OPENING COMMENTS 23 SEPTEMBER 2016 JUDICIAL PROCEEDINGS PANEL MR. GERALD ROGER BRUCE, AIR FORCE APPELLATE GOVERNMENT DIVISION

INTRO. Good afternoon Madam Chair, Panel Members. I'm Gerald Roger Bruce. Maj Meredith Steer and I have the privilege of speaking with you about victim participation in the appellate process. We are from the Air Force Appellate Government Division. [While on active duty and now as a civilian attorney, I have served as senior appellate government counsel for over the past 10 years. I supervise all the appellate work prepared by the Air Force Appellate Government Division. I previously served as an appellate defense counsel while on active duty. Maj Steer has begun her third year as an appellate government counsel, and is one of the most experienced active duty appellate counsel on our staff.][1]

I'd like to make 3 main points in addressing the discussion questions presented to us by the JPP staff:

1. We should not adopt an unprecedented and potentially unconstitutional 3-party criminal justice system at the appellate level. Moreover, proposed section 547 will not solve the problem of the release of a victim's sealed mental health records.

2. Instead, there is a rather simple change to the law that will address and solve the biggest current problem affecting victims in the appellate process: We should instead fix Rule for Courts-Martial 1103A, which governs appellate review of sealed records, including a victim's sealed medical and mental health records. And this should be done so in a fashion that provides due process to both the victim and the accused. If we fix RCM 1103A, most, if not all, of the problems raised by the SVC community will be solved in a constitutional manner.

3. There already exists an underutilized opportunity for victims to be heard during the direct appellate review process, namely the filing of amicus curiae briefs.

THE PROBLEM. We should first identify the problem, so we can identify the fix. The first 2 discussion questions posed by the JPP staff cut straight to the heart of the matter:

1) "Are current rules . . . regarding appellate counsel access to sealed materials sufficient to protect a victim's privacy interests?
2) What would be the ideal mechanism to address victim privacy concerns with respect to appellate counsel review of the record of trial without impeding on due process rights of the accused?"

Simply put, current rules are not sufficient to protect a victim's privacy interests, but changing RCM 1103A to require Courts of Criminal Appeals to first conduct their own in camera review of victims' medical and mental health records that were reviewed at trial in camera by a military judge BEFORE the appellate courts could permit appellate counsel to review the records -- is the solution we want to propose today.

[1] Bracketed information will be addressed time permitting.

The gist of the RCM 1103A problem is that military judges, as a general rule, are properly conducting in camera review of a victim's mental health records at trial. In many instances, the military judge concludes the records are not relevant to the issues at trial, refuses to release them to either the trial defense counsel or the prosecutor, and orders them sealed and attached to the record of trial. Then, the record of trial comes up on appellate review with the sealed records attached. The appellate defense counsel requests to review those sealed records the military judge found to be irrelevant and not releasable by merely citing to RCM 1103A. RCM 1103A provides that appellate defense counsel and appellate government counsel, among others, are "reviewing and appellate authorities" entitled review the sealed material. The CCA follows the plain language of 1103A and grants the appellate attorneys access to those irrelevant records.

Air Force appellate government counsel have vigorously opposed these requests from appellate defense counsel for access to the victim's sealed and irrelevant records for a year in dozens of cases without success. We have cited to older CMA and CAAF case law that would require the CCA to conduct their own in camera review of the military judge's in camera review to determine if the trial judge ruled correctly or not. Our CCA has declined to conduct an in camera review and determined that the plain language of RCM 1103A superseded the older case law.

Our office has also filed 5 petitions for extraordinary relief at CAAF this year asking CAAF to order the CCA to conduct an in camera review to determine if the trial judge properly refused to release the victim's records before releasing the records to the appellate counsel. CAAF summarily denied all 5 of our petitions, no doubt because of the clear language of RCM 1103A. [A copy of 1 of our CAAF ex writs and all 5 CAAF summary denial orders are attached.]

Question 2 asks for the ideal mechanism to address victim privacy concerns, and that answer is simple: If we fix RCM 1103A, we will also address and solve victim notification concerns.

RCM 1103A wipes away victim privacy concerns by declaring appellate defense counsel and appellate government counsel are entitled to review those mental health records the judge found to be irrelevant. RCM 1103A should be amended to require the CCAs to first conduct their own in camera review of the sealed records to determine if the military judge abused his or her discretion in refusing to release the records. If the CCA determines the judge did not commit an abuse of discretion in refusing to release the records, the CCA would order the records to remain sealed and attached to the record of trial. The accused could then seek further appellate review of that decision at CAAF, and CAAF should be required by the same amendment to RCM 1103A to conduct its own in camera review to determine if the military judge and the CCA abused their discretion in refusing to disclose the sealed records.

On the other hand, if after conducting its in camera review the CCA determines the military judge abused his or her discretion in refusing to release the sealed records, the CCA would be required by the amended RCM to notify the victim, the appellate defense counsel, and the appellate government counsel and provide all an opportunity to be heard BEFORE releasing the records. Such a procedure would provide due process to all -- an opportunity to be heard -- without creating an unprecedented, unmanageable, and possibly unconstitutional 3-party legal

system. This same notification and opportunity to be heard prior to release would be required by the RCM to apply to CAAF.

