

5 SEP 14

From: LCDR [REDACTED] CEC, USN
To: Office of The Judge Advocate General (Code 20)
Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST
ICO United States v. LCDR [REDACTED] CEC, USN
Ref: (a) The Freedom of Information Act, 5 U.S.C. §552
(b) The Privacy Act, 5 U.S.C. §552a
(c) SECNAVINST 5211.5E
(d) SECNAVINST 5720.42

1. This is a request pursuant to references (a) through (d) for documents and other records regarding the investigation and the trial of U.S. v. [REDACTED] CEC, USN due to an unrestricted report of sexual assault made by me on or about 28 December 2012 that was investigated by the Naval Criminal Investigative Service, Article 32 in November 2013 and subsequent trial from 30 June - 3 July 2014.

2. I respectfully request a copy of the following records:

a. Any documents and audio recordings in the possession of the Office of the Judge Advocate General and the Region Legal Service Office National District Washington pertaining to the courts-martial of U.S. v. LCDR [REDACTED] CEC, USN.

3. The above records are requested under the more liberal of either reference (a) or (b), as said acts apply to the respective documents. Sexual assaults in the military are an item of general public interest, and this request is not primarily in the commercial interests of the requester. Therefore, I request any fees be waived. If you do not agree to waive fees associated with this request, please contact me through my Victims' Legal Counsel, LCDR Sara de Groot, JAGC, USN, at (410) 293-1561 or degroot@usna.edu.

4. If you deny any portion of this request, please cite each specific exemption you feel justifies the refusal to release the information, and provide the remaining information with the redactions shown.

5. Please direct any questions regarding this request and provide the requested documents to my Victims' Legal Counsel, LCDR Sara de Groot, JAGC, USN, at (410) 293-1561 or degroot@usna.edu or via mail at Dahlgren Hall, 103 Fullam Court, Annapolis, MD 21402.

Very Respectfully,

[REDACTED]

14 Nov 13

From: [REDACTED]
To: Commanding General, 2nd Marine Logistics Group
Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST
ICO U.S. V. LT [REDACTED] DC, USN

Ref: (a) The Freedom of Information Act, 5 U.S.C. §552
(b) The Privacy Act, 5 U.S.C. §552a
(c) SECNAVINST 5211.5E
(d) SECNAVINST 5720.42

1. This is a request pursuant to references (a) through (d) for documents regarding the investigation and court-martial of Lieutenant [REDACTED] DC, USN, in connection with an unrestricted report of sexual assault at [REDACTED] made on or about 28 October 2012.
2. I respectfully request a copy of the following documents:
 - a. The Article 34, UCMJ Advice, Charge Sheet, and Convening Order for the subject court-martial, less redactions of signatures and social security numbers pursuant to exemption (b) (6) of the FOIA.
 - b. The Article 32, UCMJ Investigating Officer Report, including the summary of any testimony by me in the subject court-martial less redactions of personally identifiable information, signatures and social security numbers pursuant to exemption (b) (6) of the FOIA. Redactions of opinions and pre-decisional recommendations made according to exemption (b) (5) are specifically not requested, however the factual summaries of testimony are not recommendations.
 - c. Any statements signed by me, or any "Results of Interview" or similar written documents summarizing statements made by me that are relevant to the charges in the subject court-martial.
3. The above documents are requested under the more liberal of either reference (a) or (b), as said acts apply to the respective documents. Sexual assaults in the military are an item of general public interest, and this request is not primarily in the commercial interests of the requester. Therefore, I request any fees be waived. If you do not agree to waive fees associated with this request, please contact me through my Victims' Legal Counsel, LCDR Patrick Korody, JAGC, USN, at (904) 270-5191 x1213 or patrick.korody@navy.mil.

Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST
ICO U.S. V. LT [REDACTED] DC, USN

4. If you deny any portion of this request, please cite each specific exemption you feel justifies the refusal to release the information, and provide the remaining information with the redactions shown.

5. Please direct any questions regarding this request and provide the requested documents to my Victims' Legal Counsel, LCDR Patrick Korody, JAGC, USN, at (904) 270-5191 x1213 or patrick.korody@navy.mil.

Very Respectfully,

[REDACTED]

4 NOV 13



UNITED STATES MARINE CORPS
2D MARINE LOGISTICS GROUP
II MARINE EXPEDITIONARY FORCE
PSC BOX 20002
CAMP LEJEUNE NC 28542-0002

IN REPLY REFER TO:
5800
SJA

DEC 4 2013

From: Commander, 2d Marine Logistics Group
To: LT [REDACTED] DC, USN
Via: LCDR Patrick Korody, JAGC, USN
Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST ICO
U.S. v. LT [REDACTED] DC, USN
Ref: (a) The Freedom of Information Act, 5 U.S.C. 552
(b) LT [REDACTED] ltr of 14 Nov 13
Encl: (1) Convening Order

1. Your request of 14 November 2013 is denied in part and granted in part.

a. Your request for the Article 34, UCMJ Advice Letter is denied pursuant to exemption (b)(5) of reference (a) as it is a pre-decisional recommendation.

b. Your request for the Charge Sheet is denied as it is exempted by section 7(b) of reference (a) in that its disclosure "could reasonably be expected to interfere with enforcement proceedings, [or] would deprive [LT [REDACTED]] a right to a fair trial."

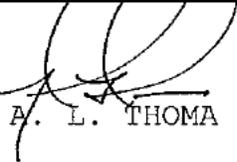
c. Your request for the Convening Order is granted and is enclosed.

d. Your request for the Article 32 Investigating Officer Report is denied pursuant to exemptions (b)(5) and (7) of reference (a) as it is a pre-decisional recommendation and its disclosure "could reasonably be expected to interfere with enforcement proceedings, [or] would deprive [LT [REDACTED]] a right to a fair trial." Your request for the summaries of your testimony and the testimony of others is denied. At present, section 7(b) of reference (a) exempts disclosure of the requested summaries because revealing them "could reasonably be expected to interfere with enforcement proceedings, [or] would deprive [LT Entralgo] a right to a fair trial."

e. Your request for any statements signed by you or any "Results of Interview" or similar written documents summarizing statements made by you that are relevant to the charges is denied. At present, section 7(b) of reference (a) exempts their disclosure because revealing the requested documents "could reasonably be expected to interfere with enforcement proceedings, [or] would deprive [LT [REDACTED]] a right to a fair trial."

Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST ICO
U.S. v. LT [REDACTED] DC, USN

2. The point of contact on this matter is Captain [REDACTED]
[REDACTED] at [REDACTED], or [REDACTED].


A. L. THOMA



UNITED STATES MARINE CORPS
2D MARINE LOGISTICS GROUP
PSC BOX 20002
CAMP LEJEUNE, NORTH CAROLINA 28542-0002

IN REPLY REFER TO:
5817
GCMCO 1-12

GENERAL COURT MARTIAL CONVENING ORDER 1-12

OCT 01 2012

Pursuant to the authority contained in Article 22, Uniform Code of Military Justice, Rule for Courts-Martial 504, and section 0120 of the Judge Advocate General Manual of the Navy, a General Court-Martial is hereby convened. It may proceed at Marine Corps Base, Camp Lejeune, North Carolina, or any such authorized place as directed. The court will be constituted as follows:

MEMBERS

Lieutenant Colonel [REDACTED] U.S. Marine Corps
Major [REDACTED] U.S. Marine Corps
Captain [REDACTED] U.S. Marine Corps

[REDACTED]
Commanding General
U.S. Marine Corps

ORIGINAL
ENCLOSURE (1)

25 Nov 13

From: [REDACTED]
To: Region Legal Service Office Southeast
Naval Criminal Investigative Service, Jacksonville, FL
Naval Hospital Jacksonville, FL
Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST
ICO [REDACTED]
Ref: (a) The Freedom of Information Act, 5 U.S.C. §552
(b) The Privacy Act, 5 U.S.C. §552a
(c) SECNAVINST 5211.5E
(d) SECNAVINST 5720.42

1. This is a request pursuant to references (a) through (d) for documents regarding the investigation and any court-martial in connection with an unrestricted report of sexual assault made by me on or about [REDACTED] that is being investigated by the Naval Criminal Investigative Service, Jacksonville, FL.

2. I respectfully request a copy of the following documents:

a. The Article 32, UCMJ Investigating Officer Appointing Order, Article 34, UCMJ Advice, Charge Sheet, and Convening Order for the an pretrial investigation or court-martial, less redactions of signatures and social security numbers pursuant to exemption (b)(6) of the FOIA.

b. The Article 32, UCMJ Investigating Officer Report, including the summary of any testimony by me in the subject court-martial less redactions of personally identifiable information, signatures and social security numbers pursuant to exemption (b)(6) of the FOIA. Redactions of opinions and pre-decisional recommendations made according to exemption (b)(5) are specifically not requested, however the factual summaries of testimony are not recommendations.

c. Any statements signed by me, or any "Results of Interview" or similar written documents summarizing statements made by me that are relevant to the charges in the subject court-martial.

