Confrontation Clause. The issue there was whether the defense had to disclose certain material in order to permit adequate cross-examination by the *prosecution*. *See Nobles*, 422 U.S. at 227; *see also id.* at 241 (labeling the defendant’s invocation of the Sixth Amendment “mis-conceive[d]”).

# APPENDIX

**APPENDIX A**

UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

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No. 08-0719  
Crim. App. No. 1275

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UNITED STATES,  
*Appellee,*

*v.*

WEBSTER M. SMITH, CADET, U.S. COAST GUARD,  
*Appellant,*

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Argued: November 10, 2009  
Decided: March 29, 2010

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[68 M.J. 445]

[446] STUCKY, J., delivered the judgment of the Court, in which RYAN, J., joined. BAKER, J., filed a separate opinion concurring in the result. ERDMANN, J., filed a separate opinion concurring in part and dissenting in part, in which EFFRON, C.J., joined.

\* \* \*

Judge STUCKY delivered the judgment of the Court.

At trial, the military judge limited Appellant's cross-examination of Cadet SR, the Government's only witness on his three convictions related to sexual misconduct. We granted review to decide whether Appellant was denied his right to confront his accuser on

those three specifications. We hold that Appellant was not denied his right to confront his accuser, and affirm.

### I.

A general court-martial consisting of members convicted Appellant, contrary to his pleas, of attempting to disobey an order, going from his place of duty, sodomy, extortion, and indecent assault. Articles 80, 86, 125, 127, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 880, 886, 925, 927, 934 (2006). The convening authority approved the sentence the members adjudged: a dismissal, confinement for six months, and forfeiture of all pay and allowances. The United States Coast Guard Court of Criminal Appeals affirmed on April 9, 2008. *United States v. Smith*, 66 M.J. 556, 563 (C.G. Ct. Crim. App. 2008). Appellant filed a motion for reconsideration which was denied on May 14, 2008. Appellant petitioned this Court for review on July 14, 2008.

### II.

As a preliminary matter, the Government contends that Appellant's petition for review was not timely filed, and that therefore the grant of review should be dismissed as improvidently granted. Article 67(b), UCMJ, 10 U.S.C. § 867(b) (2006), provides that an accused has sixty days to petition this Court for review from the earlier of "(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or (2) the date on which a copy of the decision ..., after being served on appellate counsel of record for the accused ... is deposited in the United States mails for delivery by first class certified mail to the accused." In *United States v. Rodriguez*, we held that the sixty-day statutory period for filing petitions for review was ju-

isdictional and could not be waived. 67 M.J. 110, 116 (C.A.A.F. 2009).

Before filing a petition for review at this Court, Appellant timely sought reconsideration of the CCA's decision. Until the CCA rendered a decision on the reconsideration request, either by denying reconsideration or by granting reconsideration and rendering a new decision, there was no CCA decision for [447] this Court to review. We hold that Appellant's sixty-day period for filing at this Court began on the date the defense was formally notified, under the provisions of Article 67(b), UCMJ, of the CCA's decision on reconsideration. The evidence of record does not support the Government's contention that the appeal was untimely filed.

### III.

Appellant and Cadet SR were cadets at the United States Coast Guard Academy. During the summer of 2005, Cadet SR and Appellant were assigned to neighboring Coast Guard cutters in Norfolk, Virginia. While there, Cadet SR committed an indiscretion that could have jeopardized her ranking as a cadet and threatened her Coast Guard career. Shortly thereafter, Appellant sent her a text message saying that he hoped the rumors he was hearing were not true. Cadet SR discussed the situation with Appellant but lied about some of the details. Appellant "said he'd try to squash rumors, and that it would be okay."

In October of that year, after both had returned to the Academy, Appellant notified Cadet SR that the rumors were persisting. She then truthfully disclosed the details of her indiscretion. Appellant said he would continue to try to suppress the rumors, but that he needed motivation to do so. Ap-

pellant denied he was seeking sexual favors but suggested the couple take a photograph of themselves naked together to build “trust in one another.” After the photo, Appellant left but returned to her room later that evening. On this occasion, he inserted his fingers in her vagina and placed his tongue on her clitoris. Cadet SR then performed fellatio on him.

#### IV.

Appellant alleged that Cadet SR’s indiscretion involved engaging in sex with an enlisted member and, pursuant to Military Rule of Evidence (M.R.E.) 412(c)(1), Appellant moved to admit evidence of this prior sexual conduct. That rule provides that “[e]vidence offered to prove that any alleged victim engaged in other sexual behavior” is not generally admissible. M.R.E. 412(a)(1). However, “evidence the exclusion of which would violate the constitutional rights of the accused” is admissible. M.R.E. 412(b)(1)(C).

During a closed hearing conducted pursuant to M.R.E. 412(c)(2), Appellant testified that in May 2005 Cadet SR told him that she had had nonconsensual sexual encounters with an enlisted member, but that in October 2005 she admitted that those sexual encounters had actually been consensual. Cadet SR invoked her right against self-incrimination and did not testify at the hearing. Appellant argued that he should be allowed to question Cadet SR about the encounters for “the specific purpose of establishing a pattern of lying about sexual events.”

The military judge sustained the Government’s objection to the admission of this evidence, but allowed the “members [to] be informed that [Cadet SR’s] secret was information that if revealed could have an adverse

impact on her Coast Guard career, including possibly disciplinary action under the UCMJ.” The CCA affirmed this decision. *Smith*, 66 M.J. at 560-61. Appellant asserts that the military judge erred in not admitting the sexual nature of Cadet SR’s indiscretion, and requests that we set aside his convictions for extortion, sodomy, and indecent acts.

## V.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend VI. The right to confrontation includes the right of a military accused to cross-examine adverse witnesses. See *United States v. Clayton*, 67 M.J. 283, 287 (C.A.A.F. 2009). Uncovering and presenting to court members “a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (citation omitted). “Through cross-examination, an accused can ‘expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.’” [448] *United States v. Collier*, 67 M.J. 347, 352 (C.A.A.F. 2009) (quoting *Davis*, 415 U.S. at 318).

Typically, we review a military judge’s decision to admit or exclude evidence for an abuse of discretion. See *United States v. Weston*, 67 M.J. 390, 392 (C.A.A.F. 2009). We have also applied the abuse of discretion standard to alleged violations of the Sixth Amendment Confrontation Clause. *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006); *United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005).

Appellant has the burden under M.R.E. 412 of establishing his entitlement to any exception to the pro-

hibition on the admission of evidence “offered to prove that any alleged victim engaged in other sexual conduct.” *United States v. Banker*, 607 M.J. 216, 218, 223 (C.A.A.F. 2004) (citation omitted). To establish that the excluded evidence “would violate the constitutional rights of the accused,” M.R.E. 412(b)(1)(C), an accused must demonstrate that the evidence is relevant, material, and favorable to his defense, “and thus whether it is ‘necessary.’” *Id.* at 222 (quoting *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993)). The term “favorable” as used in both Supreme Court and military precedent is synonymous with “vital.” *Id.* (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *United States v. Dorsey*, 16 M.J. 1, 8 (C.M.A. 1983)).

Appellant contends that his inability to cross-examine Cadet SR about the nature of the secret affected his convictions for sodomy, extortion, and committing an indecent act. We conclude that further cross-examination of Cadet SR was not “constitutionally required.” Assuming *arguendo* that the exact nature of the indiscretion—that it involved consensual sexual relations with an enlisted member—was relevant, it was neither material nor vital to Appellant’s defense.

Testimony is material if it was “of consequence to the determination of” appellant’s guilt.” *Dorsey*, 16 M.J. at 6 (quoting M.R.E. 401). In determining whether evidence is of consequence to the determination of Appellant’s guilt, we “consider 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 other evidence in the case pertaining to this issue.” *Id.* (citation omitted). In this case, the evidence was offered on a significant issue, the

alleged victim's credibility, which was in dispute. Nevertheless, knowledge of the exact nature of her indiscretion in relation to the other issues in the case was not important. The military judge allowed Appellant to present a fairly precise and plausible theory of bias, i.e., that she lied to preserve a secret which "if revealed could have an adverse impact on her Coast Guard career, including possibly disciplinary action under the UCMJ." While Cadet SR's credibility was in contention, it is unclear why the lurid nuances of her sexual past would have added much to Appellant's extant theory of fabrication.

Nor is cross-examining Cadet SR about her sexual past "vital" under *Banker*, 60 M.J. at 222 (quoting *Valenzuela-Bernal*, 458 U.S. at 867; *Dorsey*, 16 M.J. at 8). The "vital" issue is not whether Cadet SR engaged in consensual sex with an enlisted member or whether she lied to Appellant about it, but rather whether she lied about an important issue that would impeach her credibility. Cadet SR admitted that she had been in a "situation" that could have jeopardized her career and her ranking as a cadet; that the "situation" was in violation of cadet regulations and possibly a violation of the UCMJ; and that she initially lied to Appellant about the "situation." All of this was before the members. The military judge did not abuse his discretion; he provided Appellant what he was due under the Confrontation Clause: an opportunity to impeach the complainant's credibility.

Finally, Appellant argues that Cadet SR's past indiscretion and her lies about it gave her similar motive to lie about her relationship with Appellant. We decline to embrace such a broad, cumulative reading of M.R.E. 412 and its case law. Even according to Appellant's own theory, Cadet SR lied about her sexual past

to protect herself, not a [449] relationship with another, unlike *United States v. Williams*, 37 M.J. 352 (C.M.A. 1993), or *Olden v. Kentucky*, 488 U.S. 227 (1988). This is not a case like *Collier* in which the appellant asserted she was framed for larceny by her gay lover after the breakup of the relationship. 67 M.J. at 351. Nor does this case involve recent extramarital sex or rejection and invective which might have caused the victim to falsely claim rape, as in *Dorsey*, 16 M.J. at 6. To the extent Appellant might have tried to introduce some non-sexual aspects of his theory of bias via M.R.E. 608(c), he failed to frame or raise this issue as such at trial.

## VI.

The decision of the United States Coast Guard Court of Criminal Appeals is affirmed.

