14 October 2016

The Honorable Elizabeth Holtzman
Chair
Judicial Proceedings Panel
One Liberty Center
Suite 150
875 North Randolph Street
Arlington, VA 22203

Dear Representative Holtzman:

At the 23 September 2016 hearing of the Judicial Proceedings Panel (JPP), the panel invited additional comment from the service Appellate Defense Divisions concerning the proposed changes to the Uniform Code of Military Justice (UCMJ) that would affect victims' appellate rights. This letter is respectfully submitted in response to the panel's request. Attached to this comment, I've also included a written version of the Air Force Appellate Defense Division's testimony, which Mr. Brian Mizer provided to the panel on 23 September 2016. Mr. Mizer's attached testimony provides more detail on the points I make below.

At the outset, I should note that the views expressed here are my own and do not necessarily reflect the official position of the Department of Defense, Department of the Air Force, or The Judge Advocate General's Corps. Though personal, my thoughts are informed by my present service as the current Air Force Appellate Defense Division Chief and past service as a wing-level Staff Judge Advocate (SJA), Combatant Command Deputy SJA, wing Deputy SJA, and a variety of other positions in the Air Force Judge Advocate General's Corps.

The proposed changes present concerns for the airmen we represent on appeal as well for hundreds of other appellant service members. These concerns fall into two categories: access and timeliness.

First, concerning access, to preserve the integrity of the appellate military justice system, any changes to the military appellate process must not inadvertently diminish the right of a convicted service member to a "champion on appeal." *See United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998), a person known to them as their appellate defense counsel. The proposed changes currently under review would allow victims to "file pleadings as a real party in interest" when certain rights "are implicated." This language could be construed to permit victims to use

the resources of the Special Victim's Counsel (SVC) program to challenge the ability of appellate defense counsel to review the entire record of trial on appeal.

Although Article 66, UCMJ provides for review of the record by judges of the service Courts of Criminal Appeals (CCAs), military case law says, "[I]ndependent review is *not the same* as competent appellate representation." *May*, 47 M.J. at 481 (emphasis added). Ensuring that appellate defense counsel has access to the whole record is a vital component of a military justice system that vindicates society's strong interest in ensuring the reliability of convictions by thorough appellate review. Accordingly, I recommend any changes be clarified to provide that they are not intended to abrogate the right of convicted service members to have their appellate counsel review the entire record, as currently provided for in Rule for Court-Martial (RCM) 1103A. This RCM, as written, limits access of the record to certain trusted agents within the appellate arena who have a legal and ethical obligations to review the record as appellate defense counsel, appellate government counsel, appellate judges or those who review cases for the service Judge Advocates General. Moreover, the rule gives its own internal "gag order" to those agents. That is, it severely limits subsequent disclosure without authorization. Finally, as if this wasn't clear enough from the face of RCM 1103A, the Drafter's Analysis for the rule states as follows:

> The Rule *is designed to respect the privacy and other interests that justified sealing the material in the first place*, while at the same time recognizing the need for certain military justice functionaries [appellate counsel] to review that same information. The rule favors an approach relying on the integrity and professional responsibility of those functionaries, and *assumes that they can review sealed materials and at the same time protect the interests that justified sealing the material in the first place*. (emphasis added)

Ultimately, I can't imagine any appellate counsel representing someone without access to the entire record. Without the record, there is no appellate counsel. Without an appellate counsel, there is no due process. We must have the entire record to do our job. Accordingly, I recommend clarification on this in the current proposals.

Second, concerning timeliness, any changes to the military appellate process should be calculated to mitigate extension of an already very long appellate review timeline. As Maj Meredith Steer, Air Force Appellate Government counsel said in her public comments, "Timeliness in post-trial processing receives far greater scrutiny in the military than the federal criminal justice system." This is very true.