3. The above documents are requested under the more liberal of either reference (a) or (b), as said acts apply to the respective documents. Sexual assaults in the military are an item of general public interest, and this request is not primarily in the commercial interests of the requester. Therefore, I request any fees be waived. If you do not agree to waive fees associated with this request, please contact me through my Victims' Legal Counsel, LCDR Patrick Korody, JAGC, USN, at (904) 270-5191 x1213 or patrick.korody@navy.mil.

Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST
ICO [REDACTED]

4. If you deny any portion of this request, please cite each specific exemption you feel justifies the refusal to release the information, and provide the remaining information with the redactions shown.

5. Please direct any questions regarding this request and provide the requested documents to my Victims' Legal Counsel, LCDR Patrick Korody, JAGC, USN, at (904) 270-5191 x1213 or patrick.korody@navy.mil.

Very Respectfully,
[REDACTED]

23 Jan 14

From: Victims' Legal Counsel, NS Mayport, FL
To: Trial Counsel, RLSO SE

Subj: REQUEST FOR INVESTIGATIVE MATERIALS

1. I represent ██████████ ██████████ ██████████, ██████████, in connection with investigations and possible courts-martial for her unrestricted reports of sexual assault. The alleged offenders are ENS ██████████ ██████████ and HM3 ██████████ ██████████

2. On behalf of my client, I respectfully request a copy of any statements or summaries of statements made by ██████████ ██████████ and a redacted copy of any charge sheet preferred against the alleged offenders where my client is a named victim.

3. Additional requests for investigative materials may be made at a later date if necessary for my client to exercise her substantive legal rights.

4. I can be reached at (904) 270-5191, Ext. 1213 or patrick.korody@navy.mil with any questions or concerns you may have.

/s/

P. K. KORODY

From: CDR [REDACTED] JAGC, USN, Victims' Legal Counsel
To: Commander, Navy Region Southwest (N00J)

Subj: REQUEST FOR DISCLOSURE OF RECORDS

Ref: (a) VLC Norfolk ltr 5800 Ser VLC/11 dtd 3 Dec 13
(b) SECNAVINST 5211.5E, DON Privacy Program
(c) Trial/Government Counsel Files (April 4, 2000, 65 FR 17643)
(d) Military Justice Correspondence and Information File (January 8, 2001, 66 FR 1321)
(e) R.C.M. 701(f) (Discovery)

1. Per reference (a), I have been detailed as Victims' Legal Counsel (VLC) for [REDACTED] USN, currently assigned to [REDACTED] in connection with an unrestricted report of sexual assault made on [REDACTED]. The alleged perpetrator is [REDACTED] USN, currently assigned to [REDACTED]. I have formed an attorney-client relationship with LS3 [REDACTED].

2. Per paragraph 13a of reference (b), I hereby request disclosure of records relevant to my client maintained in accordance with references (c) and (d) retrieved by the alleged perpetrator's name or personal identifier. Per reference (a), I have a need for the requested records in the performance of my assigned VLC duties.

3. I do not request disclosure of any information protected by the Military Rules of Evidence. Specifically, I do not request the disclosure of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants or representatives within the meaning of reference (g).

4. I can be reached at [REDACTED] or [REDACTED].

COLLEEN M. XXXXX

FOR OFFICIAL USE ONLY/PRIVACY SENSITIVE/PRIVILEGED

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES

V.

) MOTION
) FOR MATERIALS NECESSARY
) TO EXERCISE SUBSTANTIVE
) LEGAL RIGHTS ON BEHALF
) OF VICTIM [REDACTED]

[REDACTED]
[REDACTED]

)
)
)
)
)

1. NATURE OF MOTION

[REDACTED], through counsel, respectfully requests that this Court order the government to provide materials necessary for her to exercise substantive legal rights afforded to her as a crime victim in the military justice system.

2. SUMMARY OF FACTS

(a) [REDACTED] [REDACTED] is the named victim in the charges in this court-martial. The charges in this case stem from the Accused's sexual assault of [REDACTED] in the early morning hours on 28 October 2012.

(b) On 31 October 2013, the undersigned counsel was detailed as Victims' Legal Counsel for [REDACTED], and on 4 November 2013, the undersigned counsel entered an appearance in this court-martial.

(c) The undersigned counsel has made repeated requests in writing and orally to the government to provide certain documents necessary for ██████ to exercise her substantive legal rights a crime victim in the military justice system. The government denied these requests, including a request made under the Freedom of Information Act and Privacy Act that was denied on 4 December 2013.¹

(d) The defense in this case has filed motions seeking to admit evidence that falls under Military Rule of Evidence (M.R.E.) 412 and to compel the production of LT ██████ psychotherapist records that are privileged under M.R.E. 513.

3. DISCUSSION

Historically, the military justice system, like the federal criminal justice system, "functioned on the assumption that crime victims should behave like good Victorian children - seen but not heard." Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1013 (9th Cir. 2006)

(discussing the application of the Crime Victims' Rights Act (CVRA) in federal court). In 1994, the Department of

¹ While ██████ did make a FOIA and Privacy Act request to the General Court-Martial Convening Authority in this case for a copy of the charge sheet and certain investigative materials, ██████ is not relying on these authorities in this Motion. Rather, the legal authority for this Motion rests on a crime victim's substantive legal rights in the military justice system. FOIA and the Privacy Act are ways for members of the general public to obtain information from the government. ██████ while a member of the general public, has substantive legal rights in the military justice system as a crime victim.

Defense issued its first Victim Witness Assistance Procedures (VWAP) directive and instruction, and subsequently issued a new VWAP directive instruction in 2004 that enumerated seven of the eight rights codified in the Crime Victims' Rights Act (CVRA) of 2004, 18 U.S.C. sec. 3771. See DoDD 1030.01 and DoDI 1030.2 series. These lawful regulations, and other additions to the Uniform Code of Military Justice (UCMJ) and Military Rules of Evidence (M.R.E.), ushered in a new era in which crime victims are full participants in the military justice system.

Department of Defense Directive (DoDI) 1030.01 dated 23 April 2007 (interim change) provides a crime victim substantive legal rights. Paragraph 4.4 provides that "[a] crime victim has the right to:

4.4.1. Be treated with fairness and respect for the victim's dignity and privacy.

4.4.2. Be reasonably protected from the accused offender.

4.4.3. Be notified of court proceedings.

4.4.4. Be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.

4.4.5. Confer with the attorney for the Government in the case.

4.4.6. Receive available restitution.

4.4.7. Be provided information about the conviction, sentencing, imprisonment, and release of the offender."

Although it is unclear if the CVRA directly applies to military justice proceedings, the Department of Defense has, by instruction, and the military courts have recognized as much, adopted the overwhelming majority of substantive rights that the CVRA provides to crime victims. See Daniels v. Kastenberg, 2013 LEXIS CCA 286, *22 (A.F.C.C.A. April 2, 2013) ("We note Department of Defense Instruction (DoDI) 1030.01, Victim and Witness Assistance, ¶ 4.4 (23 April 2007, interim change), provides victims of crimes under the UCMJ with generally the same rights found in 18 U.S.C. § 3771(a)(1)-(8). . . .") (rev'd on other grounds in LRM v. Kastenberg, 72 M.J. 364, (C.A.A.F. 2013)).

Congress and the President have given substantive legal rights to crime victims through the UCMJ and M.R.E. For example, Congress amended Article 54, UCMJ in 2012 to provide a sexual assault victim who testifies with the right to receive a copy of the authenticated record of trial. Art. 54(e), UCMJ. The President, by Executive Order 13643 in 2013, re-issued the M.R.E. which contain substantive legal rights for crime victims. M.R.E. 412 provides that a sexual assault victim has the right to be

notified and heard before evidence of other sexual behavior or predisposition is admitted at a court-martial. M.R.E. 513 provides similar rights for patients with respect to mental health records. M.R.E. 615 plainly lays out a crime victim's right to be present during court proceedings absent specific findings made by the military judge.

In July 2013, the Court of Appeals for the Armed Forces (C.A.A.F) enforced a victim's substantive legal right to present facts and make legal argument, including through counsel, to the court when given the opportunity to be "heard" by the M.R.E. In LRM v. Kastenberg, the C.A.A.F. reviewed the statutory construction of M.R.E. 412 and M.R.E. 513 and case law to find that "[a] reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel." 72 M.J. 364, 370 (2013). The court in Kastenberg understood that when the Congress and the President codified these substantive legal rights for crime victims (or patients), they did so with the intent of providing these interested parties - like defendants - with a meaningful opportunity to exercise these rights; such an opportunity is embodied in the notion of fairness and due process that is the bedrock of the American legal system.