BAKER, Judge (concurring in the result):

I concur in the result. In my view, this case is governed by *United States v. Banker*, 60 M.J. 216, 225 (C.A.A.F. 2004). In *Banker*, we concluded that in the context of Military Rule of Evidence (M.R.E.) 412, it is “within the judge’s discretion to determine that such a cursory argument [does] not sufficiently articulate how the testimony reasonably established a motive to fabricate.... [It is] within the discretion of the military judge to conclude that the offered testimony was not relevant.” *Id.* at 225. The burden is on the appellant to prove why the M.R.E. 412 prohibition should be lifted. *Id.*

Appellant’s theory of admission was that SR, having lied to Appellant about her prior sexual misconduct with an enlisted member of the Coast Guard, demonstrated a propensity to lie about her sex life generally and in particular to make false allegations to law en-

forcement authorities to conceal her own sexual misconduct. Appellant argues that SR's misconduct also included engaging in consensual sexual activities with Appellant in the Cadet barracks. Therefore, Appellant argues, he had a constitutional right to cross-examine SR about her prior sexual conduct, notwithstanding the general prohibition on such examination enshrined in M.R.E. 412.

The problem for Appellant is that his theory of admission is too far-fetched to pass constitutional and M.R.E. 403 muster. First, SR had no obligation to tell Appellant about her sexual life and misconduct. It does not logically follow that someone who would lie to protect her privacy from a probing acquaintance would lie to the police and commit perjury. Second, it was SR herself who reported her sexual contact with Appellant; this cuts against Appellant's theory that SR would lie to conceal her own misconduct. Third, to support this theory of admission the members needed to know that SR had "lied" to Appellant about her sexual misconduct; they did not need to know the details of the prior sexual conduct. This much the military judge permitted.

In my view, Appellant might have a different appellate case if he had argued to this Court that members needed to know the nature of "the secret" in order to assess beyond a reasonable doubt whether SR might succumb to pressure to protect the secret. This alternative theory was not the basis of Appellant's appeal before this Court. In any event, it should be noted that the military judge rejected this theory at trial, his conclusions of law stating:

While the importance of her secret would be relevant in this fashion, I do not think that the

members would need to know the specifics. At the Article 39(a) session, the Government offered a generic formulation that would impress upon the members the seriousness of the secret. In essence, the members could be informed that the secret was information that if revealed could have an adverse impact on her Coast Guard career, including possibly disciplinary action under the UCMJ.

Reasonable judges might disagree on whether additional detail about “the secret” was needed for members to fairly assess whether this Coast Guard cadet was coerced into sexual conduct to safeguard that secret. But I am not persuaded that it was plain error. The military judge informed the members that the secret exposed the witness to criminal liability and violated academy regulations. This is the very sort of balancing military judges are supposed to conduct [450] when they weigh an accused’s rights and a victim’s privacy under M.R.E. 412.

ERDMANN, Judge, with whom EFFRON, Chief Judge, joins (concurring in part and dissenting in part):

While I concur with the majority opinion as to the jurisdictional issue raised by the Government, I respectfully dissent from the majority’s conclusion as to the granted issue. In a case where credibility of the complainant was fundamental, the military judge prevented the defense from presenting to the panel an explanation of the circumstances that would have provided a motive for the complainant to make a false allegation of rape.

*Background*

Cadet Webster Smith was initially charged with twenty-two specifications, the majority of which related to his sexual relationships with female cadets at the United States Coast Guard Academy. Eleven of those charges were dismissed before trial. At a general court-martial composed of members, Smith was found not guilty of six of the remaining charges. Contrary to his pleas, the members found him guilty of absence without leave, attempted failure to obey a lawful order, sodomy, extortion, and indecent assault. The sodomy, extortion, and indecent assault charges arose out of allegations made by SR, a female cadet.

In this appeal, Smith asserts that the military judge erred by preventing him from fully cross-examining SR as to her motive and credibility in violation of his Sixth Amendment right to confrontation and the “constitutionally required” exception to Military Rule of Evidence (M.R.E.) 412. M.R.E. 412(b)(1)(C). At trial the defense filed a motion pursuant to M.R.E. 412 requesting permission to cross-examine SR about her alleged statements to Smith concerning a prior sexual encounter she had with an enlisted servicemember. The factual basis for the motion was summarized by the military judge in his findings of fact:

During the summer training program at the start of their first class year, Cadet Smith and [SR] were both assigned to patrol boats that moored at Station Little Creek. Both lived in barracks rooms at the Station. In May 2005, Cadet Smith approached [SR] to inform her that he was hearing rumors from the enlisted personnel assigned to the Station that she had a sexual encounter with an enlisted

member assigned to the Station. [SR] told him that this was true, but that it was not a consensual encounter. Cadet Smith then informed the enlisted personnel who were spreading the rumors that the conduct was not consensual.

On or about 19 October 2005, Cadet Smith again approached [SR]. He told her that he had remained in contact with some of the enlisted personnel assigned to Station Little Creek and that the rumors surrounding her sexual encounter with the enlisted man had continued. This time she told him that the incident with the enlisted man had been a consensual encounter and that the scope of the encounter had been greater than she had previously described.

At the Article 32 hearing, [SR] merely stated that she had confided a secret to Cadet Smith. In her 15 February 2006 statement, she merely stated that a situation occurred which led to rumors. On both occasions, she went on to state that on October 19th, she was concerned enough that Cadet Smith would expose this secret that she agreed to pose for a picture with him in which both of them were nude, and later that night allowed him to perform cunnilingus on her then she performed fellatio on him.

In the defense motion, Smith argued that the evidence was constitutionally required because “[t]he fact that the alleged victim lied to Cadet Smith about her sexual activity and has misled CGIS about that activity tends to show the alleged victim as untruthful about her sexual conduct generally and specifically has mo-

tive to lie about the specific sexual rumors underlying the charge—the very issue before the trier of fact.”

The Government opposed the admission of the evidence arguing that the substance of SR’s secret was not relevant, material, or vital to Smith’s defense. In denying the motion the military judge concluded that: [451] while the evidence was relevant, the members did not need to know the specifics, but could be provided with a non-specific summary;<sup>1</sup> although the evidence could show that SR had a propensity to bring false accusations against men with whom she had consensual sexual encounters, the evidence was not strong since the source of the allegation, Smith, was biased; there was a significant difference between SR making a false allegation to Smith and making a false allegation to law enforcement authorities; and the probative value of the evidence was outweighed by the danger of unfair prejudice.

The United States Coast Guard Court of Criminal Appeals affirmed the findings and sentence. *United States v. Smith*, 66 M.J. 556, 563 (C.G. Ct. Crim. App. 2008). We review a military judge’s decision to admit or exclude evidence for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). In doing so, we review findings of fact under the clearly erroneous standard and conclusions of law under the de novo standard. *Id.*

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<sup>1</sup> The military judge found that “the members could be informed that the secret was information that if revealed could have an adverse impact on [SR’s] Coast Guard career, including possibly disciplinary action under the UCMJ.”

*Discussion*

The evidence at issue was proffered to attack SR's credibility by establishing that she had earlier made a false allegation of a nonconsensual sexual encounter to protect her Coast Guard career. Before addressing the M.R.E. 412 issue, it is worth noting that there is some question as to whether M.R.E. 412 even applies to this type of evidence. The Drafters' Analysis to M.R.E. 412 states "[e]vidence of past false complaints of sexual offenses by an alleged victim of a sexual offense is not within the scope of this Rule and is not objectionable when otherwise admissible." *Manual for Courts-Martial, United States*, Analysis of the Military Rules of Evidence app. 22 at A22-36 (2008 ed.).<sup>2</sup> However, given the posture of this case on appeal, and assuming that M.R.E. 412 does apply, the evidence is clearly admissible under the M.R.E. 412 analysis.

1. *Objections Under M.R.E. 412*

"[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (citing *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). "[E]xposure of a witness' motivation in testify-

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<sup>2</sup> See also Fed. R. Evid. 412 advisory committee's note on proposed 1994 amendment ("Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, the evidence is subject to the requirements of Rule 404.").

ing is a proper and important function of the constitutionally protected right of cross-examination.” *Id.* at 678-79. “The question is whether ‘[a] reasonable jury might have received a significantly different impression of [the witness’s] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.’” *United States v. Collier*, 67 M.J. 347, 352 (C.A.A.F. 2009) (brackets in original) (quoting *Van Arsdall*, 475 U.S. at 680).

“M.R.E. 412 was intended to protect victims of sexual offenses from the degrading and embarrassing disclosure of intimate details of their private lives while preserving the constitutional rights of the accused to present a defense.” *United States v. Banker*, 60 M.J. 216, 219 (C.A.A.F. 2004). There are, however, three exceptions to the exclusionary provisions of M.R.E. 412. Smith relied on the third exception that requires the admission of evidence “the exclusion of which would violate the constitutional rights of the accused.” 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.” *Banker*, 60 M.J. at 221 (citations omitted) (emphasis added). *Banker* requires that “where evidence [452] is offered pursuant to this exception, it is important for defense counsel to detail an accused’s theory of relevance and constitutional necessity.” 60 M.J. at 221. Smith’s counsel did just that in this case.

## 2. *Relevance and Materiality*

In order to properly determine whether evidence is admissible under the constitutionally required exception the military judge must evaluate whether the proffered evidence is relevant, material, and favorable to the defense. *Id.* at 222. “[T]he relevancy portion of this

test is the same as that employed for the other two exceptions of the rule,” which is that “[e]vidence is relevant if it has ‘any tendency to make the existence of any fact ... more probable or less probable than it would be without the evidence.’ M.R.E. 401.” *Id.* at 222. The proffered evidence could have impacted SR’s credibility by allowing the defense to provide a commonsense explanation for SR to give false testimony. That is, when SR learned of the investigation of Smith for alleged sexual offenses, she became concerned that the investigation would produce allegations that she had engaged in prohibited sexual activity<sup>3</sup> with Smith in their dormitory at the Coast Guard Academy, thereby jeopardizing her own career. Thus, she fabricated the charges against Smith to protect her career, as she had in the past for the same reason. The military judge found that the evidence would be relevant and I agree.

Having found the evidence relevant, the next step for the military judge was to determine whether the evidence was “material and favorable to the accused’s defense, and thus whether it is ‘necessary’” *Id.* at 222 (citing *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993)).

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

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<sup>3</sup> Pursuant to Regulations for the Code of Cadets 4-5-05.a.3, sexual conduct is prohibited on Coast Guard Academy installations even if it is between consenting cadets. Cadets found guilty of consensual sexual misconduct can be disenrolled. *Id.* at 4-5-05.a.4.

nature of the other evidence in the case pertaining to this issue.”

*Id.* (quoting *United States v. Colon-Angueira*, 16 M.J. 20, 26 (C.M.A. 1983)).

There can be no dispute that testing the credibility of a witness through cross-examination is crucial to the right of confrontation.

A more particular attack on the witness’ credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is “always relevant as discrediting the witness and affecting the weight of his testimony.” 3A J. Wigmore, *Evidence* § 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

*Davis v. Alaska*, 415 U.S. 308, 316 (1974) (citation omitted).

