

## **CAAF Bolsters Alleged Sex Assault Offenders' Ability to Confront Accusers**

By Greg T. Rinckey

In a ruling that could have broad impacts on military rape cases involving married victims, a divided U.S. Court of Appeals for the Armed Forces (CAAF) ruled in *U.S. v. Ellerbrock*

that a military judge violated the constitutional rights of an Army private first class by suppressing evidence about his accuser's extramarital affair from approximately three years earlier. The soldier wanted to present this evidence to support a theory the accuser had a motive to falsely claim the sexual encounter was not consensual, namely that her husband would divorce

her if it was.

The case involved David C. Ellerbrock, who was found guilty to conspiracy, destruction of military property, larceny of military property, rape, larceny, sodomy by force, and housebreaking, in violation of Articles 81, 108, 120, 121, 125, and 130 of the Uniform Code of Military Justice

, respectively. He had pleaded guilty to all charges except the ones concerning rape and sodomy.

These two charges stemmed from a 2007 incident where Ellerbrock and a friend visited the home of the victim, whose husband had recently deployed. During the night the victim, who previously did not know Ellerbrock, drank alcohol and may have snorted lines of the anti-anxiety drug Xanax. The two ended up in a room alone, and three witnesses testified to seeing them engaged in sexual intercourse, though the accuser's level of mental awareness was not certain. She later said she felt "horrible" about the encounter.

Ellerbrock's accuser had earlier engaged in an extramarital affair, which severely angered her husband. Ellerbrock attempted to present details about this affair to support a theory that the accuser had a reason to fabricate her rape allegation. The military judge blocked admission of this evidence, saying the affair occurred too long ago (i.e., the evidence was "stale") and it was speculative to believe revelations about a second affair would lead to divorce. The U.S. Army Court of Criminal Appeals (ACCA) affirmed the judge's decision. In a 3-2 decision, however, the CAAF said this evidence was constitutionally required and the judge abused her discretion by not admitting it. It reversed the lower court's ruling pertaining to the rape and sodomy charges.

What service members need to know:

The Sixth Amendment of the U.S. Constitution affords accused individuals the right “to be confronted by the witnesses against him” (e.g., the right to cross-examine a witness).

Military Rule of Evidence (MRE) 412 limits an accused individual’s ability to ask about an accuser’s sexual consent for the purpose of insinuating consent.

The goal of this rape shield law is to protect victims’ privacy and guard them from embarrassing and degrading cross examinations.

To overcome the admission barriers raised by MRE 412, the evidence must be relevant, material and the “probative weight of the evidence must outweigh the privacy interests of the victim, the CAAF said.

The error to admit such evidence, which would have caused a reasonable jury to have a “significantly different impression” of a witness’ credibility, is not harmless beyond a reasonable doubt.

In his dissenting opinion, CAAF Judge James Baker warned that “Under the majority’s reasoning, in the case of a sexual assault trial, it would seem constitutionally required to permit inquiry on any stressor upon the marriage, past or present, sexual or not, because such stressors might always serve as a basis to protect the marriage or made the other spouse angry.”

The CAAF’s decision in Ellerbrock will undoubtedly shake the delicate balance between a rape victim’s legitimate privacy interests and the confrontation rights of the accused. Service members accused of sexual assault should immediately contact a military law attorney who can help them assert their constitutional rights and defeat false accusations made against them.

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