Like an accused represented by a defense counsel, a crime victim with substantive legal rights must be afforded access to the information necessary to exercise those rights. When an accused requests information through counsel, he does so in order to have the means to meaningfully exercise his substantive legal rights; these means include challenging the admissibility of evidence, cross-examining witnesses, and making legal argument. A victim is afforded the same means to exercise substantive legal rights, such as under M.R.E. 412 and 513, but can only meaningfully do so, like an accused, if given the necessary information.

The Congress, the President, and the C.A.A.F. recognized that these substantive legal rights afforded to crime victims become meaningless unless they are viewed through the lens of due process guaranteed under the due process clause of the Fifth Amendment to the Constitution. See Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (applying constitutional due process to Texas adoption proceeding and finding "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

present their objections."). In other words, all of the substantive legal rights that are afforded to crime victims in the military justice system are imbued with the requirements that they be interpreted in a meaningful manner - to do otherwise would ignore the mandate that victims be these afforded rights. Due process and fairness require that crime victims - like the government and defense - be adequately informed in order to meaningfully exercise their substantive rights.

Among these rights are the right to confer² with the attorney for the government in the case³, to be treated with fairness and respect for dignity and privacy, and to be "heard" under M.R.E. 412 and M.R.E. 513; these rights are implicated in this case. To make a victim's views and legal arguments fully and effectively to the parties and the court and to present evidence, the victim must first be adequately informed, and [REDACTED] seeks materials - namely

² The word "confer" supports the existence of a substantive legal right that can only be exercised with information. Webster's New World Dictionary defines "confer" to mean "to have a conference or talk; to meet for discussion." Black's Law Dictionary defines "conference" as a "meeting of several persons for deliberation, for the interchange of opinion, or for the removal of differences or disputes." A crime victim cannot "confer" with the attorney for the government if they have no information upon which to form opinions and differences, or on which to base a dispute. This right becomes meaningless if only one party to the conference has information.

³ The Discussion to R.C.M. 306(b) makes clear the policy that commanders consider the views of the victim when reaching disposition decisions. This is often accomplished by the crime victim conferring with government counsel.

copies of her statements,⁴ a copy of the charge sheet, and other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime. Information that establishes the totality of circumstances of the alleged crime is imperative since evidence for or against the admissibility, for example, of evidence falling under M.R.E. 412 may be derived from statements of other witnesses, including the accused.

Crime victims deprived of access to information cannot be meaningfully informed such that he or she can fully and effectively confer with government counsel, exercise legal rights, or be heard under M.R.E. 412 and 513. This principle that information is necessary to make an informed and effective decision or legal argument is not new to military courts. For example, military courts recognize that to support an *in camera* review of mental health records under M.R.E. 513, a party must make a threshold showing but that "this standard is not high, because [the courts] know that the moving party will often be unable to determine the specific information contained in a

⁴ ██████ made ██████ unrestricted report of sexual assault more than 1 year ago. ██████ has made sworn statements and testified at an Article 32, UCMJ investigation. While ██████ knows the facts of this case, these statements are needed to determine what statements - and specific words or phrases - were used in the past to describe the facts related to the case.

psychotherapist's records." United States v. Klemick, 65 M.J. 576, 580 (N.M.C.C.A. 2006). Likewise, a victim cannot meaningfully form views, let alone make their views known or present legal arguments or evidence to parties or the court, if not meaningfully informed. At this time [REDACTED] does not know what evidence exists in this case such that she can even present it to the parties and the court since she has been denied access by the government. Therefore, in this case [REDACTED] will be denied her substantive legal rights to "confer" with government counsel and be "heard" by the court unless she is afforded access to key information.

Importantly, while neither the Constitution, Congress, or the President has specifically defined the terms "fairness" and "respect," those words must at minimum guarantee a victim's rights are given no less consideration than an accused's rights or government interests. See Snyder v. Massachusetts 291 U.S. 97, 122 (1934) (Cardozo, J.) ("[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."), reaffirmed by Payne v. Tennessee, 501 U.S. 808, 827 (1991); Morris v. Slappy, 461 U.S. 1, 14 (1983) (stating that "in the

administration of criminal justice, courts may not ignore the concerns of victims"); United States v. Heaton, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006) (finding that under the Federal Crime Victims' Rights Act, treating "a person with 'fairness' is generally understood as treating them 'justly' and 'equitably'"). The legislative history of the CVRA instructs that "fairness includes the notion of due process." 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statements of Sen Kyl).

Victims are not on an even playing field if the victim – the persons most impacted by the crime – is not given access to key information known by the parties when the victim's rights are implicated. Treating victims in such an uneven manner is contrary to the intent of Congress, the President, and the C.A.A.F., as well as the explicit provision of a right to fairness and respect in the DoD regulations. Accordingly, denying a crime victim access to information denies a crime victim the ability to exercise those legal rights in a meaningful manner.

██████████ as described above, has a right to the requested information. In this case, where the defense is seeking to admit both evidence of sexual predisposition and other sexual behavior and seeking production of ██████████ mental health records, ██████████ has compelling privacy

interests at stake. [REDACTED] must be afforded a meaningful opportunity to protect public disclosure of private information during a court-martial, and the only way to meaningfully exercise these rights is to know what information is known by the parties that may have some bearing on these issues.

Lastly, the government and defense will likely respond that providing the requested information to [REDACTED] will somehow taint her testimony in this case. But they do not cry foul when an accused has access to the entire discovery provided by the government to the defense, attends an entire Article 32, UCMJ investigation, is present for all court sessions and trial on the merits, and then testifies last in his own defense. The only thing that providing [REDACTED] the requested information will accomplish is the enforcement of the substantive legal rights that are provided to [REDACTED] under the law.

4. BURDEN

The burden is on the government to demonstrate that it has afforded [REDACTED] substantive legal rights as a crime victim.

5. REMEDY REQUESTED

[REDACTED] requests that this Court order the government to provide [REDACTED] copies of [REDACTED] statements, a copy of the

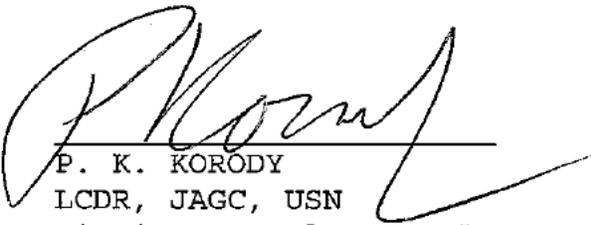
charge sheet, and other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime.

At this time, [REDACTED] is not seeking a continuance of the Article 39(a) session. [REDACTED] requests that this Court hear this Motion first and, if the Court orders production, give a sufficient recess to permit [REDACTED] and [REDACTED] counsel to review the information prior to presenting facts and legal argument on the M.R.E. 412 and 513 motions.

6. ORAL ARGUMENT

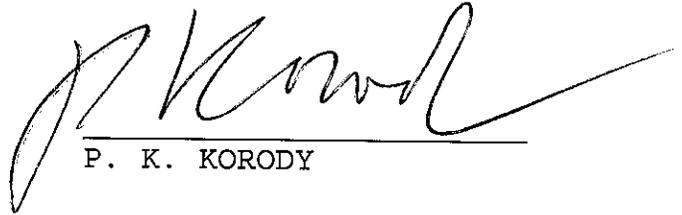
[REDACTED] through counsel, desires to present legal argument orally.

Respectfully submitted,


P. K. KORODY
LCDR, JAGC, USN
Victims' Legal Counsel
For [REDACTED]

Certificate of Service

I hereby attest that a copy of the foregoing pleading was served on the Court, Defense Counsel, and Trial Counsel electronically on 6 December 2013.



A handwritten signature in black ink, appearing to read 'P. K. Korody', is written over a horizontal line. The signature is fluid and cursive.

P. K. KORODY

**GENERAL COURT-MARTIAL
EASTERN JUDICIAL CIRCUIT
UNITED STATES MARINE CORPS**

UNITED STATES)	
)	
)	
v.)	Government Response to Victim Motion
)	“For Materials Necessary to Exercise
)	Substantive Legal Rights on Behalf of
)	Victim [REDACTED]”
[REDACTED])	
[REDACTED])	
U.S. Navy)	11 December 2013
)	

1. **Relief Requested:** The Government respectfully moves the court to deny LT [REDACTED] motion in its entirety.

2. **Summary of Facts:**
The accused is charged with violations of Articles 120, 133, and 134 UCMJ, related to his sexual assault of LT [REDACTED] another [REDACTED] at a Halloween party in October 2012.