As in *United States v. Dorsey*, 16 M.J. 1, 7 (C.M.A. 1983), this was a “he said-she said” case and for the charges at issue in this appeal,<sup>4</sup> the critical question for the members was the credibility of the sole prosecution witness. Evidence of a motive to fabricate and that SR had alleged that an earlier consensual sexual encounter was nonconsensual in an attempt to protect her career

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<sup>4</sup> Sodomy, extortion, and indecent assault.

bears directly on SR's credibility as to the allegations she made against Smith. It may have shown that SR had a propensity to lie about consensual sexual encounters when her career was on the line. The materiality of this evidence is not the "lurid nuances of the victim's sexual past" as noted by the majority, but rather the allegation that SR had previously lied about a sexual encounter under similar circumstances.

[453]

### 3. *Balancing*

Once the military judge has determined that the proffered evidence is relevant and material, the military judge must undertake the M.R.E. 412 balancing test to determine if the evidence is favorable to the accused's defense.<sup>5</sup> *Banker*, 60 M.J. at 222. The term favorable is synonymous with vital. *Id.* "[W]hen balancing the probative value of the evidence against the danger of unfair prejudice under M.R.E. 412, the military judge must consider ... factors such as confusion of the issues, misleading the members, undue delay, waste of time, needless presentation of cumulative evidence, [and] also prejudice to the victim's legitimate privacy

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<sup>5</sup> Commentators have noted that the "constitutionally required" exception may be unnecessary since once it is established that the evidence is constitutionally required, there can be no further limitation on its admission. *See* 1 Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* § 412.02[4], at 4-194 (6th ed. 2006) ("Any limitation on a constitutional right would be disregarded whether or not such a Rule existed."); Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:81, at 306 (3d ed. 2007) ("The exception is arguably unnecessary because Fed. R. Evid. 412 is subordinate to the Constitution anyway, but perhaps including it diminishes the sense of conflict between the two legal standards.").

interests.” *Id.* at 223. The M.R.E. 412 balancing test weighs in Smith’s favor. Under the circumstances of this case, any risk of confusion of the issues, misleading the members, wasting time, or presenting cumulative evidence was minimal and is outweighed by the high probative value of this evidence.

In *Dorsey* the court found evidence favorable when it “undermined the credibility of the sole prosecution witness who directly testified to appellant’s guilt of the charged offense.” *Dorsey*, 16 M.J. at 7. In a similar fashion, admission of a prior false allegation of a non-consensual sexual encounter could have undermined the credibility of SR, the only witness who testified against Smith on the extortion, sodomy, and indecent assault charges.

While the evidence of SR’s earlier allegation of a false nonconsensual sexual encounter and her subsequent admission that the encounter was consensual would have impacted her privacy interests, withholding this constitutionally required evidence from the panel deprived Smith of his best opportunity to provide a motive for SR’s allegations and to challenge her credibility. The fact that the military judge allowed the panel to hear that SR had a secret that, if revealed could have an adverse impact on her Coast Guard career, including possibly disciplinary action under the UCMJ, was simply not sufficient. With this limited information about SR’s secret, the members were left to speculate whether the secret was a minor disciplinary infraction or a more serious charge, but they had no idea that the

proffered evidence directly implicated SR's motive and credibility.<sup>6</sup>

In *Collier* this court found the military judge erred in limiting cross-examination of the complaining witness for possible bias. *Collier*, 67 M.J. at 349. There, the defendant attempted to establish bias by presenting evidence of the existence of a romantic relationship that ended badly between the accused and the complaining witness. *Id.* at 351. The military judge only allowed cross-examination as to the "breakup of a friendship." *Id.* at 351-52. This court found that there was a qualitative difference between the two situations and if the members had been shown evidence of the romantic relationship they might have had a significantly different impression of the accusing witness' credibility. *Id.* at 352, 353. Similarly, there is a qualitative difference between an undisclosed situation that "could have had an adverse impact on [SR's] Coast Guard career" and an allegation that SR had previously made a false allegation of a nonconsensual sexual encounter to protect her career.

[454] While the military judge found that the evidence was not strong because it came from Smith, who had an obvious bias, it is well established that "[t]he weight and credibility of the ... witness are matters for

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<sup>6</sup> Trial counsel illustrated the range of incidents that the members could have speculated on when, at one point during his argument on the motion, he stated that while the existence of the secret was extremely relevant, the content of the secret was not. Trial counsel argued, "[t]he extortion charge is that there was a secret. It doesn't matter if that secret was whether she liked Smarties. It doesn't matter if she had committed some other felony ...."

the members alone to decide.” *United States v. Moss*, 63 M.J. 233, 239 (C.A.A.F. 2006) (citing *United States v. Bins*, 43 M.J. 79, 85 (C.A.A.F. 1995)). The court in *Banker* noted that the role of the military judge is to assure that the evidence meets the usual evidentiary standards. *Banker*, 60 M.J. at 224 (citing *United States v. Platero*, 72 F.3d 806, 812 (10th Cir. 1995)). The court in *Platero* went on to say, “when the Judge decides whether or not a defense is true or false and decides that on the basis of the credibility of the witnesses, the Judge is doing what the jury is supposed to do in a serious criminal case covered by the Sixth Amendment.” *Platero*, 72 F.3d at 812.

Smith had a commonsense explanation for SR’s claim that the sexual activity was nonconsensual and the military judge’s ruling prevented the members from considering this theory. The alleged false accusation was close in time to the allegation made against Smith, both allegations involved military members and both situations presented a motive for SR to lie about the consensual nature of her sexual activities to protect her career. Putting aside the fact that M.R.E. 412 may not even apply to this type of evidence, I would conclude that the evidence should have been admitted under M.R.E. 412. I would further find that the error was not harmless beyond a reasonable doubt as it essentially deprived Smith of his best defense and “the excluded evidence may have tipped the credibility balance in [Smith’s] favor.” *Moss*, 63 M.J. at 239.

I would reverse the decision of the United States Coast Guard Court of Criminal Appeals and set aside the findings and sentence for Additional Charge I, Specification 1 of Additional Charge II, and Additional Charge III, and remand the case for further proceedings, if any.



**APPENDIX B**

UNITED STATES COAST GUARD COURT OF  
CRIMINAL APPEALS

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Docket No. 1275  
CGCMG 0224

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UNITED STATES,

*v.*

WEBSTER M. SMITH, CADET (E1C), U.S. COAST GUARD,

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Decided: 9 April 2008

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[66 M.J. 556\*]

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[557]

BEFORE MCCLELLAND, TUCHER & LODGE,  
Appellate Military Judges

MCCLELLAND, Judge:

Appellant was tried by general court-martial composed of members. Contrary to his pleas, Appellant was convicted of one specification of unauthorized absence, in

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[\* Petitioner notes that the opinion that appears in the official reporter includes several redactions. The unredacted version reprinted here was sealed by the court of criminal appeals but unsealed, by order dated October 29, 2009, by the court of appeals. Also, footnotes 1-6 in the court's opinion, regarding counsel representing the parties, have been omitted.]

violation of Article 86, Uniform Code of Military Justice (UCMJ); one specification of attempted failure to obey a lawful order, in violation of Article 80, UCMJ; one specification of sodomy, in violation of Article 125, UCMJ; one specification of extortion, in violation of Article 127, UCMJ; and one specification of indecent assault, in violation of Article 134, UCMJ. The court sentenced Appellant to a dismissal, confinement for six months, and forfeiture of all pay and allowances. The Convening Authority approved the sentence as adjudged.

Before this Court, Appellant has assigned six errors:

- I. The convictions for extortion, sodomy, and indecent assault must be reversed because the military judge violated Appellant's constitutional right to confront his accusers by limiting his cross-examination of SR.
- II. If the findings for extortion and indecent assault are set aside, then the sodomy conviction, which is based on private consensual non-commercial activity between adults of equal rank, is unconstitutional.
- III. The extortion conviction must be overturned because the Government failed to prove that Appellant threatened SR with the intent to obtain sexual favors.
- IV. The conviction for going from an appointed place of duty cannot stand because the Government failed to prove that Appellant knew that his duty assignment required him to remain in Chase Hall after 2200.
- V. The evidence was factually insufficient to sustain the conviction for attempted violation of an order.

VI. The Convening Authority erred in summarily denying Appellant's request to defer confinement.

We summarily reject the third and fourth assigned errors. The evidence, though circumstantial, is sufficient to support the convictions. We will discuss the other assigned errors. We find no error and affirm.

#### I

Appellant asserts that the military judge erred in limiting his cross-examination of the complaining witness concerning the extortion, sodomy, and indecent assault specifications of which he was found guilty. We will review the military judge's decision *de novo*.<sup>7</sup> [558] If error is found, we will reverse unless we find the error harmless beyond a reasonable doubt.

In May 2005, during the Coast Guard Academy's summer program, Appellant, a Coast Guard Academy cadet, and SR, a female Academy classmate, were assigned to neighboring cutters in Norfolk, Virginia. Appellant communicated with SR, letting her know that he was hearing rumors about her. They discussed the

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<sup>7</sup> The Court of Appeals for the Armed Forces has stated that it employs an abuse-of-discretion standard when reviewing claims that a military judge's evidentiary ruling violated the Sixth Amendment right of confrontation. *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006); *United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005). These cases, as well as others preceding them, found error in the trial court's ruling, weakening the claim that they represent holdings as to the standard of review to be applied. In any event, we choose to review this issue *de novo* under our Article 66, UCMJ, responsibility to determine whether the findings and sentence, on the basis of the entire record, should be approved. See *United States v. Olean*, 56 M.J. 594, 598-99 (C.G.Ct.Crim.App. 2001).

rumors, and SR told Appellant the story underlying the rumors. (R. at 878, 1320.) SR testified that she told Appellant a part of but not the whole situation; she lied to him by omitting details that would have painted her in a bad light. (R. at 878, 901-02.) Appellant assured her that he would counteract the rumors. (R. at 878, 1320.)

On 19 October 2005, Appellant communicated with SR to the effect that the rumors were still being talked about. Again they discussed the rumors, and this time SR told Appellant the complete story of what had happened. (R. at 880, 921, 1321.) Appellant testified to the effect that his source had indicated the story was different from what she had originally told him, and that when she told him the complete story, it was indeed “pretty substantially different.” (R. at 1321.) SR testified that, at that point, she thought if she did not tell him the whole story, he would stop helping her. (R. at 922.) Her actions in the complete story, she admitted, violated cadet regulations and possibly the UCMJ, but she understood at the time of trial that she would not be prosecuted for them. (R. at 899.) Once she told Appellant the whole story, she testified, he responded that he needed motivation to continue helping her. (R. at 880-81.) Later that evening, Appellant and SR engaged in sexual conduct that became the subject of the extortion, indecent assault, and sodomy charges against Appellant. (R. at 881-92.) SR maintained that the reason she engaged in the conduct was because she “was scared to upset him because he had a big secret of mine.” (R. at 891.)