In addition to Maj Steer's insightful comments on the time implications of victim appeals, another substantial factor to consider in the timeliness of appellate review is the ability of appellate defense counsel to review the record, consult with a convicted service member, draft assignments of error, and respond to opposing parties. Currently, the government is generally the only "opposing party." The proposed changes would potentially expand the universe of opposing parties to any "victim of an offense under this chapter," *i.e.*, the UCMJ, who claims their rights under Military Rules of Evidence (M.R.E.) 412, 513, or 514 are "implicated." The proposed change also elevates the status of a victim to a "real party in interest." This appears inconsistent with even the most progressive state statutes granting victims appellate rights, a state statutory framework some on the panel hold out as the very model the military should template. *See, e.g., Griffin v. Lindsey*, 119 A. 3d 753, 754 (Md. 2015) ("In Maryland, a victim is not a party to a criminal prosecution."); MD. CODE ANN., CRIM. PROC. § 11-103(b) ("Although not a party to a criminal or juvenile proceeding, a victim of a crime . . . may file an application for leave to appeal . . . from an interlocutory order or appeal . . . from a final order that denies or fails to consider a right secured" under certain specified statutes).

Further, the proposed changes contain no requirement that a victim explicitly request or retain appellate counsel in addition to the trial-level representation provided by the SVC program pursuant to 10 U.S.C. § 1044e. This provision – and the omission of appellate victim's counsel – contrasts with the requirement under Article 70(c)(1), UCMJ that an appellate defense counsel will only represent a convicted service member "when requested by the accused." It is not clear that appellate representation would naturally fall within the scope of an SVC's earlier representation of a victim during an investigation or court-martial proceeding such that filing appellate pleadings would be inherently authorized without the explicit request of a victim. Accordingly, the proposed change may inadvertently create a situation where an SVC feels obligated to file appellate pleadings based on a prior attorney-client relationship with a victim when that victim has not specifically asked – and may not want – appellate representation. As the proposed changes do not explicitly limited to convictions for sex-related offenses, it also potentially expands the class of victims to which the government is obligated to provide an appellate SVC.

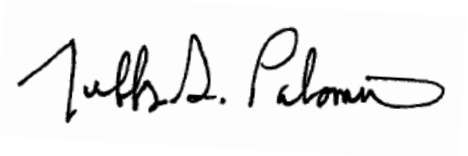
The service members who assist crime victims as SVCs have provided an important contribution to military justice that is on the cutting-edge of multi-jurisdictional approaches to victims' rights. There is, however, no clear civilian counterpart to the proposed military appellate changes currently under consideration. This is because the changes effectively provide for federally funded

appellate representation to a class of individuals that may exceed the current parameters of the SVC program. Such an expansion of the SVC program presents concerns for timely appellate review because zealous appellate defense counsel will inevitably be forced to respond to additional pleadings opposing both assignments of error and challenges to their ability to even review the appellate record to fulfill their ethical obligations.

The Court of Appeals for the Armed Forces recognized in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) that timely appellate review in the military justice system presents due process concerns. The proposed changes presents certain ambiguities concerning the scope of appellate SVC representation that will necessarily lead to litigation causing either appellate delay or a need to address whether appellate defense divisions are adequately staffed to handle a caseload that frequently includes an additional opposing party.

Thank you for inviting the service appellate defense shops to comment on the proposed changes. Ultimately, I remain concerned about the change's impact on service members who have a long history of rights under the UCMJ. As we contemplate changes to the appellate process of the military justice system, I implore any changes be careful and deliberate. This is because any single change has a potentially lasting impact on the system and a possibly devastating effects on all service members. It is vital that we maintain a fundamentally fair system that delivers justice at the trial and appellate levels. Please let me know if I can provide any additional information that would be helpful to the JPP.