3. **Discussion**
Rules for Courts-Martial (R.C.M) 701 and 703 provide the statutory guidance for the management of disclosure and production of evidence by the Government. However, the rules only govern disclosures to the *defense* and production of items requested by the *defense*. It should be noted that these rules do not make reference to “all parties,” instead they specifically refer to “the prosecution and the defense”¹ or “the *trial counsel* shall provide . . . to the *defense*.”²

In *LRM v. Kastenberg* the Court of Appeals for the Armed Forces (C.A.A.F) specifically addressed the question of whether certain Military Rules of Evidence

¹ R.C.M. 703(a)
² R.C.M. 701(a)

(M.R.E.) require that a victim be allowed to make certain arguments before the court, through a counsel. 72 M.J. 364 (C.A.A.F. 2013). C.A.A.F. looked at M.R.E.s 412 and 513 and the actual language that was used addressed the victim's rights. Specifically, C.A.A.F. focused on the M.R.E.s' references to the victim being afforded an opportunity to be "heard." *Id.* at 369-370. C.A.A.F.'s decision said nothing about rights to documents, such as statements, charge sheets, or investigations, beyond the filings that implicate rights under those M.R.E.s.

██████████ argument regarding Due Process is also misplaced. The Fifth Amendment states, in the relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law." While a criminal defendant has a readily cognizable claim that in a criminal prosecution one faces the potential deprivation of all three, a crime victim cannot make the same claim.

██████████ through ██████████ VLC, has been able to properly exercise ██████████ rights without the requested documentation. ██████████ has been provided copies of both defense motions which implicate ██████████ rights under M.R.E. 412 and 513. ██████████ has filed responses to both of those motions. Through ██████████ counsel ██████████ has been able to confer with the Government counsel about the progression of the case. ██████████ along with ██████████ VLC, are scheduled to appear via VTC at the 39(a) on 16 December.

The potential danger of the disclosure of the requested documents is significant. ██████████ request is for "copies of ██████████ statements, a copy of the charge sheet, and other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime." VLC Motion at 11-12. Provision to a witness of copies of their own statements, the charge sheet, or other investigatory documents

threatens to taint the judicial proceeding. While it is certainly not improper for a witness to review their statement prior to testifying, or even while having his/her recollection refreshed, being provided copies to take home is another matter. The charge sheet presents additional concerns related to potential violations of the accused's privacy. A victim in possession of a charge sheet could also create the appearance of impropriety, as a member of the public may believe that this would potentially taint a victim's testimony. The final request dealing with "investigatory documents" is so broad and vague as to render it meaningless. A request so lacking in specificity can hardly be responded to. It is sufficient to say that [REDACTED] has failed to specifically articulate *what* [REDACTED] is looking for, *where* [REDACTED] believes it to be located, *how* it will assist [REDACTED] in the exercise of [REDACTED] rights, and *why* [REDACTED] is unable to exercise [REDACTED] rights without it. There is a significant risk of danger if a witness were to be provided copies of an investigation which detailed the statements, or summaries of statements, of other witnesses.

4. **Burden of Proof:** The Government specifically disagrees with [REDACTED] assertion that the burden is on the Government. [REDACTED] has provided no case, statute, or authority for that proposition. Under R.C.M. 905(c)(2) [REDACTED] as the moving party, has the burden of proof. Under R.C.M. 905(c)(1), the burden of proof for this motion is by a preponderance of the evidence.

5. **Evidence:** The Government offers no additional evidence for this motion.

6. **Argument:** The Government requests oral argument.

[REDACTED]
[REDACTED]
Captain, U.S. Marine Corps
Trial Counsel

I hereby certify that a copy of the above motion was served upon defense counsel and the Court by electronic means on 11 December 2013.

A large black rectangular redaction box covering the signature of the certifier.A smaller black rectangular redaction box covering the name of the certifier.

Captain, U.S. Marine Corps
Trial Counsel

EASTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT MARTIAL

UNITED STATES)

V.)

[REDACTED])

[REDACTED])

U.S. NAVY)

SUPPLEMENTAL COURT RULING
RE: DISCOVERY REQUEST BY
COMPLAINING WITNESS

1. **Nature of the Motion.** The Complaining Witness (CW) in the above captioned case seeks relief from the court in compelling discovery from the government of materials necessary to exercise CW's substantive legal rights as they pertain to MRE 412 and 513. At the Article 39(a) session held on 16 December 2013, the court received evidence and heard the arguments by counsel, including Legal Counsel for CW, on this motion. This is a supplement to the ruling delivered orally on the record at that hearing.

2. **Findings of Fact.**

a. Defense filed motions regarding MRE 412 and 513 on 8 November 2013. AE XXI and XII, respectively. The government provided LC with copies of these pleadings.

b. Non-Party Legal Counsel (LC) representing the Complaining Witness (CW) filed responses to the MRE 412 and 513 motions on 21 November 2013. AE XXIII and XIII, respectively.

c. On 6 December 2013, two weeks *after* LC responded to the defense MRE 412 and 513 motions, LC filed this motion to compel discovery of materials necessary for CW to exercise substantive legal rights afforded to her as an alleged crime victim in the military justice system. AE XIX.

d. A 39a was scheduled to hear the CW compel discovery motion, as well as the defense MRE 412 and 513 motions. LC consented to have all three motions heard on the same day. AE XIX.

e. CW via LC requested the following be produced for discovery: copies of the charge sheets; any statements made by CW, including summaries of any testimony by CW provided thus far; and "copies of any other statements or summaries of statements or testimony by anyone, including the accused, that are relevant, particularly to MRE 412 & 513 issues that have been raised in this case." Record at 30.

f. Defense moved the court in AE XXI to find MRE 412 exceptions with respect to three different scenarios: (a) alleged flirtatious behavior between the accused and CW on the night of the charged offenses; (b) the status of CW as "in a relationship" at the time of the charged offenses; and tangentially, (c) that CW was a "huge gay advocate."

g. In their written briefs, both government counsel and LC concurred that items (a) and (b) above would fall under an exception to MRE 412, however both requested limitations on the *extent* of cross of CW regarding the interactions between the accused and CW, as well as the *scope* of cross of CW regarding the gender of CW's significant other, as well as any sexual acts between CW and her significant other. AE XXII and XXIII.

h. In support of the defense request to allow evidence of CW's position as a "huge gay advocate" as an exception to MRE 412, the defense included in their motion a NCIS Results of Contact with [REDACTED] CIV. Among the six paragraphs within that document there contained a statement that CW was a "huge gay advocate". AE XXI. No other evidence in support of this proposition was offered to the court, nor was any foundation for that proposition included in the witness statement.

i. The basis of the defense MRE 513 motion was a pharmacy report which indicated that two days before the charged offense, CW was dispensed two different medications that are prescribed to treat depression and/or anxiety. AE XII.

j. The pharmacy report was mentioned, but not attached to AE XII until the motions session on 16 December 2013.

3. Discussion.

There is no statutory requirement for the government to provide discovery to CW that is enforceable by this court. The Rules for Courts-Martial regarding discovery place requirements between trial and defense counsel, the actual parties to the litigation. RCM 701, 703.

Despite no statutory requirement to provide discovery to CW, LC argues that LRM v Kastenburg, 72 M.J. 364 (C.A.A.F. 2013) implicates an enforceable discovery responsibility on the trial counsel. Assuming such a discovery obligation is implicated, existing statutory requirements between trial and defense are helpful when analyzing what is discoverable and what should be produced.

The rules of discovery have a reoccurring theme regarding discoverable items as being that which are *material to the preparation* of the requesting party or are intended for use by the opposing party. RCM 701 (emphasis added). The right to have evidence produced rests on its relevance and necessity. RCM 703.

In this case, the specific info requested by LC in this case is not tailored to the need to present a basis for a claim of privilege or exclusion raised by the defense motions. AE XXI and XII. Rather, the discovery request filed by LC is overly broad and nothing more than what is commonly referred to as a "fishing expedition."

LC stated CW wants to know what is in the possession of the government that implicates [REDACTED] substantive legal rights under MRE 412 and 513. Record at 30. The answer to that legitimate

demand would be all pleadings that involve MRE 412, 513 and 514, as well as the evidence used to support those pleadings. Those materials should sufficiently enable CW to exercise [REDACTED] substantive legal rights, and those materials were provided to CW by the government.

Providing CW with the materials to be considered during this hearing is wholly sufficient to allow CW to exercise her substantive legal rights. CW knew in advance both the arguments of counsel regarding the theory of admissibility or releasability, as well as any evidence in support of those propositions. The court has the role of a gatekeeper for privileged information falling under MRE 412 and 513. That privileged information will not be presented in the court-martial without first holding a hearing with the military judge. The military judge, exercising its gatekeeping function, will base its ruling on those materials which had already been provided to CW, as well as any testimony and/or argument presented at the motion session. There is no question CW could not exercise [REDACTED] substantive legal rights since [REDACTED] had the same information as the military judge.

LC counters that CW nevertheless requires essentially the government case file so that CW can see if there is any other evidence to support [REDACTED] position, whatever that may be. The court finds this request to be overly broad, and to the detriment of the government's case in chief.

The court is hard pressed to determine that the government case file, as broadly requested by LC, is relevant and necessary for CW to exercise her substantive rights. Particularly illustrative to this point is that LC filed exceptional responses to both defense MRE 412 and 513 motions, squarely addressing the arguments of defense. Even more compelling is that these responses were filed *before* LC filed this motion for discovery. Clearly, LC did not believe the government case file was relevant and necessary to address the substantive legal rights of CW that have been raised thus far in the case.