Early in the trial, a closed Article 39(a) session was held pursuant to Military Rule of Evidence (M.R.E.) 412 to address the details of the story underlying the rumors, on which the defense proposed to cross-

examine SR. According to Appellant, SR's story in May was that she had had a sexual encounter involving oral sex with an enlisted Coast Guard member, that it was not consensual, and that she felt guilty about it because it was not with her boyfriend. (R. at 101-02.) SR's story in October, according to Appellant, was that the sexual encounter was in fact consensual and that it included intercourse as well as oral sex. (R. at 102.) The military judge ruled that SR could be cross-examined concerning the lie in May, but that the details, as described in this paragraph, were not to be brought out.<sup>8</sup>

Appellant contends that the military judge's ruling was a "flagrant violation" of Appellant's Sixth Amendment right of confrontation. In defense of the extortion, indecent assault, and sodomy charges, Appellant sought to convince the court members that SR was lying about her sexual encounter with Appellant, in particular falsely contending that it was not consensual, and that she was doing so to protect herself from discipline. This argument, he asserts, would have been much more persuasive had the members known that before 19 October, SR had been lying to Appellant

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<sup>8</sup> It is undisputed that the details fall within Military Rule of Evidence (M.R.E.) 412's exclusion. Moreover, SR, a newly-commissioned Coast Guard officer at the time of trial, testified that she was still concerned about the story because "I'm afraid of rumors when I go from unit to unit." (R. at 877.) It is for this reason that we continue to treat the details as specified in M.R.E. 412(c), keeping them nonpublic, although M.R.E. 412 addresses itself to admission of evidence, implying that it applies at trials, and does not mention appellate proceedings. Portions of the briefs were sealed, and we held a closed hearing for oral argument on this assignment of error. We seal portions of this opinion in the same spirit; likewise the dissent.

about her sexual encounter with an enlisted man, in particular falsely contending that it was not consensual, and doing so to protect herself from discipline.

M.R.E. 412 renders evidence inadmissible that is offered to prove a complainant engaged in sexual behavior other than that involved in the alleged offense. M.R.E. 412(a)(1). However, it excepts, among other things, “evidence the exclusion of which would violate the constitutional rights of the [559] accused.” M.R.E. 412(b)(1)(C). An accused has the right to admission of such evidence if it is relevant, material, and favorable to his defense. *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983) (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982)). “Favorable” is further interpreted as “vital.” *United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004).

Appellant was properly allowed to cross-examine SR concerning her May 2005 lie, pursuant to M.R.E. 608(b) and the Sixth Amendment. However, the right to confrontation is not absolute. “[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination 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. And as we observed earlier this Term, ‘the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’” *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (citation omitted). The trial judge could properly restrict Appellant’s cross-examination of SR on the basis of M.R.E. 412, excluding, as he did, the details of the May incident,

unless those details were relevant, material, and vital to his case. *Dorsey*, 16 M.J. at 5; *Banker*, 60 M.J. at 222.

Appellant cites *United States v. Bahr*, 33 M.J. 228 (C.M.A. 1991), and *United States v. Moss*, 63 M.J. 233 (C.A.A.F. 2006), in support of his argument that the details of the May incident were constitutionally required to be admitted. In each of these cases, evidence of a complainant's motive to fabricate was proffered but excluded.<sup>9</sup> In both cases, the court held the exclusion was prejudicial error.

In *Bahr*, the accused was charged with sexual offenses against his 14-year-old daughter. The defense offered the daughter's diary, in which she expressed intense dislike of her mother, and proposed to cross-examine her on it to show that she hated her mother. The Court of Military Appeals agreed that this tended to show a motive to testify falsely against her father in order to hurt her mother. Admission of such evidence was required under M.R.E. 608(c) and the Sixth Amendment. 33 M.J. at 233. The defense further sought to cross-examine the child concerning prior false statements to her classmates about being raped by soldiers in Spain, which she had admitted to counsel were lies she had uttered to attract attention. Again, the court agreed that this line of cross-examination was admissible to show the prosecutrix had a second motive to testify falsely. *Id.* at 233-34.

The accused in *Moss* was charged with sexual offenses against his 14-year-old niece. The defense sought to show that the niece fabricated the allegations so as to cast herself as a victim to gain favorable treat-

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<sup>9</sup> M.R.E. 412 was not implicated in these cases.

ment from her parents, by cross-examining her and her mother on her acts of misbehavior and the resulting punishments, and on the improvement in the relationship with her parents after she reported the allegations. 63 M.J. at 235. In this case, too, CAAF held the proposed cross-examination should have been allowed, citing M.R.E. 608(c) and the Sixth Amendment.<sup>10</sup> *Id.* at 237.

The circumstances of these cases are different from those of our case. The girls' claimed motives to fabricate, in order to retaliate against her mother and also to gain attention in the one case, and to divert attention from her own misdeeds in the other, were supported by direct evidence or evi-[560]dence from an earlier parallel situation. In our case, the argument as to motivation is being made based on an earlier situation claimed to be parallel, but there is a significant difference between the two situations.

It is clear that SR wanted Appellant's help in suppressing rumors concerning the May 2005 incident, and it is fair to argue that avoiding discipline was a factor motivating her to lie to Appellant about the details. The motive for SR to falsify the truth regarding the

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<sup>10</sup> During the trial of this case, there was little mention of motive as a basis for admission of the disputed evidence. M.R.E. 608(c) was not cited. In the defense's Notice Pursuant to M.R.E. 412, the argument referred to credibility generally, and went on to argue that the evidence at issue "tends to show the alleged victim as untruthful about her sexual conduct generally and specifically has motive to lie about the specific sexual rumors underlying the charge." (Appellate Ex. XIX at 3 (citing *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983)).) However, the "motive to lie" point was not developed. In the context of this case, this omission makes no difference to our analysis.

May incident can be directly linked to her concern for either UCMJ or administrative action against her for engaging in consensual sexual relations with an enlisted member. There is no apparent similar motive to fabricate her story regarding the events on 19 October 2005. There is no evidence in the record, no suggestion, and no reason to believe that anyone knew about the 19 October conduct other than Appellant and SR, and thus no reason to believe a preemptive false report on her part would be useful to her. Since no one else knew about the events that took place in the cadet barracks that night, there was no reason for SR to be concerned with either UCMJ or administrative action against her, and therefore no reason for her to falsify the information when she made her report<sup>11</sup> or when she testified at trial. Appellant could have cross-examined her upon her motive for making that report, instead of relying solely on a claimed parallel with the May incident, but did not do so. Hence, there is no evidence at all of motive to fabricate, and the earlier situation is not parallel.

The military judge's ruling allowed Appellant to attack SR's credibility by means of showing a prior lie. It precluded Appellant from showing that the prior lie pertained to the nature (consensual or not) of a prior sexual encounter with someone else, but did not preclude Appellant from attempting to show, by other means, that SR had a motive to lie in her testimony against Appellant. Nor did it preclude Appellant from "portray[ing] the witness as the architect of a scheme

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<sup>11</sup> SR provided a signed statement dated 15 February 2006 to the Coast Guard Investigative Service containing the allegations against Appellant. (Appellate Ex. XVII, Enclosure 13; Appellate Ex. XXI at 1.)

of false allegations intended to cover up her own misconduct,” as the dissent complains. That the witness lied came into evidence (R. at 901), as did the fact that the lie pertained to her misconduct (R. at 899-901).

We further disagree with the dissent that her testimony “created a substantially different impression of her credibility than what the defense had tried to show—namely, that SR had knowingly provided Appellant with false information” for the purpose of using him to counter a career-threatening rumor, impliedly by disseminating the false information. She testified on direct examination that she “did not tell [Appellant] the whole situation,” but only “[a] little bit of it.” (R. at 878.) But she also admitted, under cross-examination, that she had lied to him, that the bits she had omitted painted her in a bad light. (R. at 901-02.) Appellant’s testimony reflected that her statements to him had been “substantially different.” (R. at 1321.) The military judge’s ruling prevented the members from judging for themselves whether her behavior should be characterized as a lie or something less, but it did not prevent Appellant’s defense counsel from arguing, as he did, that she admitted lying.<sup>12</sup> (R. at 1510.)

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<sup>12</sup> The dissent propounds the theory that SR sought to have Appellant lie for her. Both her testimony and Appellant’s testimony imply that he volunteered to help her suppress the rumors, without her asking. (R. at 878, 1320.) She also testified that on 19 October, she said to him, “I’m not gonna ask you to lie for me.” (R. at 903.) As the dissent notes, there is nothing to indicate just what she hoped for or expected him to do to “squash” or suppress rumors. On the evidence, it would be fair argument to say that she sought to have him lie for her, but the defense did not actually make that argument at trial.

As noted above, an accused has the right to admission of evidence despite M.R.E. 412 if it is relevant, material, and vital to his defense. *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983); *United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004). In this case, we find that the evidence sought to be admitted was no more than superficially relevant, was not material, and was not vital to his [561] defense. We find no error in the military judge's ruling against Appellant.<sup>13</sup>

## II

Appellant asserts that if he prevails on the previous assignment, clearly necessitating reversal of the extortion and indecent assault convictions, the sodomy conviction must also be reversed because it would be unconstitutional under *Lawrence v. Texas*, 539 U.S. 558 (2003).

In *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004), the court held that *Lawrence* applies to the military, but Article 125, the UCMJ's punitive article on sodomy, is not facially unconstitutional. Rather, the court concluded "that its application must be addressed in context," that is, is it constitutional as applied? *Id.* The court set forth three questions to be considered.

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<sup>13</sup> The military judge did not explicitly find that the evidence was relevant, but did say, "I agree that this theory would be a valid reason for admitting this evidence under M.R.E. 412(b)(1)(C)." (Appellate Ex. CLIII at 3.) He went on to find that "the minimal probative value of this evidence is outweighed by danger of unfair prejudice to [SR]'s privacy interests [per M.R.E. 412(c)(3)] and the potential danger of sidetracking the [members'] attention to a collateral issue [per M.R.E. 403]." *Id.*

First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

*Id.* at 206-07 (citation omitted).