Very respectfully,



JEFFREY G. PALOMINO, Lt Col, USAF
Chief, Appellate Defense Division
United States Air Force

Attachment:
Testimony of the Air Force Appellate Defense Division, provided by Mr. Brian Mizer, Senior Appellate Defense Counsel, 23 Sep 16

Testimony of the Air Force Appellate Defense Division, 23 Sep 16

Good Afternoon Madam Chair, Honorable Members of the Panel,

I am Brian Mizer, Senior Appellate Defense Counsel with the Air Force Appellate Defense Division, and along with Major Lauren Shure, we would like to thank the Panel for this opportunity. I know the panel has our biographies, but I will briefly state I have been doing appellate defense work for the U.S. Navy as an active duty and reserve judge advocate since 2004. I served as an Assistant Federal Public Defender here in the Eastern District of Virginia for five years, and I have spent the last 2 years as a civilian with the Air Force. Maj Shure is also an experienced defense counsel. She served as a trial defense counsel and served the last two and a half years at the Air Force Appellate Defense Division defending Airmen.

And, that's where I'd like to begin my brief comments – with Airmen. Maj Shure and I are here today for one simple reason: To speak on behalf of the airmen who are our clients. We are here on their behalf.

As you know, the Air Force has been the vanguard of a concerted effort to acknowledge and help victims of sexual assault, while always remaining faithful to our nation's founding charter. Now those efforts have continued on appeal. Just this week, I was informed the Air Force Trial and Appellate Government Division has established a program to provide timely appellate notice to Special Victim's

Counsel of filings made on direct appeal. As my counterpart in that Division, Mr. Gerald R. Bruce, is scheduled to testify before the panel later this afternoon, I will let him discuss that matter with you.

As for my comments, I believe I can best address apparent misconceptions about military appellate practice by accurately describing our military appellate practice before then turning to reasons that the Panel should continue on its deliberate and measured approach to balancing the equities of all involved in the appellate process. On this, I want to talk to you about two things: access and timeliness. Along the way, I'll also explain what happens on appeal, what appellate defense counsel do, and I'll also clarify the process for handling records that have been ordered sealed by the trial court.

First, I want to talk about access. By access I mean access to the entire appellate record. Appellate defense counsel require full access to the appellate record to fulfill our constitutional as well as statutory and ethical responsibilities. This naturally brings up the issue of sealed records. With respect to sealed materials, the practice before the Air Force Court of Criminal Appeals closely parallels the handling of classified materials familiar to me and my former colleagues at the Federal Public Defender's Office here in the Eastern District of Virginia. As we currently practice, the defense files a motion to view sealed exhibits and proceedings pursuant to Rule 23.3f, which is granted approximately a

month later. The Court then issues what amounts to protective order prohibiting appellate counsel from disclosing the contents of those records. Counsel then schedules an appointment with the Clerk of Court to examine the materials. This takes place in a windowless court space that is indistinguishable from any classified SCIF in which I have worked.

After reviewing the materials, counsel is required to reseal with labels bearing counsel's name and the date of access, and returned to the Court. Additionally, I want to add that while appellate counsel must fulfill our professional, ethical duties to our client, this does not involve disclosing any of the sealed material to our clients except where it is reasonably necessary to advise our clients, and also expressly authorized by the Court. This is what the rules say and this is what we do. This brings out an important distinction between military trial practice, where the accused is physically with his attorneys in the courtroom, and military appellate practice, where the accused and counsel will likely never meet, and the accused never appears before the Court.

To the extent sealed material becomes the subject of litigation on direct appeal, which occurs in a minority of cases with sealed material, the pleadings are filed under seal. And the appeal often ends with an unpublished decision in which the Court does not discuss sealed material. Oral argument is statistically rare and to the extent sealed material would need to be discussed, the Court would issue an

additional protective order, as the Court of Appeals for the Armed Forces did *United States v. Martin* in April of this year, and the hearing would also potentially be sealed.

While the handling of sealed materials by appellate defense counsel mirrors the handling of material classified pursuant to the national security privilege in federal district court, our responsibilities are broader than our counterparts in the federal public defenders offices in light of our obligation to raise ineffective assistance of counsel claims on direct appeal and safeguards rooted in the historical distrust of military tribunals. As Justice Black said in *Toth v. Quarels*, 350 U.S. 11, 22 (1955), "[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution."