There may be occasions when the court would compel a discovery request of CW beyond the motions and attachments based on MREs 412/513/514. An example of an appropriate discovery request in this case would have requested the pharmacy report mentioned in, but not attached to, the MRE 513 defense motion. Had LC filed an appropriately tailored discovery request for that report, I wholeheartedly believe it would have been provided since the relevance is so obvious, and given the government's willingness to provide the pleadings and their attachments to LC. In fact, had the LC crafted an appropriately tailored request, the 39a session would not have been recessed, and thereby delayed,¹ while the court waited for a copy to be sent, and then digested/discussed between LC/CW.

LC claimed that it was "absurd" for LC to conduct its own investigation when the government has all the information at their fingertips. Record at 31. The court agrees that there is no need for duplicative efforts when they can be avoided. However, this court also thinks it is "absurd" not to do some of your own investigation when representing a client. There are occasions that the

¹ Albeit 12 minutes. Record at 53.

court anticipates due diligence would require LC to interview witnesses, and/or do some investigation, relevant to a CW's claim of privilege or exclusion, regardless if those efforts are parallel or in conjunction with TC efforts since LC and TC have different clients. An interview by LC of ██████████ is a great example of supplemental investigation that LC should be expected to do in preparation for the MRE 412 motions session. Another example of an appropriately tailored discovery request would have been to produce any statements made by ██████████ or any other witness, that discussed anything about CW being a "huge gay advocate."

In this case, the court finds that LC/CW did not require the broad breadth of evidence requested. It appears to the court to be a request for information to enable LC/CW to evaluate the government's case against the accused. There is a significant chance that the government's case against the accused would be jeopardized if the CW has access to essentially the entire government case file, specifically in the form of CW's impeachment under the 600 series of the Military Rules of Evidence. The court took pause at LC's argument in this regard.

For all intents and purposes, LC wants full disclosure of the government case file. Disclosure appears to be at the expense of the government's chances of obtaining a conviction of the assailant, a goal presumably shared by CW. This imbalance is demonstrated by LC's argument that giving the case file to CW is no different than allowing CW to be in the courtroom during other witnesses' testimony *since ██████████ can be impeached by the 600 series in that regard too.*² Record at 33. In other words, "Give me the file, I don't care if my credibility is attacked as a result of having the file even though this is a case that comes down to my credibility." The court is incredulous at this proposition offered by the counsel representing the person alleged to be the victim of the sexual assault. Is the LC intruding on the government's case at the expense of impeaching CW's credibility?

There are parameters to LC's new role in these proceedings that should include a balance between their client's ability to exercise their "substantive legal rights" with the end state of convicting an assailant. That balance is achieved by requesting a discriminating list of discovery to the government for only that evidence which is relevant and necessary to protect those substantive legal rights, just as the discovery rules would normally require.

Though this ruling is written as a supplement to the oral ruling made at the 39a session on 16 December 2013, and after the MRE 412 and 513 motions were litigated and ruled on, the results of those motions are also informative.

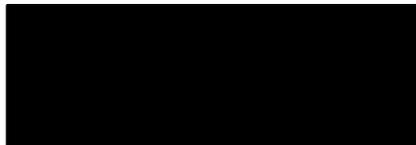
² Arguably, a savvy trial counsel would call the CW before the other witnesses, thereby alleviating those impeachment problems.

In the MRE 412 motion, essentially all parties concurred that two of the three items that defense proffered as exceptions to MRE 412 would be admissible.³ The government and LC opposed the third exception proposed by defense. The court agreed, denying the defense motion in that regard. The LC/CW prevailed on the motion.

With respect to the MRE 513 motion, the court ordered an *in camera* review, over the objection of LC, of 56 days of CW's mental health records after defense demonstrated a reasonable likelihood that the records contained constitutionally required information. The *in camera* review did result in identifying constitutionally required information to explain the emotional state of the CW at the time of the alleged assault and a motive to fabricate. Though the CW did not prevail, and disagrees with the court's ruling, CW was afforded all the tools necessary in order to exercise [REDACTED] claim of privilege or exclusion.

The substantive legal rights of CW have been protected in this case.

The motion is **DENIED**.



Lieutenant Colonel, USMC
Military Judge

³ LC did object to a technicality regarding one of the 412 items, but agreed in concept to the relevancy of the defense theory.

Preamble

Lieutenant [REDACTED] Dental Corps, United States Navy, respectfully requests that this Court instruct the Trial Court to provide LT [REDACTED] with meaningful notice and afford her a meaningful opportunity "to be heard" prior to public disclosure of intimate details of her private sexual history and confidential mental health communications. To enforce [REDACTED] right to receive meaningful notice and to be afforded a meaningful opportunity "to be heard" under Military Rules of Evidence (Mil. R. Evid.) 412 and 513, LT [REDACTED] asks this Court to issue a stay of the trial proceedings in the general court-martial of *United States v. [REDACTED]* to set aside the Trial Court's rulings of December 16, 2013, made under Mil. R. Evid. 412 and 513, and to direct the Trial Court to provide LT [REDACTED] investigative materials relevant to the motions and responses made by the Parties under Mil. R. Evid. 412 and 513.

LT [REDACTED] is not seeking "discovery" as a matter of right simply because [REDACTED] name appears on the charge sheet or access to all investigative materials in the case. However, when the Parties intend to publicly disclose intimate details of [REDACTED] private sexual history and seek to produce confidential mental health communications, the Mil. R. Evid., constitutional due process, and the right to be treated with fairness and respect for dignity and privacy require that [REDACTED] receive meaningful

notice and be afforded a meaningful opportunity "to be heard" at an evidentiary hearing prior to such disclosure. An alleged victim or patient is deprived of these rights when he or she is unable, because of a lack of investigative materials, to make an informed decision as to whether to exercise the opportunity "to be heard" and, if necessary, to prepare to and actually exercise that right by presenting facts and legal argument.

LT ■ asks this Court to provide ■ more than the bare notice and hollow opportunity "to be heard" that ■ was given by the Trial Court. This Court should find that the right to receive notice and to be afforded an opportunity "to be heard" includes the right to an even playing field where all participants at the Mil. R. Evid. 412 and 513 evidentiary hearing have access to the relevant investigative materials.

History of the Case

The Government preferred charges against LT ■ on an unknown date alleging violations of Articles 120 and 134, Uniform Code of Military Justice (UCMJ). The Government preferred an Additional Charge alleging a violation of Article 133, UCMJ, on an unknown date. The Charges and Additional Charge name LT ■ as the victim.

An Article 32, UCMJ, investigation was held in July 2013, and LT ■ testified as a witness. The Charges and Additional Charge were referred for trial by general court-martial at an

unknown date. Arraignment in the case of *United States v.*

██████████ was held on an unknown date. An Article 39(a) session was held on December 16, 2013, to address pretrial motions, and trial on the merits is scheduled to commence on January 26, 2013.

Jurisdictional Statement

This Court has jurisdiction to issue all writs necessary or appropriate in aid of its existing statutory jurisdiction. 28 U.S.C. § 1651(a) (2006); *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999); *Loving v. United States*, 62 M.J. 235, 239 (C.A.A.F. 2005). The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

Specific Relief Sought

Petitioner seeks a Stay until this Court rules on this Petition and Petitioner seeks a Writ of Mandamus setting aside the Trial Court's rulings of December 16, 2013, under Mil. R. Evid. 412 and 513, and directing the Military Judge to order the United States to provide LT ████████ investigative materials that are relevant to the motions made under Mil. R. Evid. 412 and 513.

Issue Presented

WHETHER THE MILITARY JUDGE ERRED BY DENYING LT HS'S REQUEST FOR INVESTIGATIVE MATERIALS THAT ARE RELEVANT TO MOTIONS MADE UNDER MIL. R. EVID. 412 AND 513 THEREBY DEPRIVING LT HS OF HER RIGHT TO RECEIVE MEANINGFUL NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD UNDER THE MILITARY RULES OF EVIDENCE.

Statement of Facts

LT [REDACTED] made an unrestricted report of sexual assault to authorities on or about October 28, 2012. LT [REDACTED] reported that Lieutenant [REDACTED] Dental Corps, United States Navy, sexually assaulted her in his vehicle outside a Halloween party at the home of another Naval officer at or near [REDACTED] [REDACTED] in the early morning hours of October 28, 2012. The Naval Criminal Investigative Service (NCIS) assumed investigative jurisdiction of the case and conducted an extensive investigation into the allegations made by LT [REDACTED]

An investigation pursuant to Article 32, UCMJ, was held in July 2013. LT [REDACTED] testified at the investigation, but [REDACTED] was not present for the testimony of any other witnesses, including [REDACTED] [REDACTED], who testified under oath.