In the absence of the coercive element of extortion, Appellant's conduct might be characterized as private, consensual sexual activity between adults. We may assume, as the court did in *Marcum*, that the conduct would be within the *Lawrence* liberty interest. Since Appellant and SR were both first-class cadets and not in the same chain of command, unlike the situation in *Marcum*, we may also assume that the conduct would not encompass behavior or factors identified as being outside the *Lawrence* analysis. However, in the language of *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004), Appellant's conduct "squarely implicates the third prong of the framework."

The Regulations for the Corps of Cadets includes an Article 4-5-05 entitled Sexual Misconduct. (Appellate Ex. XXIV.) Paragraph a.3 thereof prohibits sexual conduct on board military installations, which includes the Academy, even if between consenting cadets. We find that Appellant's conduct, as he testified to it (R. at 1326-27), was outside any protected liberty interest recognized in *Lawrence*. See *Stirewalt*, 60 M.J. at 304 (liberty interest is considered "in light of the established ... regulations and the clear military interests of

discipline and order that they reflect”). We note that a holding otherwise would apparently yield the anomalous result that the regulation would be enforceable as to all forms of sexual conduct except sodomy, as the Government pointed out at oral argument.<sup>14</sup>

The presence of the regulation readily distinguishes this case from those of the Army Court of Criminal Appeals opinions attached to Appellant’s brief, in which in-barracks consensual sodomy convictions were overturned. In one of them, the opinion specifies that there was no evidence of a barracks policy prohibiting the conduct. *United States v. Meno*, ARMY 20000733, at 4 (A.Ct.Crim.App. Jun. 22, 2005) (per curiam). In the other, a guilty plea case, the accused had not admitted any facts that would take the case out of the *Lawrence* liberty interest.<sup>15</sup> *United States v. Bullock*, ARMY 20030534, at 5 (A.Ct.Crim.App. Nov. 30, [562] 2004). We are not aware of any court-martial appellate decision overturning a sodomy conviction based on *Lawrence* when there was a regulation aside from Article 125, UCMJ, prohibiting the behavior.<sup>16</sup>

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<sup>14</sup> We have found no authority suggesting that military regulation of sexual conduct generally may be unconstitutional.

<sup>15</sup> Appellant’s clemency request to the Convening Authority, dated 22 August 2006, attached another Army Court of Criminal Appeals opinion and cited a Navy Court of Criminal Appeals opinion, each of which involved a guilty plea with no indication or admission by the accused of additional factors taking the case out of the *Lawrence* liberty interest.

<sup>16</sup> Under the circumstances of this case, even if Appellant were found not guilty of extortion and even if there were no regu-

## III

Appellant was charged with violating an order prohibiting him from contact with cadets. He was convicted of an attempt to violate the order. He contends that the evidence was factually insufficient to support the conviction, in that his attempt to contact a cadet took place the day before the order was issued.

The specification charges violation of a paragraph of a written order issued by the Commandant of Cadets on 7 December 2005, which is Prosecution Exhibit 4. It is styled as an amendment to a written order he had issued on 5 December 2005, which is Defense Exhibit F.<sup>17</sup> The Commandant of Cadets issued the written order of 5 December at the time Appellant was removed from the barracks. (R. at 820, 1351.) Appellant's acknowledgment of receipt is recorded on Defense Exhibit F at 0410 on "5 DEC 05." The Commandant of Cadets issued the written order of 7 December after receiving legal advice (R. at 820), but the intent of the order had not changed (R. at 807). Appellant's acknowledgment of receipt is recorded on Prosecution Exhibit 4 at 1600 on "DEC 05" (sic). This order was issued after the Commandant of Cadets had referred allegations of sexual assault against Appellant to Coast

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lation, it is not clear that the conduct would be within the *Lawrence* liberty interest. We do not reach that question.

<sup>17</sup> Defense Exhibit F was admitted (R. at 818), although it is not listed in the index as an exhibit admitted into evidence and is found in the record with exhibits that were not admitted.

Guard Investigative Service (CGIS) for investigation.<sup>18</sup> (R. at 814.)

The order of 7 December alleged to have been violated reads, “You are prohibited from any contact of any kind, directly or indirectly, through any source, or by any means, with Coast Guard Academy Cadets wherever they are located; to include text messages, emails, or phone calls.” (Prosecution Ex. 4.) This differs from the order of 5 December by the added words, “directly or indirectly, though any source, or by any means,” and “wherever they are located.”

The specification alleges violation of the order by, “on or about 16 December 2005, ... wrongfully sending an instant message to [KS], with the intention of having [KS] contact Cadet [KN, an Academy classmate of Appellant].”

KS and KN were close friends. (R. at 408, 423, 496, 555; Defense Ex. A.) KS testified that she received an instant message from Appellant in December 2005. (R. at 519.) The text of the instant message is found in Prosecution Exhibit 1 without any marker as to date of origin, and includes the words, “I need you to make sure that she knows that I hope that everything is physically and emotionally ok with her right now.” KS understood this to mean Appellant wanted her to relay a message to KN. (R. at 519.) She saved it to her computer desktop, intending to relay it to KN, but when she realized that she would be unable to do so before taking a trip, she emailed the text to herself. (R. at 519-20.) Prosecution Exhibit 1 is a printout of the

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<sup>18</sup> Appellant was acquitted of several charges growing out of that investigation.

email, dated 16 December 2005. KS testified that she had received the instant message a few—less than ten—days before that. (R. at 560-61.)

Appellant testified that he had sent an instant message to KS on 6 December 2005 (R. at 1333), before receiving information that he was not supposed to contact any cadets *indirectly* (R. at 1351), but none after receiving the order the next day prohibiting *indirect* contact with KN (R. at 1334).

Appellant argues that his testimony was certain as to the date he sent the message and KS's testimony was uncertain, and therefore his version must be accepted. Apparently the members did not believe Appellant's version and believed KS's testimony that she had received the instant message a few (less than ten) days before 16 December. [563] We are satisfied that the evidence supports the finding that Appellant sent the instant message after he received the 7 December order.<sup>19</sup>

#### IV

Appellant asserts error on the part of the Convening Authority in summarily denying his request for deferment of the sentence to confinement.

Shortly after the trial ended at 1856 hours on 28 June 2006, Appellant submitted a written request for a one-week deferment of the sentence of confinement.

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<sup>19</sup> We reject Appellant's suggestion that the 7 December amendment came about because the Commandant of Cadets learned Appellant had sent the instant message the previous day. (Appellant Br. 35.) There is no evidence and no reason to suspect that anyone other than Appellant and KS knew about the instant message at the time.

The Convening Authority memorialized his action on the request by writing on it, “Request Denied,” his signature, and the date, “06/28/06.” This was error, as such action must not only be in writing, R.C.M. 1101(c)(3), but also “must include the reasons upon which the action is based.” *United States v. Sloan*, 35 M.J. 4, 7 (C.M.A. 1992). The Government concedes the error, but contends that Appellant is not entitled to relief. (Government Br. 14-15.)

Appellant claims prejudice in that he was “paraded in front of frenzied members of the media ... in what can only be described as a ... ‘perp walk.’”<sup>20</sup> (Appellant Br. 38.) The Government’s affidavits contradict Appellant’s version of events. This Court has extremely limited authority to resolve factual disputes that arise from post-trial submissions. *United States v. Ginn*, 47 M.J. 236, 238 (C.A.A.F. 1997).

Nevertheless, assuming Appellant’s version of the facts, we agree with the Government that no relief is due. We find that the Convening Authority’s failure to state any reason for denying the deferment request, while error, was harmless. Appellant served the same amount of confinement he would have served if the deferment had been granted, albeit without a week of delay in its commencement. Assuming he suffered the humiliating and embarrassing experience he describes, we know of no precedent for relief, and we are not inclined to grant relief. *See United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992); *United States v. Brownd*, 6 M.J.

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<sup>20</sup> Appellant claims that his affidavit is corroborated by, and the Government’s affidavits conflict with, media reports. We decline to accept media statements as evidence or take judicial notice of them.

338 (C.M.A. 1979). Distasteful though it may be, we do not believe the criminal law has occasion to take cognizance of such an experience. In any event, there is no guarantee that a deferment of confinement would have avoided exposure to the media when he reported for confinement at the end of the deferment.

#### Decision

We have reviewed the record in accordance with Article 66, UCMJ. Upon such review, the findings and sentence are determined to be correct in law and fact and, on the basis of the entire record, should be approved. Accordingly, the findings of guilty and the sentence, as approved below, are affirmed.

Judge LODGE concurs.

TUCHER, Judge (concurring in part and dissenting in part):

I concur with the majority decision on Assignments II, IV, V, and VI. I dissent from the decision on Assignments I and III.

I agree with the majority opinion that admission of the underlying details of SR's secret—namely, her prior sexual encounter with an enlisted member—was subject to some limitation under Military Rule of Evidence (M.R.E.) 412. I would find, however, that the military judge abused his discretion when he prohibited the defense from cross-examining SR on her false statement to Appellant that the encounter was nonconsensual, since this evidence was highly probative of the defense theory that SR engaged in a pattern of fabrication to avoid discipline. As discussed below, I believe that the military judge erred when he decided the admissibility of this evidence based on his own credibili-

[564]ty determination of the only two witnesses involved. The military judge also erred in not considering important factors that favored admission of the defense evidence, including that the Government made first use of evidence of SR's secret in its case-in-chief to prove that she was extorted and coerced into sexual relations with Appellant; that SR's credibility was a key element in an otherwise uncorroborated case; and that the strength of the Government's case turned on the members finding the presence of subtle psychological influences that overcame SR's will. The excessive restrictions imposed on Appellant's Sixth Amendment confrontation rights allowed SR to testify through non-factual euphemisms on critical issues related to the Government's proof and her own credibility, and allowed the Government to create a substantially different impression of her truthfulness than what the defense had sought to show through the excluded evidence.

It is well-settled that "a primary interest secured by [the confrontation clause of the Sixth Amendment] is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Moreover, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* at 316-17. In military courts-martial, the right to attack the partiality of a witness is primarily secured under M.R.E. 608(c), which provides for the admission of evidence that shows bias, prejudice, or any motive to misrepresent through cross-examination of witnesses or extrinsic evidence. See *United States v. Hunter*, 21 M.J. 240, 242

(C.M.A. 1986); *United States v. Saferite*, 59 M.J. 270 (C.A.A.F. 2004).