[This simple amendment to RCM 1103A would solve most, if not all, the sealed records issues we have encountered and ensure due process for both the victim and accused. That is not happening now and something that can and should easily be fixed. This more modest but much more effective proposed change in the law is more prudent and preferable to a suspect 3-party appellate legal system that could jeopardize further sexual assault convictions. We can do a better job of protecting victims' privacy interest while affording the accused due process, but we have to fix RCM 1103A to do so.]

[The JPP question #3 regarding victim standing to file a pleading to prevent disclosure of mental health records would be directly resolved by this change to RCM 1103A.]

[JPP question #4 concerns the proposed Section 547 and a victim's standing to file pleadings regarding sealed materials. Again, the problem is RCM 1103A, not the lack of party status for a victim. Section 547, as drafted, would do nothing to prevent improper release of irrelevant sealed mental health records. According party status (or real party in interest status, which is the same as party status) would result in the same release of irrelevant sealed records that is occurring now under RCM 1103A. Section 547 offers the wrong solution and one that has potentially serious consequences to future sexual assault convictions if an appellate court concludes that an unprecedented 3-party criminal appellate system rises to a due process violation.]

Questions #1 and #2 of Part II address due process concerns of according "real party in interest" status to victims to file pleadings during direct appellate review.

Real party in interest is an appellate term of art borrowed from petitions for extraordinary relief that is inapplicable to direct appellate review as confusingly proposed in Section 547. LRM v. Kastenberg provides a good illustration. LRM was not a direct appellate review case; it was an interlocutory appeal brought by the victim as a petition for extraordinary relief. The accused in that case, named Daniels, was the real party in interest because he was obviously a party to the court-martial because he was being prosecuted. Daniels was permitted as a real party in interest to file a brief in that victim's interlocutory appeal under the All Writs Act. Section 547 confuses and conflates real party in interest status used in petitions for extraordinary relief by incongruously trying to apply it to direct appeal.

As noted above, yes, Section 547 poses due process concerns by creating an unprecedented 3-party criminal appellate system in which 2 of the "parties" are aligned against 1 accused. It is not hard to imagine an appellate court finding a due process violation with such an unbalanced appellate legal system not found elsewhere in the United States. Future sexual assault convictions could be jeopardized by such a system, a system that is not needed if RCM 1103A is fixed. Also, creating a 3-party system will certainly prolong the appellate process and likely undermine an accused's due process right to timely appellate review. If untimely appellate review occurs, appellate courts will grant relief, which can jeopardize convictions and sentences.

Question #3 in Part II asks if victims should alternatively be allowed to file amicus briefs during the appeal. Yes, they should and the rules of both CAAF and the CCAs currently permit them to file amicus briefs, and both Courts have accepted them when properly submitted. Especially in the early stages of the SVC program, our office has encouraged victims and their SVCs to file amicus briefs. The Air Force Court invited the victim and her counsel in United States v. O'Shaughnessy to file an amicus brief after the CCA concluded the victim was not a party. We have attached a copy of the CCA's order in that case. Unfortunately, the victim in that case did not file an amicus brief but instead sought to litigate the question of a victim's status as a party. Amicus briefs by victims are an underutilized opportunity for a victim to be heard.

[Question #5 of Part II addresses various victim privacy interests in Mil. R. of Evid. 412, 513, and 514 issues. Privacy interests involving sealed records under MRE 412, 513, and 514 can be different. For example, many times at trial, a judge will release 412 material, both the trial defense counsel and the prosecutor have access to it at trial, and then the judge then seals the material and attaches it to the record as required by law. On appeal, appellate defense counsel must have access to such material released at trial in order to provide constitutionally effective assistance of defense counsel on appeal. That is not true for sealed but not released records, which usually involve the victim's mental health records reviewed in camera, not released, sealed, and attached to the record. The appellate defense counsel needs access to such sealed and unreleased records only if the CCA first determines release of the records is required, which is why RCM 1103A must be fixed.]

Part III addresses the lack of CAAF jurisdiction to review Article 6b interlocutory appeals filed by a victim as set forth in EV v. Martinez.

Section 547 confuses direct appellate review and petitions for extraordinary relief. Section 547 does not fix the lack of jurisdiction CAAF found in EV as that proposal expressly applies to direct appellate review (which is Article 66 and 67, UCMJ). CAAF has a very literal appellate perspective, especially concerning jurisdiction, and we can expect that CAAF would once again hold that they have no jurisdiction to review a victim's writ-appeal filed under Article 6b if Section 547 is adopted. If the intent of Section 547 is to remedy the lack of jurisdiction in the EV case, it does not accomplish that objective.

Question #2 asks if a victim should be permitted to appeal adverse interlocutory rulings by the CCA to CAAF. If so, does Section 547 provide this right?

CAAF has statutory authority to review virtually all other CCA decisions, so there is no good reason why CAAF should not have authority to review a victim's interlocutory appeal of a CCA decision under Article 6b. But proposed Section 547 does not provide for it.

[Part IV addresses an SVC concern that they are not aware of the progress of the case during the appellate process. Section IV broadly proposes without any definition notice to victims of any appellate matters related to the offense.]

In conclusion, fixing RCM 1103A in a manner that would require notification to a victim and his or her counsel before a CCA could release sealed mental health records and provide an opportunity to the victim, the accused, and the United States before a CCA could release previously unreleased privileged material would solve most, if not all, of the victim notification problems we have experienced. And it would do so in a manner that provides due process to all.

Thank you.