In October 2013, the United States Navy, at the direction of the Secretary of Defense, created the Victims' Legal Counsel Program to provide legal representation, advice, and assistance to eligible victims of sexual assault. (Appendix A.) Lieutenant Commander Patrick K. Korody, JAGC, USN, was detailed

as Victims' Legal Counsel (hereinafter "VLC") for LT [REDACTED] on October 31, 2013. VLC provided notice of representation to the United States and Civilian Defense Counsel that same day. (Appendix B.) Trial Counsel informed VLC that the case was pending trial by general court-martial in the Eastern Judicial Circuit, Navy-Marine Corps Trial Judiciary. On November 4, 2013, VLC entered a notice of appearance in the case of *United States v. [REDACTED]* (Appendix C.) On November 4, 2013, VLC requested via email that Trial Counsel provide him copies of a redacted charge sheet and any statements made by his client. (Appendix D.) Trial Counsel never responded to this request in writing but indicated orally to VLC on several occasions that he was waiting to receive guidance from his superiors as to what, if any, materials could be provided to a VLC.

On or about November 8, 2013, Trial Counsel informed VLC that an Article 39(a), UCMJ, session was scheduled for December 10, 2013, at Camp Lejeune to hear pretrial motions. The next day, Trial Counsel forwarded copies of the Defense motions filed under Mil. R. Evid. 412 (Appendix E) and 513 (Appendix F) to VLC. The Defense motion under Mil. R. 412 included three redacted pages from a NCIS report of investigation as an attachment. The Defense motion under Mil. R. Evid. 513 did not include any attachments. On November 14, 2013, LT [REDACTED] made a request to the General Court-Martial Convening Authority for investigative

materials in the case of *United States v. ██████████* under the Privacy Act, 5 U.S.C. § 552a, and Freedom of Information Act (FOIA), 5 U.S.C. § 552. (Appendix G.)

On November 15, 2013, VLC requested a continuance of the Article 39(a) session because of planned OCONUS leave. (Appendix H.) The then-assigned Military Judge granted VLC's request for a continuance on November 21, 2013, and the Article 39(a) was re-scheduled for December 16, 2013. (Appendix I.) On November 21, 2013, LT ██████ through VLC, filed responses to the defense motions under Mil. R. Evid. 412 (Appendix J) and Mil. R. Evid. 513 (Appendix K). VLC indicated in a footnote that LT ██████ and he were disadvantaged in responding to the motions because the United States had refused to provide copies of requested investigative materials and a copy of the charge sheet. On November 22, 2013, the United States filed its responses to the defense motions under Mil. R. Evid. 412 (Appendix L) and Mil. R. Evid. 513 (Appendix M). VLC was provided copies of these responses. The responses did not include any supporting evidentiary documents.

On December 2, 2013, having received no response to his repeated requests for investigative materials, VLC sent an email to Trial Counsel indicating that if VLC did not receive a response to LT ██████ Privacy Act and FOIA request within 48 hours, LT ██████ may seek other avenues of redress, including contacting

her congressional representatives. (Appendix N.) On December 4, 2013, the General Court-Martial Convening Authority responded to LT [REDACTED] request: he released a copy of the standing general court-martial convening order and denied the remainder of the request. (Appendix O.)

On December 6, 2013, LT [REDACTED] through counsel, filed a motion to compel the United States to provide LT [REDACTED] investigative material necessary for her to exercise the legal rights afforded to her as an alleged victim and patient in the military justice system under Mil. R. Evid. 412 and 513. (Appendix P.) On December 11, 2013, the United States filed a motion asking the court to deny the VLC motion. (Appendix Q.) The defense did not file a pleading in response to this VLC motion.

On December 16, 2013, LT [REDACTED] and VLC appeared via video teleconferencing at the Article 39(a) session in the case of *United States v. [REDACTED]* from Naval Station Mayport, Florida. The parties and the Military Judge were in a military courtroom on-board Camp Lejeune, North Carolina. Lieutenant Colonel [REDACTED] United States Marine Corps, was detailed as the new military judge.

The Military Judge first heard LT [REDACTED] motion to compel the United States to provide material necessary for her to exercise her legal rights under Mil. R. Evid. 412 and 513. The Military Judge asked VLC to present evidence on the motion. VLC

responded that the precise issue was that the United States had refused to provide any investigative materials to LT [REDACTED] and, therefore, he had no evidence. The Military Judge ruled from the bench that LT [REDACTED], as the moving party, had the burden of proof on the motion. After hearing argument, the Military Judge ruled from the bench and denied the motion because LT [REDACTED] had failed to demonstrate "necessity." The Military Judge stated that she saw "no harm" in providing LT [REDACTED] a copy of the cleansed charge sheet and ordered the United States to do so. The charge sheet was provided to VLC by Trial Counsel the following day. (Appendix R.)

The next motion addressed by the Military Judge was the defense motion under Mil. R. Evid. 412. Neither the United States nor the defense presented any evidence to the court, other than the three (3) pages of investigative materials attached to the Defense motion. LT [REDACTED] chose to testify regarding specific sexual behavior alleged by the Defense in its motion; the Defense alleged XXXXXXXXXXXXXXXXXXXXXXX

The Military Judge and the parties alluded that this proffered interaction had been discussed previously at a prior Article 39(a) session or Rule for Courts-Martial (R.C.M.) 802 conference—LT [REDACTED] was not present for this session—and that she would accept the proffers of the parties. LT [REDACTED] has never received any investigative materials that would support a basis

to believe that this alleged XXXXXXXXXXXXXXXXXXXX took place. After argument by the parties and VLC on behalf of LT [REDACTED] who opposed admitting such evidence, the Military Judge ruled from the bench that evidence of the proffered "flirtatious interaction" was admissible at trial. The Military Judge made additional rulings from the bench pertaining to other evidence of LT [REDACTED] sexual predisposition and prior sexual behavior that the Defense sought to admit.

The next motion addressed by the Military Judge was the defense motion to under Mil. R. Evid. 513 to compel production of LT [REDACTED] mental health records. The defense introduced a document (Appendix S)¹ at the hearing that listed prescription drugs filled by LT [REDACTED] the Military Judge ordered the United States to forward the document to VLC during a recess. After argument by the Parties and VLC on behalf of LT [REDACTED] who opposed production, the Military Judge, from the bench, ordered production of LT [REDACTED] mental health records in the possession of a civilian provider for an *in camera* review. The records were to be provided to the Military Judge by December 27, 2013.

On December 16, 2013, VLC requested copies of the Military Judge's written rulings relating to the VLC motion for investigative materials, the Mil. R. Evid. 412 motion, and the

¹ This document was not redacted when received by VLC.

Mil. R. Evid. 513 motion; the Military Judge responded that she would not be drafting written rulings. (Appendix T.)

On December 26, 2013, VLC made a motion to delay the production of LT [REDACTED] mental health records to the Military Judge for an *in camera* review. (Appendix U.) The Military Judge responded that [REDACTED] had already reviewed the material. (Appendix V.) On December 30, 2013, the Military Judge ordered an *ex parte* Article 39(a) for Monday January 6, 2014. (Appendix W.) The Military Judge further noted that she had already decided that parts of the records were admissible and will be turned over to the defense counsel, but she would allow LT [REDACTED] and [REDACTED] VLC to make argument on whether the Military Judge should disclose additional parts of the privileged records.

Reasons Why the Writ Should Issue

A WRIT OF MANDAMUS IS APPROPRIATE BECAUSE THE MILITARY JUDGE DENIED LT [REDACTED] THE ABILITY TO EXERCISE [REDACTED] RIGHTS IN A MEANINGFUL WAY—CONTRARY TO THE RULES, *KASTENBERG*, DUE PROCESS, AND FAIRNESS—WHEN THE MILITARY JUDGE REFUSED TO ORDER THE DISCLOSURE OF RELEVANT INVESTIGATIVE MATERIALS.

A. This Court has jurisdiction over this writ because it is "in aid of" the Court's jurisdiction and the harm alleged has the potential to affect the findings and sentence.

The petitioner must meet two conditions before this court may provide extraordinary relief in the form of a writ of mandamus: (1) the writ must be "in aid of" the court's existing jurisdiction; and (2) the writ must be "necessary and appropriate." *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008); see also *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-81 (2004). As the Court of Appeals for the Armed Forces (CAAF) noted in *Denedo*, "in aid of" includes cases where a petitioner seeks to "modify an action that was taken within the subject matter jurisdiction of the military justice system." *Denedo*, 66 M.J. at 120.

This includes interlocutory matters where no finding or sentence has been entered. *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013); see also *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012). The harm alleged must have the "potential to affect the findings and sentence." *Ctr. For Constitutional Rights v. United States (CCR)*, 72 M.J. 126, 129 (C.A.A.F. 2013) (citation omitted).