Although trial judges have broad discretion to impose reasonable limits on cross-examination to address concerns over harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant, this discretion is not without boundaries. Where the accuracy and truthfulness of the witness' testimony are "key elements" in the Government's case, a trial court's refusal to allow the defendant to cross-examine the witness regarding possible bias, motive, or prejudice is a violation of his Sixth Amendment rights. *Davis*, 415 U.S. at 317-18; *see also Saferite*, 59 M.J. at 273 ("Evidence of bias can be powerful impeachment."); *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006) ("When the military judge excludes evidence of bias, the exclusion raises issues regarding an accused's Sixth Amendment right to confrontation."); *United States v. Bins*, 43 M.J. 79, 84 (C.A.A.F. 1995) ("When the defense offers this evidence, it may deny confrontation rights to exclude it."); *United States v. Foster*, 986 F.2d 541, 543 (D.C. Cir. 1993) ("The more important the witness to the government's case, the more important the defendant's right, derived from the Confrontation Clause of the Sixth Amendment, to cross-examine the witness.").

Evidence that SR had made a prior false claim of sexual assault to Appellant should have been admissible at trial because the central issue was whether SR consented during their sexual encounter on 19 October 2005, and SR was the only Government witness on the issue of consent. The defense should have been able to show that because SR had falsely informed Appellant that her prohibited sexual encounter with an enlisted member was nonconsensual, members could infer that

she had followed a similar scheme in fabricating a false complaint of indecent assault against Appellant, where the motive underlying each statement was SR's fear of being disciplined. Here, the record of trial shows that SR relied on Appellant to contain rumors that were circulating over what prosecutors cryptically referred to as her "bad situation" or "secret." (R. at 881, 901, 922-23.) Both SR's "bad situation" and her encounter with Appellant in Chase Hall involved a military nexus that, if disclosed, subjected SR to discipline. Both incidents were connected, in that the encounter in Chase Hall apparently was meant to secure Appellant's continued assistance in "suppressing" rumors regarding the earlier encounter.

[565] I find it significant that the Government made first use of evidence of SR's secret during its case-in-chief. Although the prosecution was able to present evidence that SR was coerced into unwanted sexual relations with Appellant by the implied threat that he would reveal the facts of her "bad situation," the defense was prohibited from showing that this same fear of disclosure weighed so heavily in SR's mind that she relied on Appellant to disseminate false information concerning her secret. The anomalous result was that the members heard only the Government's evidence on the question of SR's motivation in submitting to Appellant's advances, while the defense was unable to complete the picture by showing the depths of her fear and the lengths she allegedly had gone—and was prepared to go—to shield the facts of her misconduct.

I disagree that the cross-examination allowed the defense was adequate to develop SR's motive to testify falsely against Appellant. The sexual encounter between SR and Appellant had many outward appear-

ances of being consensual. The Government's case of indecent assault was not strong and turned on the members finding the existence of coercion that was sufficient to overcome the victim's will. Resolving this issue necessarily required the members to carefully evaluate the potentially subtle psychological pressure that resulted from Appellant's veiled threat to reveal the truth about SR's secret—a threat that Appellant denied making. Certainly, one explanation for SR's encounter with Appellant was that she felt coerced into unwanted sexual relations. Another entirely plausible explanation was that the encounter resulted from her own calculation that Appellant needed additional "motivation" to continue spreading false information on her behalf.<sup>1</sup> Both scenarios would account for the considerable pressure SR was under after Appellant informed her that rumors still were circulating about her secret, but the latter would not necessarily describe extortion or an indecent assault.<sup>2</sup> Appellant could not develop this alternate scenario at trial because he was prohibited from adequately addressing SR's prior false statement.

In addition, the Government offered no evidence of a fresh complaint and no other evidence to support SR's

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<sup>1</sup> The defense attempted to develop this alternate theory during cross-examination of SR, but was hamstrung by its inability to speak directly to the facts of the prior false allegation. (R. at 903.)

<sup>2</sup> In fact, the Government, in apparent acknowledgment of the subtle psychological pressures at work, responsibly determined that it would not charge Appellant with forcible sodomy. In its answer and brief, the Government explained, "[a]s a practical matter, it would be difficult to convict someone of forcible sodomy on these facts, however, that does not mean that the conduct was consensual." (Government Br. 7.)

account of the incident involving Appellant. SR was the Government's key witness against Appellant—in fact, SR's testimony was the only evidence supporting Appellant's conviction on extortion and indecent assault. Moreover, her own testimony on the question of consent was far from conclusive. For example, although SR testified that at one point during their encounter she pushed Appellant's head aside and told him, "Please don't," she also testified that they kissed each other and exchanged back massages; that he told her, "You don't have to if you don't want to"; and that she thanked him for his support—presumably in reference to his assistance in defusing rumors regarding her secret. (R. at 885-86, 889-92, 914-17.) On the unusual facts of this case, it was essential that the defense be given wide latitude to explore SR's credibility, and to fully develop any motive reasonably raised by the evidence that she would bring a false allegation of sexual assault against Appellant. *See Moss*, 63 M.J. at 236 ("rules of evidence should be read to allow liberal admission of bias-type evidence").

The members eventually did hear SR admit that her secret involved a violation of Cadet Regulations (R. at 899), and that she had misled Appellant about the circumstances, saying, "Yes, I did lie to him" (R. at 901). In addition, defense counsel argued in closing that SR "admitted she lied to Cadet Smith." (R. at 1510.) This limited impeachment allowed the defense was inadequate given that a general attack on a witness' credibility is not the same as a showing of bias or motive. *See Davis*, 415 U.S. at 316-[566]17. Here, the members never were able to place SR's admission that she had lied to Appellant in any factual context, because they never heard what the secret was or what she had lied about. The members only heard that SR

had lied to Appellant in the past, not why she would have lied in bringing allegations against Appellant.

More importantly, SR was able to minimize her lie to Appellant by testifying that she had only omitted certain details from her account, saying, “I just didn’t tell him all that occurred,” and also that she told him, “I’m not gonna ask you to lie for me.” (R. at 902-03.) Her testimony on this point created a substantially different impression of her credibility than what the defense had tried to show—namely, that SR had knowingly provided Appellant with false information, which he then used to counter a career-threatening rumor. *See Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (defendant states a violation of Confrontation Clause if a “reasonable jury might have received a significantly different impression of [the witness’] credibility” had excluded line of cross-examination been allowed). Establishing this point was essential, as the crux of Appellant’s defense was that SR had followed a pattern of fabrication to avoid discipline that was revealed by like motives from a prior scheme. Given this record, where SR was able to downplay her lie as a mere omission of details, and the defense was not allowed to inform the members what SR had lied about or the lengths she was prepared to go to protect her career, the members may well have concluded that the defense was engaged in a “speculative and baseless line of attack on the credibility of an apparently blameless witness.” *Davis*, 415 U.S. at 318.

The military judge issued his ruling under M.R.E. 412, which broadly prohibits the introduction of evidence of a victim’s past sexual behavior or sexual predisposition, unless the evidence fits into one of three

narrow exceptions.<sup>3</sup> Appellant moved to admit the facts of SR's secret under M.R.E. 412(b)(1)(C), which provides an exception for "evidence the exclusion of which would violate the constitutional rights of the accused."<sup>4</sup> Evidence that is offered under an enumerated exception to M.R.E. 412 shall be admitted if the military judge determines that the evidence is relevant and that the probative value outweighs the danger of unfair prejudice—i.e., prejudice to the privacy interests of the alleged victim. *See* M.R.E. 412(c)(3); *United States v. Sanchez*, 44 M.J. 174, 178 (C.A.A.F. 1996). In addition, relevant evidence that is offered under the constitutionally required exception must be admitted if it is material and favorable to the defense, and therefore is necessary. *United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004).

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<sup>3</sup> M.R.E. 412 is modeled after Federal Rule of Evidence 412 and is intended to protect victims of sexual offenses from degrading and embarrassing disclosure of intimate details of their private lives while preserving the constitutional rights of the accused to present a defense. Appendix 22 at A22-36, Manual for Courts-Martial, United States (2005 ed.).

<sup>4</sup> I agree with the majority that the trial defense team did not precisely address the admissibility of the evidence in terms of SR's "motive" to fabricate. Indeed, it appears that the defense objection has assumed greater clarity and focus on appeal. The defense, however, did argue at trial that the evidence implicated Appellant's confrontation rights to show the witness's "biases and ... credibility," in that it revealed SR's "pattern" of claiming that prohibited consensual relations were coerced when disclosure could be damaging to her career. (R. at 97-98.) By focusing on SR's conscious decision to lie under similar circumstances in order to avoid punishment, the defense adequately raised the issue of SR's motive to fabricate allegations against Appellant.

In a detailed ruling, the military judge correctly determined that evidence of a prior false claim of sexual assault was relevant evidence of SR's motive to make a false claim of indecent assault against Appellant, stating, "I agree that this theory would be a valid reason for admitting this evidence under M.R.E. 412(b)(1)(C) ...." (Appellate Ex. CLIII at 3.) The military judge reasoned:

[I]f the members hear that [SR] originally told Cadet Smith that a sexual encounter with another man was non-consensual, and then later admitted that it in fact was consensual, then the members could ... infer that the same thing is happening in this case.

*Id.*

However, the military judge then went on to conclude that the evidence had "low" probative value because:

[567] [T]he evidence proffered that [SR] made these statements is not strong since it comes from the accused, who has an obvious bias. [SR]'s written statement and Article 32 testimony on this point is not clear. She admitted at the Article 32 that she only partially confided in Cadet Smith in May and fully confided in him on October 19th; however, this is far from proof that she initially claimed that the encounter was non-consensual. In fact, it is consistent with the rest of Cadet Smith's Article 39(a) testimony that on October 19th she told him the scope of the sexual encounter had been greater than she had previously described.

*Id.*

I would find that the military judge erred when he decided the probative value of motive evidence based on his evaluation of the credibility of the only two witnesses involved. It is the members' role to determine whether a witness' testimony is credible or biased. *Bins*, 43 M.J. at 85. "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." *Banker*, 60 M.J. at 224. Accordingly, relevant and material evidence of a prior false allegation of sexual assault is no less admissible merely because it is offered through the testimony of the criminal accused. This is particularly so here, where SR—the only other witness to the conversation in issue—secured her unavailability to testify at the motions hearing by invoking her rights against self-incrimination.<sup>5</sup> (R. at 79.) In a credibility contest between Appellant and SR, it should have been up to the members to resolve discrepancies in their respective accounts and decide whom to believe.