Among these safeguards is the requirement that both appellate defense counsel and the Court of Criminal Appeals review the entire record of trial, and let me emphasize the words "the entire record." Post-conviction, an appellate defender steps in to grade the homework, and when we do we are there to grade everyone's work. The standard we use for our grading is the Constitution, the UCMJ with its corresponding rules for Court-Martial and Military Rules of Evidence, ethical standards, as well as a sixty-six years of military justice jurisprudence. To make this a bit clearer, military appellate defense counsel scrutinizes the evidentiary rulings of the military judge, and assesses whether trial

counsel and defense counsel fulfilled their respective constitutional obligations. This is our job, and there is no substitute for an appellate defense counsel acting in this role. As the Court of Appeals for the Armed Forces said, in *United States v. May*, 47 M.J. 478 a military appellant is entitled to "a champion on appeal."[1] While these words may sound like hyperbole, I assure you they're not. They are not to an Airman who had constitutional legal errors in their case, an Airman whose guilt is in a lesser degree than found, or an Airman who received an unjust sentence.

To be sure, after reviewing the entire record, the appellate defender may have knowledge of the case the military judge—trial or appellate—does not. This may make certain information in the records important, relevant or even exculpatory. With this in mind, there is a Rule for Court-Martial called R.C.M. 1103A. This rule permits access to defense counsel and other appellate reviewing authorities, but not disclosure of sealed records in order to ensure there were no *Brady* violations, no abuse of discretion, and no ineffective assistance of counsel.

[1] "Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (CMA 1987), independent review is not the same as competent appellate representation. An appellant who is denied counsel is forced to proceed 'without a champion on appeal.' *Douglas v. California*, 372 U.S. 353, 356, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963). Denial of appellate counsel is presumptively prejudicial. *Penson v. Ohio*, 488 U.S. 75, 88, 102 L. Ed. 2d 300, 109 S. Ct. 346 (1988)." *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998)

The point I'm making is the Rules for Courts-Marital, strike the necessary balance between protecting the rights of victims, and ensuring Appellant's due process rights are protected. For the victim, it protects their rights by limiting access to a very limited number of authorized parties and then limiting disclosure thereafter to military courts of appeals.

As for the appellant, this leads me to my second point, and that is timeliness. For the Appellant, his or her rights include the due process right to timely appellate review within eighteen months of docketing before the presumption of unreasonable delay set forth in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), is triggered. The Air Force Court of Criminal Appeals has exceeded this timeframe in at least three cases this year, which may result in the dismissal of all charges and specifications at the Court of Appeals for the Armed Forces.

In recent months there has been significant litigation in the Air Force Court of Criminal Appeals regarding the proper application of RCM, and this litigation has caused significant delay. For example, in a recent case, between the filing of the motion to view the sealed materials and the court's order permitting me to actually see them there was a 31 day delay. As drafted, R.C.M. 1103A firmly protects the disclosure of sealed materials, but it does not prohibit access to those materials. The current procedure protects victim's privacy rights, while also balancing the Appellant's right to "competent appellate representation."

One potential change that may alleviate some concerns with regards to sealed records is this: the Rules for Court-Martial and, specifically, R.C.M. 1103A could be amended so that the appellate court could limit access initially to only appellate defense counsel. This is because at the early stages of review the government has no need to review the materials, especially when they do not become an issue on appeal. If any changes to this RCM were to be made, we recommend limiting access to only defense counsel for the initial review. By doing this, we eliminate potentially two, possibly more, government counsel reviewing those privileged records. This is because it's only if we raise an issue would those government counsel have access to the record. Ultimately, this is a reasonable balance between the rights of the accused and the need to ensure the victim's continuing privacy rights.

In summary, I submit that the appellate procedures set forth in the Manual for Courts-Martial put the privacy interests of victims and the due process and counsel rights of military appellants at equipoise. I urge the members of the panel to move deliberately and cautiously as it considers changes to a system of appellate review that already deprives airmen of many rights afforded civilians, such as a tenured and independent judiciary, and which has thus far survived due process challenges at the Supreme Court.

Thank you, for letting us speak on behalf of our clients. Major Shure and I stand ready to answer any questions you might have.