CAAF recently considered a similar question of whether a court of criminal appeals had jurisdiction to hear an alleged victim's interlocutory appeal from the military judge's ruling

that limited the right to be heard under Mil. R. Evid. 412 and 513. *Kastenberg*, 72 M.J. at 368. The court held that the court of criminal appeals did have jurisdiction because the victim was "seeking to protect the rights granted to her by the President in duly promulgated rules of evidence, namely to a claim of privilege under M.R.E. 513 and a right to a reasonable opportunity to be heard under M.R.E. 412(c)(2) and 513(e)(2)." *Id.* Further, the military judge's ruling would affect the very foundation of the finding and sentence:

The military judge's ruling has a direct bearing on the information that will be considered by the military judge when determining the admissibility of evidence, and thereafter the evidence considered by the court-martial on the issues of guilt or innocence

Id. Thus, CAAF concluded that the "CCA erred by holding that it lacked jurisdiction." *Id.* (citation omitted).

Similarly here, LT [REDACTED] is seeking to protect the rights granted to [REDACTED] by the President in Mil. R. Evid. 412 and 513. The Military Judge's ruling limits [REDACTED] right to be heard and affects the very foundation of the findings and sentence in this case. As with the court of criminal appeals in *Kastenberg*, this Court has jurisdiction because LT [REDACTED] petition is "in aid of" the court's jurisdiction and the harm alleged has the potential to affect the findings and sentence. LT [REDACTED] is not a "stranger[]

to the court-martial," *CCR*, 72 M.J. at 129, and she should not be treated as one.

B. LT [REDACTED] has standing to protect the rights afforded to her, and the issue is ripe since the injury is taking place and will continue unless this Court issues a writ.

The holder of a privilege has a right to contest and protect the privilege, even where the holder is a nonparty to the court-martial. *Kastenburg*, 72 M.J. at 368 (citing "long-standing precedent" in the military justice system). Similarly, federal courts "have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to material already so disclosed." *Id.* at 369 (quoting *United States v. Hubbard*, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980) (citations omitted)).

Standing also requires a showing of injury-in-fact: "an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l. USA*, 133 S. Ct. 1138, 1147 (2013) (discussing standing in Article III courts). That is, the issue must be ripe, which can be evidenced by a concrete ruling by the military judge in an adversarial setting. *United States v. Chisholm*, 59 M.J. 151, 153 (C.A.A.F. 2003).

Though [REDACTED] is a nonparty, the President provided LT HS rights and privileges in this court-martial in Mil. R. Evid. 412 and 513. She sought to exercise [REDACTED] rights at the court-martial, but the Military Judge's ruling denied LT [REDACTED] access to the relevant investigative materials necessary to exercise these rights and privileges. In addition, since this ruling, the Military Judge has received the privileged records, and she has ruled that portions of the records will be turned over to the defense imminently.

LT [REDACTED] is attempting to enforce her rights and protect her interests by preventing disclosure of privileged records and in preventing further public disclosure of the records already reviewed by the Military Judge. LT [REDACTED] has standing to challenge the Military Judge's ruling—which denied her access to relevant investigative materials—and the issue is ripe since the injury is taking place and will continue unless this court issues a writ. *See Clapper*, 133 S. Ct. at 1147.

C. The President afforded LT [REDACTED] the right to receive notice and to be afforded the opportunity to be heard under Mil. R. Evid. 412 and 513.

Mil. R. Evid. 412 is a rule of exclusion. Mil. R. Evid. 412(b) prescribes certain exceptions, however, that make evidence of an alleged victim's prior sexual behavior and sexual predisposition admissible in a court-martial. A "party intending to offer evidence" under Mil. R. Evid. 412(b) must

"file a written motion ... describing the evidence and stating the purpose for which it is offered" and "notify the alleged victim." Mil. R. Evid. 412(c)(1). Before admitting this evidence, the military judge must conduct a hearing and the "alleged victim must be afforded a reasonable opportunity to attend and be heard." Mil. R. Evid. 412(c)(2).

Mil. R. Evid. 513 affords similar rights to patients with respect to confidential mental health communications. The President prescribed that "a patient has a privilege to refuse to disclose and prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist." Mil. R. Evid. 513(a). Before a military judge pierces the psychotherapist-patient privilege and orders production or admits confidential psychotherapist-patient communications, the moving party must "notify the patient" and the patient "shall be afforded a reasonable opportunity to attend the hearing and be heard" Mil. Evid. 513(e)(1-2). In *Kastenberg*, CAAF considered these Rules and held that a "reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented through counsel be heard through counsel." 72 M.J. at 370. The victim or patient's right, therefore, is not merely as a fact witness; instead, the right to be heard "includes through counsel on legal issues." *Id.* As

the court noted, this is supported by statutory construction, military case law, and federal precedent. *Id.*

D. Mil. R. Evid. 412 and 513, *Kastenberg*, due process, and crime victim rights logically dictate that the right to receive notice and to be afforded the opportunity "to be heard" must include the right to be informed of the relevant facts and evidence and the positions of the parties.

LT [REDACTED] through counsel, is asking to receive meaningful notice and the meaningful opportunity "to be heard" on evidentiary issues impacting [REDACTED] privacy in this court-martial. But the Military Judge deprived LT [REDACTED] of these rights when she denied LT [REDACTED] request for investigative materials that were relevant to motions made under Mil. R. Evid. 412 and 513. This violates the logical mandate of the Rules, *Kastenberg*, constitutional due process, and crime victim rights laws that require treating a victim with fairness and with respect for dignity and privacy.

1. The Rules logically require that the alleged victim or patient be informed of the relevant facts and evidence and legal positions of the parties to be able to meaningfully exercise his or her rights.

Mil. R. Evid. 412 and 513 are designed to protect an alleged victim's and a patient's privacy in the military justice system. Mil. R. Evid. 412 protects an alleged sexual assault victim from unwarranted public intrusion into the victim's private life and thereby protects the alleged victim from

embarrassment, humiliation, and further trauma. *See, e.g., United States v. Sanchez*, 44 M.J. 174, 177 (C.A.A.F. 1996).

Mil. R. Evid. 513 establishes a qualified patient-psychotherapist privilege in courts-martial to promote individual and social interests related to successful mental healthcare treatment. *See* Analysis of Mil. R. Evid. 513, Appendix 22, Manual for Courts-Martial (2012); *see also Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (examining analogous federal rule) (“[T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.”).

Even though there is no explicit language in the UCMJ, R.C.M., or Mil. R. Evid. requiring relevant investigative materials be provided to an alleged victim or patient, the plain meaning of Mil. R. Evid. 412 and 513 and use of the phrase “to be heard” in both the Mil. R. Evid. and the R.C.M. demonstrate that an alleged victim or patient must be informed of the relevant facts and evidence and legal positions of the parties.

Each and every time the phrase is used it refers to an occasion where the parties (through counsel) can provide argument to the military judge on a legal issue in which the parties are informed of the relevant facts and evidence and legal positions. *See, e.g., R.C.M. 806(d), Discussion* (parties have an opportunity to be heard before issues a protective

order); R.C.M. 917(c) (parties have an opportunity to be heard regarding a motion for finding of not guilty); R.C.M. 920(c) (parties have an opportunity to be heard on the findings instructions); R.C.M. 920(f) (parties have an opportunity to be heard on objections to instructions); R.C.M. 1005(c) (parties have an opportunity to be heard on sentencing instructions); R.C.M. 1102(b)(2) (parties have an opportunity to be heard at post-trial 39(a) sessions); Mil. R. Evid. 201(e) (parties have an opportunity to be heard regarding judicial notice). At these discrete milestones in every trial, the parties have an opportunity "to be heard," and there is a logical and obvious requirement in law that the parties be informed of the relevant facts and evidence so as to be in a position to meaningfully exercise this right to present facts and legal argument to the court.

Like the parties to a court-martial, an alleged victim or patient with the opportunity "to be heard" must be informed of the relevant facts and evidence and legal positions of the parties to make an informed decision as to whether to exercise that right and, if necessary, to prepare to and actually exercise that right. The President promulgated Mil. R. Evid. 412 and 513 to specifically grant an alleged victim and a patient procedural due process—the right to receive notice and to be afforded the opportunity "to be heard" at an evidentiary

hearing prior to public disclosure of private and privileged information²; the President gave citizens like LT [REDACTED] who find themselves thrust into the military justice system, the right to present legal argument and facts because their privacy interests are at stake. This can only be accomplished—the rights only become meaningful—if the non-party with so much at stake is provided relevant information known by the parties. The Rules logically require that LT [REDACTED] be provided relevant investigative materials when motions are filed under Mil. R. Evid. 412 and 513.

2. Kastenber logically requires that an alleged victim or patient be informed of the relevant facts and evidence and legal positions of the parties to be able to meaningfully exercise his or her rights.