As a second basis for excluding the defense evidence, the military judge concluded that SR's state-

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<sup>5</sup> Because SR refused to testify, the military judge based his findings on Appellant's in-court testimony, SR's prior written statement, and the non-verbatim summary of her Article 32 testimony. Based on my review of the complete record, I would find that there was at least a reasonable probability that SR provided Appellant with a false account of her secret—namely that the encounter was non-consensual—which he then used to counter rumors on her behalf. Appellant's testimony concerning their initial conversation was partially corroborated in several key respects by SR's trial testimony, including her admission that the conversation took place, that she had "lied" to Appellant by omitting details that presented her in a "bad light," and that Appellant had assisted her by "squashing" rumors of her secret. (R. at 878, 901-02.)

ment to Appellant was materially different from a report that she subsequently provided to investigators. The military judge stated:

[E]ven if [SR] falsely told the accused *in confidence* that her sexual encounter with the enlisted man was non-consensual *in an effort to suppress rumors*, this would have little value in proving that her *official* allegations against Cadet Smith *resulting in a public trial* are also false.

(Appellate Ex. CLIII at 3.)

The military judge then concluded, “[T]he minimal probative value of this evidence is outweighed by danger of unfair prejudice to [SR’s] privacy interests and the potential danger of sidetracking the member’s [sic] attention to a collateral issue ....” *Id.*

In a trial on charges of extortion and coerced sexual relations, I do not agree that the defense intrudes in a collateral matter by making an inquiry into facts that describe the victim’s fear that her secret will be revealed. Proof of the secret’s existence and the genuineness of SR’s fear of disclosure were key issues in the Government’s case against Appellant, and the defense had a right to explore them, subject to carefully tailored restrictions respecting SR’s privacy.<sup>6</sup> Moreover,

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<sup>6</sup> The military judge clearly recognized the relevance of the content of the secret to the extortion and indecent assault offenses, observing, “[I]f the secret is about something that is completely inconsequential, it makes it less likely that [SR] would have been willing to do something against her will.” (R. at 112.) Ultimately, however, the Government was able to prove both the existence and importance of the secret through the witness’s layering on of additional conclusory statements.

by focusing on the confidential versus official nature of SR's two statements, the military judge overlooked the greater significance of the defense proffer. The defense theory was that SR's ultimate motive in avoiding discipline was revealed in her expectation that Appellant would place his reputation on the line and communicate false information to counter rumors then in circulation about her secret.<sup>7</sup> The defense argued that [568] this same motive was also present in her complaint against Appellant, and it seems an artificial distinction to say that the formality of the complaint process somehow altered SR's overriding concern for protecting her career. *Compare United States v. Bahr*, 33 M.J. 228, 233 (C.M.A. 1991) (error to exclude evidence of witness' prior false statements to classmates that she had been sexually assaulted; evidence was admissible to show witness' motive to testify falsely against accused in order to call attention to herself).

The majority largely sidesteps the problems with the M.R.E. 412 order and under its Article 66(c), Uniform Code of Military Justice (UCMJ), authority concludes that the instant case involves non-parallel statements—an earlier statement to Appellant where avoiding discipline was a factor in SR's motivation to lie, and a second statement to law enforcement investi-

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<sup>7</sup> There is no dispute that SR did not actively seek out Appellant to lie for her concerning her secret. However, after furnishing Appellant with an allegedly false account of her secret, SR apparently did nothing to discourage Appellant from using that information to counter rumors that were in circulation. In fact, SR's approval of Appellant's efforts to "help her" by suppressing rumors was reflected in her own trial testimony (R. at 901, 922-23, 926), and Appellant's threatened withholding of that assistance ultimately formed the basis of the Government's extortion charge.

gators where no such motive existed because nobody else knew about the encounter and SR had no reason to fear UCMJ action. The majority emphatically concludes that because SR had no possible motive to fabricate her allegations against Appellant, the earlier statement was not relevant and therefore was inadmissible at trial. The flaw in the majority's argument is the implicit assumption that no circumstances other than the *actual disclosure* of the facts surrounding the Chase Hall encounter could have provided SR with the motive to fabricate allegations of sexual assault. In my view, the timing, content, and circumstances surrounding SR's initial report to investigators all point to the making of an intrinsically unreliable statement, and provide sufficient grounds to question SR's motives in bringing her allegations against Appellant.

The record reveals that on 5 December 2005, Coast Guard Investigative Service (CGIS) agents interviewed Appellant—the other person who knew of the Chase Hall encounter—as part of a large-scale probe into allegations of his sexual misconduct at the Coast Guard Academy. SR was not interviewed by CGIS until almost two months later, on 9 February 2006,<sup>8</sup> at which time she discussed her allegations against Appellant but specifically refused to address the details of her secret. SR's self-censored initial report reveals that she had made the understandable but nevertheless calculated decision to limit the disclosure of information that could be harmful to her career.<sup>9</sup> Such a decision on

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<sup>8</sup> The record does not disclose whether SR voluntarily came forward or was first approached by CGIS.

<sup>9</sup> In her signed statement to CGIS dated 15 February 2006, SR also indicated, "A situation occurred, that I do not which [sic]

SR's part following a considerable opportunity for reflection necessarily calls into question the completeness and reliability of her contemporaneous allegations against Appellant. Given the visibility of this dragnet investigation, the four-month delay between the Chase Hall encounter and SR's initial report, and her selective and continued withholding of facts that did not reflect favorably on her, it certainly was possible that SR fabricated or embellished details of her allegation against Appellant as a preemptive strike to avoid discipline, based on *her fear or expectation* that the true facts of their encounter, if not already known by investigators, likely would be discovered.<sup>10</sup> Accord-[569]ingly, the two statements were "parallel" not because anyone else knew the facts, but because of the illegality of the encounters and SR's fear that the true facts *could be* discovered. Whether or not SR actually formed the motive to fabricate allegations against Appellant was an

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to discuss, which led to rumors (which were grossly exaggerated)." (Appellate Ex. XVII, Enclosure 13 at 1; Appellate Ex. XXI at 2.) SR's clear attempt to downplay the rumors while at the same time refusing to address them indicates, in my mind at least, a concern for UCMJ or administrative action, if not a desire to deflect official interest in her own behavior.

<sup>10</sup> Given the ongoing CGIS investigation, there certainly would have been risks to SR in not stepping forward at all. SR likely had no way of knowing if Appellant had already reported their encounter to CGIS agents, leaving the possibility of an un rebutted, potentially career-threatening allegation of sexual misconduct in the hands of authorities. There also was the risk that Appellant might decide to cooperate with authorities and make a preemptive disclosure at a future time. The argument that the record completely foreclosed the possibility of fabrication by SR would make more sense if SR had made a prompt and complete report of her allegations against Appellant at a time prior to the CGIS investigation. That did not happen in this case.

issue that that the members should have decided at trial.

Faced with a recalcitrant key witness who refused to testify at the motions hearing, the Government obtained a windfall through the erroneous application of M.R.E. 412. At trial, SR provided conclusory testimony regarding her “bad situation” and Appellant’s prior role in “squashing” career-threatening rumors, for the purpose of showing that she was coerced into unwanted sexual relations after Appellant impliedly threatened to reveal the truth about her secret. On cross-examination, the defense was prohibited from addressing the facts of SR’s “bad situation” or “secret,” and similarly was prohibited from eliciting factual testimony that would inform the members that Appellant’s efforts to “squash” and “suppress” rumors specifically meant spreading false information provided by SR, on SR’s behalf.<sup>11</sup> The result was that the Government was allowed to portray SR as an innocent victim of an extortionist plot, while the defense was not allowed to portray the witness as the architect of a scheme of false allegations intended to cover up her own misconduct. I cannot agree that SR’s privacy interest in shielding her alleged false statements from inquiry was so important that it justified denying Appellant the opportunity to pierce the veneer of the Government’s conclusory assertions that were used to convict him. I disagree with the notion that M.R.E. 412 was intended to allow the Government to prove the *corpus delicti* of the offenses through a witness indulging in euphemisms of doubtful legal sufficiency, particu-

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<sup>11</sup> The record of trial is devoid of any facts that would have explained to the members what these words actually meant.

larly when they obscure facts that raise serious questions concerning her own credibility.<sup>12</sup>

When a constitutional violation is shown, a case must be reversed unless the error is harmless beyond a reasonable doubt. *United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005). In deciding whether or not the erroneous exclusion of evidence is harmless, the court must consider “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and ... the strength of the prosecution’s case.” *United States v. Moss*, 63 M.J. 233, 238 (C.A.A.F. 2006) (quoting *Bahr*, 33 M.J. 228 at 234 (quoting *Delaware v. Van Arsdall*, 465 U.S. 673, 684 (1986))). At trial, SR testified that on 19 October 2005, she had discussed her secret with Appellant in the mailroom; that Appellant had responded by indicating he needed “motivation” to keep “helping her” by continuing to suppress rumors that were circulating about her; that she had replied by asking whether by “motivation” he meant sex—a suggestion she says

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<sup>12</sup> Certainly there were less burdensome remedies available to the military judge that could have protected the legitimate privacy interests of the victim in this case. The military judge could have fashioned an order restricting the defense from probing the intimate and personal details of the secret, focusing instead on the nature of the encounter and the alleged false claim of sexual assault. In addition, the military judge could have closed the proceeding during testimony on the May 2005 incident to protect the victim from undue embarrassment or humiliation. The military judge also could have provided instructions to the members limiting the improper use of the evidence.

made him bristle; that Appellant later appeared in her room in Chase Hall on three separate occasions, where they posed together nude for a photograph and engaged in sexual activity; that the sexual encounter had in her mind provided the “motivation” Appellant needed to continue to suppress her secret; and that although she never told Appellant to stop, she participated only out of fear that he would not keep her secret.

Appellant presented his case upon his own testimony, stating in substance that while he met SR in the mailroom on 19 October, he never extorted sexual favors from her and denied saying that he needed “motivation” to continue suppressing rumors about SR’s se-[570]cret. Appellant testified that they discussed getting together to pose for a nude photograph in her room; that after arriving in her room that evening, he took two digital photographs of them together, which he kept for safekeeping; and that he subsequently returned to her room on two additional occasions to exchange massages and perform consensual oral sodomy. Appellant admitted that SR was “tense” and “stressed” but claimed that the entire sexual encounter with SR was consensual. (R. at 1325.)

The difficulty accepting Appellant’s account of a consensual encounter with SR is that it makes little intuitive sense given the lack of any evidence of a relationship or any rational explanation for its spontaneous nature. In short, Appellant’s testimony is remarkable in its failure to explain SR’s actions in the absence of at least some undue influence. In this failure, however, lies the major flaw in the military judge’s M.R.E. 412 order. Appellant’s account of an almost spontaneous consensual encounter with SR would be difficult to believe unless the members were informed of SR’s prior

false claim and were able to understand the depths of her concern for protecting her career. Only if informed of SR's prior scheme would the members have considered the possibility that her encounter with Appellant in October 2005 resulted not so much from coercion, but rather from her own calculation that she needed to ensure his continued cooperation in keeping her prior misconduct secret. Only then would the members have considered the possibility that SR might have fabricated a false claim of sexual assault against Appellant as a preemptive strike, out of fear that the encounter would be discovered through an ongoing investigation. The erroneous M.R.E. 412 order deprived Appellant of his best defense to the charges involving SR. *See United States v. Gray*, 40 M.J. 77, 80 (C.M.A. 1994) (military judge committed reversible error by excluding evidence of victim's past sexual behavior under M.R.E. 412; case came down to a credibility contest between witnesses, and the excluded evidence "could have made [the accused's] otherwise incredible explanation believable"); *see also United States v. Williams*, 37 M.J. 352, 360 (C.M.A. 1993) (accused's constitutional right to present evidence of victim's extramarital affair improperly excluded under M.R.E. 412; excluded evidence would have revealed motive to provide false testimony in order to protect affair, victim was key witness in government's case, and evidence of guilt was not overwhelming).

Here, the Government offered no other evidence to support SR's testimony that her sexual encounter with Appellant, which had many outward indicators of being consensual, actually resulted from coercion. The admission of evidence that SR had furnished Appellant with false information which he then used to counter a career-threatening rumor may well have cast doubt on

the veracity of SR's testimony, and tipped the balance in favor of Appellant's version of events. Accordingly, I would find that the error in excluding this evidence was not harmless beyond a reasonable doubt.

I would affirm the findings of guilty to sodomy, attempted failure to obey a lawful order, and unauthorized absence. I would set aside the findings of guilty to extortion and indecent assault, and the sentence, and return the case to the Convening Authority for a rehearing.

For the Court,

Jane R. Lee  
Clerk of the Court

**APPENDIX C**

**GENERAL COURT-MARTIAL  
UNITED STATES COAST GUARD**

UNITED STATES

*v.*

WEBSTER M. SMITH, CADET, U.S. COAST GUARD

FILED UNDER SEAL[\*]

**MEMORANDUM ORDER AND OPINION**

**M.R.E. 413 [sic] EVIDENCE  
CADET [SR]**

The Defense has provided notice that it intends to introduce evidence of specific instances of sexual behavior involving then Cadet, now Ensign [SR]. This alleged sexual behavior is the subject of the secret that Cadet Smith is charged with threatening to expose in Specification I of Additional Charge II. The Government seeks to bar the introduction of such evidence pursuant to M.R.E. 412. At the Article 39(a) session held on 23 May 2006, Ensign [SR] did not testify because she invoked her right under Article 31(b) to consult with an attorney. The accused testified as to the content of his conversations with Cadet [SR] on this subject. The Defense also submitted a written statement dated 15 February 2006 that Cadet [SR] provided to the Coast Guard Investigative Service.

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[\* Petitioner notes that by order dated October 29, 2009, the court of appeals unsealed this order. Petitioner has nonetheless changed all uses of the accuser's name to her initials.]

## FINDINGS OF FACT

During the summer training program at the start of their first class year, Cadet Smith and Cadet [SR] were both assigned to patrol boats that moored at Station Little Creek. Both lived in barracks rooms at the Station. In May 2005, Cadet Smith approached Cadet [SR] to inform her that he was hearing rumors from the enlisted personnel assigned to the Station that she had a sexual encounter with an enlisted member assigned to the Station. Cadet [SR] told him that this was true, but that it was not a consensual encounter. Cadet Smith then informed the enlisted personnel who were spreading the rumors that the conduct was not consensual.

On or about 19 October 2005, Cadet Smith again approached Cadet [SR]. He told her that he had remained in contact with some of the enlisted personnel assigned to Station Little Creek and that the rumors surrounding her sexual encounter with the enlisted man had continued. This time she told him that the incident with the enlisted man had been a consensual encounter and that scope of the encounter had been greater than she had previously described.

At the Article 32 hearing, Cadet [SR] merely stated that she had confided a secret to Cadet Smith. In her 15 February 2006 statement, she merely stated that a situation occurred which led to rumors. On both occasions, she went on to state that on October 19th, she was concerned enough that Cadet Smith would expose this secret that she agreed to pose for a picture with him in which both of them were nude, and later that night allowed him to perform cunnilingus on her then she performed fellatio on him.

## CONCLUSIONS OF LAW

1. Generally, evidence that an alleged victim of a sexual offense engaged in other sexual behavior or evidence of the alleged victim's sexual predisposition is not admissible. M.R.E. 412(a). There are three exceptions to this general rule, but only one may be relevant here: evidence of the sexual behavior of the victim is admissible if excluding the evidence would violate the constitutional rights of the accused. M.R.E. 412(b)(1)(C). This exception protects the accused's Sixth Amendment right to confront witnesses and Fifth Amendment right to a fair trial. *United States v. Banker*, 60 M.J. 216, 221 (2004). In other words, the accused has a right to produce relevant evidence that is material and favorable to his defense. *Id.* Evidence is relevant if it tends to make the existence of any fact more or less probable than it would be without the evidence. M.R.E. 401. Assuming these requirements are met, the accused must also demonstrate that the probative value of the evidence outweighs the danger of unfair prejudice. M.R.E. 412(c)(3). In this context, the unfair prejudice is, in part, to the privacy interests of the alleged victim. *Banker*, 60 M.J. at 223. M.R.E. 412 is a legislative recognition of the high value we as a society place on keeping our sexual behavior private.

2. The Defense offered several theories of why this evidence is admissible. First, the Defense wanted to introduce this evidence to impeach the credibility of Ensign [SR] when she testifies. The general rule is that a witness' credibility may be attacked in the form of an opinion or by reputation concerning the witness' character for truthfulness. M.R.E. 608(a). Specific instances of conduct of witness may be admitted, at the discretion of the military judge, if probative of truthfulness. I decline to exercise that discretion in this case

because I believe that, under these circumstances, the probative value of this evidence is substantially outweighed by the danger of unfair prejudice. Then Cadet [SR] was under no duty to be completely forthcoming with Cadet Smith concerning her private life, particularly under these circumstances since her rumored conduct would be in violation of Coast Guard regulations and could subject her to disciplinary action or other adverse consequences. More important, despite any limiting instruction, members might consider this evidence less for its tendency to prove Ensign [SR]'s character for truthfulness than for its tendency to prove that she is a bad person. Finally, conflicting testimony on this point from Ensign [SR] and Cadet Smith could easily sidetrack members from testimony regarding the charged offenses which the member's should be focusing on.

3. The Defense also argued that the members must know the substance of Cadet [SR]'s secret in order for them to independently assess whether or not she would feel coerced into taking a nude photograph with Cadet Smith and later engaging in mutual oral sex in order to protect that secret. While the importance of her secret would be relevant in this fashion, I do not think that the members would need to know the specifics. At the Article 39(a) session, the Government offered a generic formulation that would impress upon the members the seriousness of the secret. In essence, the members could be informed that the secret was information that if revealed could have an adverse impact on her Coast Guard career, including possibly disciplinary action under the UCMJ.

4. The final rationale offered by the Defense at the Article 39(a) hearing is the most persuasive. The Defense argued that if the members hear that Cadet

[SR] originally told Cadet Smith that a sexual encounter with another man was non-consensual, and then later admitted that it in fact was consensual, then the members could use this testimony to infer that the same thing is happening in this case. In other words, the members could infer that Cadet [SR] has a propensity to bring false accusations against men with whom she has had consensual sexual encounters. I agree that this theory would be a valid reason for admitting this evidence under M.R.E. 412(b)(1)(C), but there are two problems with the Defense proffer. First, the evidence proffered that Cadet [SR] made these statements is not strong since it comes from the accused, who has an obvious bias. Cadet [SR]'s written statement and Article 32 testimony on this point is not clear. She admitted at the Article 32 that she only partially confided in Cadet Smith in May and fully confided in him on October 19th; however, this is far from proof that she initially claimed that the encounter was non-consensual. In fact, it is consistent with the rest of Cadet Smith's Article 39(a) testimony that on October 19th she told him that the scope of the sexual encounter had been greater than she had previously described. The probative value of this evidence is therefore low.

5. More important, there is no evidence that Cadet [SR] made an official complaint against the unnamed enlisted man. Even if Cadet [SR] told the accused in May that the encounter was not consensual, the nature of this confidential statement is far different from the nature of her statements to law enforcement personnel that she must have known would result in a public prosecution. Cadet [SR]'s alleged statement to Cadet Smith was apparently intended to keep more people from learning about her sexual encounter with the enlisted man. It was not a false complaint to law

enforcement. In contrast, her statements made in this case were to law enforcement personal and would certainly lead to a public prosecution. Consequently, even if Cadet [SR] falsely told the accused *in confidence* that her sexual encounter with the enlisted man was non-consensual *in an effort to suppress rumors*, this would have little value in proving that her *official* allegations against Cadet Smith *resulting in a public trial* are also false. I am convinced that the minimal probative value of this evidence is outweighed by danger of unfair prejudice to Ensign [SR]'s privacy interests and the potential danger of sidetracking the member's attention to a collateral issue as described in paragraph 2 above.

5. For the above reasons, the Government's objection that this evidence is inadmissible in accordance with M.R.E. 413 [sic] is SUSTAINED.

#### EFFECTIVE DATE

This order was effective on 26 May 2006.

Done at Washington, DC,

/s/

Brian Judge  
Captain, U.S. Coast Guard  
Military Judge

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**APPENDIX D**

IN THE UNITED STATES COAST GUARD  
COURT OF CRIMINAL APPEALS

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Docket No. 1275  
CGCMG 0224

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UNITED STATES,  
*Appellee*

*v.*

WEBSTER M. SMITH, CADET, U.S. COAST GUARD,  
*Appellant*

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14 May 2008

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APPELLANT'S MOTION FOR  
RECONSIDERATION EN BANC  
FILED 9 MAY 2008

**ORDER**

Appellant filed a Motion for Reconsideration En Banc, and for leave to file a brief in support thereof. On consideration of Appellant's Motion, filed under the Court's Rules of Practice and Procedure, it is, by the Court, this 14th day of May, 2008,

**ORDERED:**

That Appellant's Motion be, and the same is, hereby denied.

66a

For the Court,

L. I. McClelland  
Chief Judge

Copy: Office of Military Justice  
Appellate Government Counsel  
Appellate Defense Counsel