CAAF could not have imagined that an alleged victim or patient would be afforded the opportunity “to be heard” in a court-martial, especially through counsel, without the aid of a copy of the charge sheet, relevant investigative materials, and copies of the parties’ pleadings. To the contrary, it necessarily and logically follows that a victim or patient must be informed of the relevant facts and evidence and legal positions of the parties in order to receive meaningful notice and to be afforded a meaningful opportunity “to be heard.” A

² In the case of Mil. R. Evid. 513, public disclosure occurs when mental health records or communications are made known to anyone, including the military judge, who is not the patient or psychotherapist.

foundational requirement of the holding in *Kastenberg* is that an alleged victim or patient must be informed such that he or she would be able to present facts and legal argument, especially where interests were not aligned with trial counsel, at an evidentiary hearing. See *Kastenberg*, 72 M.J. at 371. This necessarily and logically requires that an alleged victim or patient be informed of the relevant facts and evidence and the legal positions of the parties under similar circumstances.

An alleged victim or patient who is provided mere notice that a party seeks to admit evidence under Mil. R. Evid. 412 or 513 but not a copy of the parties' pleadings will not know what evidence or legal arguments will be addressed at the hearing. An alleged victim or patient who is unaware of the parties' legal positions and theory of admissibility or production is unable to make it known whether his or her interests are aligned with or opposed to those of trial counsel and unable to present legal argument. An alleged victim or patient who is denied access to relevant witness statements, forensic reports, and other investigative materials known by the parties but unknown to the alleged victim or patient is unable to review the merits of a party's position, much less prepare to call witnesses and present evidence at a hearing.

It is illogical to provide an alleged victim or patient the right to receive notice and the opportunity "to be heard" on

complex legal issues but fail to provide him or her with the information necessary to present facts and legal argument. Thus, an alleged victim or patient who is not informed is denied notice and the opportunity "to be heard."³

3. Due process logically requires that an alleged victim or patient be informed of the relevant facts and evidence and legal positions of the parties to be able to meaningfully exercise his or her rights.

The right to receive notice and to be afforded the opportunity "to be heard" in the context of Mil. R. Evid. 412 and 513 are not intended to be hollow rights; instead, these rights, when interpreted through the lens of basic constitutional due process, are extremely meaningful. In *Kastenberg*, CAAF addressed the opportunity "to be heard" in the context of Mil. R. Evid. 412 and 513 and found that it includes

³ CAAF did not order the lower court to provide investigative materials to the alleged victim in *Kastenberg*. 72 M.J. at 372 ("However, while this Court may appropriately take action at this time, a writ of mandamus is not the appropriate remedy. At the lower court, LRM petitioned for a writ of mandamus directing the military judge 'to provide an opportunity for [LRM] to be heard through counsel at hearings conducted pursuant to [M.R.E.] 412 and 513, and to receive any motions or accompanying papers reasonably related to her rights as those may be implicated in hearings under [M.R.E.] 412 and 513.' The military judge's ruling must be based on a correct view of the law. M.R.E. 412 and M.R.E. 513 create certain privileges and a right to a reasonable opportunity to be heard on factual and legal grounds, which may include the right of a victim or patient who is represented by counsel to be heard through counsel. However, these rights are subject to reasonable limitations and the military judge retains appropriate discretion under R.C.M. 801, and the law does not dictate the particular outcome that LRM requests.").

the right to "present facts and legal argument, and allows a victim or patient who is represented by counsel to be heard through counsel." 72 M.J. at 370; see also *United States v. Carlson*, 43 M.J. 401, 405 (C.A.A.F. 1995) (Ordering that sexual assault victims seeking to assert privileges "will be giving the opportunity, with the assistance of counsel if they so desire, to present evidence, arguments and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents.").

While CAAF did not conduct a due process analysis in its decision, the holding in *Kastenber* ensured that alleged victims and patients were afforded due process by the trial court before private matters and privileged communications were publically disclosed. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) ("Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved, as well as of the private interest that has been affected by governmental action." (internal citations omitted)).

Due process requires more than bare notice and the opportunity to speak in a court-martial; due process requires that an alleged victim or patient be informed in order to receive meaningful notice and be afforded a meaningful opportunity "to be heard." The Supreme Court routinely

recognizes that legal rights afforded individuals become meaningless unless those with due process interests are adequately informed about the pending matter. *See, e.g., Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (applying constitutional due process to Texas adoption proceeding and finding "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (stating that notice must "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections," which includes the corollary requirement that notice "must be of such nature as reasonably to convey the required information.").

"For more than a century, the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified.' It is equally fundamental that *the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.*" *Fuentes v. Shevin*, 407 U.S. at 79, 80 (1972)

(addressing Due Process Clause of Fourteenth Amendment to state action authorizing seizure of property) (emphasis added) (internal citations omitted); see also *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citing *Armstrong*, 380 U.S. at 552). Due process requires that those with an interest be "given a meaningful opportunity to present their case." *Eldridge*, 424 U.S. at 349.

In short, the right to receive notice and to be afforded the opportunity "to be heard" provided to an alleged victim or patient under Mil. R. Evid. 412 and 513 is imbued with the requirement that alleged victim or patient be informed so as to be in a position to choose to exercise the right "to be heard" and, if necessary, to prepare to and exercise that right in a meaningful manner. To interpret the Rules otherwise would ignore the basic legal principle founded in constitutional due process that the right to receive notice and be afforded the opportunity "to be heard" be meaningful.

4. Fairness and respect for dignity and privacy require that an alleged victim be informed of the relevant facts and evidence to be able to meaningfully exercise his or her rights.

Crime victims under the UCMJ are to be treated with fairness and respect for their dignity and privacy by the military justice system. *Victim and Witness Assistance*, DoDD 1030.01 dated 23 Apr 07 (interim change); see also 10 U.S.C. § 806b (2013) (NDAA FY 2014) (A victim of a crime under the UCMJ has "[t]he right to be treated with fairness and respect for the dignity and privacy of the victim of an offense under this chapter."). Although "fairness" has not been specifically defined in this circumstance, it must guarantee that a victim's rights are given similar consideration to those of an accused and the government. *cf. Snyder v. Massachusetts*, 29 U.S. 97, 122 (1934) (Cardozo, J.) ("[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."), reaffirmed by *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (stating that "in the administration of criminal justice, courts may not ignore the concerns of victims"); *United States v. Heaton*, 458 F. Supp. 2d 1271, 1271 (D. Utah 2006) (finding that under the federal Crime Victims' Rights Act, treating "a person with

'fairness' is generally understood as treating them 'justly' and 'equitably'"). If the constitutional guarantee of due process requires that "criminal defendants be afforded a meaningful opportunity to present a complete defense," *California v. Trombetta*, 467 U.S. 479, 485 (1984), then an alleged victim or patient has a similar guarantee to fairness and an opportunity to present a complete case against disclosure of private matters and privileged communications.

An alleged victim is not treated with fairness and respect for dignity and privacy if not given access to relevant information known by the parties litigating the disclosure of the alleged victim's sexual history and confidential patient-psychotherapist communications. Treating an alleged victim in such an uneven manner is contrary to the intent of Congress, the President, and CAAF, as well as the explicit crime victim rights provisions in lawful regulations and, now, the UCMJ.

An alleged victim must be treated fairly and with respect for dignity and privacy; within Mil. R. Evid. 412 and 513, this means providing meaningful notice and affording a meaningful opportunity "to be heard" by informing the alleged victim of the relevant facts and evidence and legal positions of the parties through, at minimum, a copy of the charge sheet, relevant investigative materials, and copies of the parties' pleadings.

E. A writ is necessary and appropriate because the Military Judge deprived LT [REDACTED] of her right to receive meaningful notice and to be afforded a meaningful opportunity "to be heard" when she denied LT [REDACTED] request for relevant investigative materials.

While Trial Counsel voluntarily provided VLC copies of the Defense motions⁴ and his responses, Trial Counsel and the General Court-Martial Convening Authority denied repeated requests by LT [REDACTED] and her counsel, in various forms, for a redacted copy of the charge sheet, statements made by LT [REDACTED] and other relevant investigative materials. Trial counsel also filed a motion opposing LT [REDACTED] request that the Military Judge order disclosure of the charge sheet and relevant investigative materials. The United States made clear that it was unwilling to meaningfully afford LT [REDACTED] the rights provided to her by the Mil. R. Evid. 412 and 513.

When the Military Judge denied LT [REDACTED] request for investigative materials relevant to the motions made under Mil. R. Evid. 412 and 513, she validated the United States' position and deprived LT [REDACTED] of right to receive meaningful notice and to be afforded a meaningful opportunity "to be heard." This left LT [REDACTED] to prepare to and actually exercise her opportunity "to be heard"—to present facts and legal argument to the court—armed

⁴ No other form of notice was provided to LT [REDACTED] or required by the military judge.

with only the marginal, and biased, information that the Parties chose to include in their motions.

This deprivation was most clear when the Military Judge ruled that evidence of an alleged flirtatious and consensual encounter between the Accused and LT ■■■ was admissible at trial under an exception found in Mil. R. Evid. 412. The Defense and United States did not submit any evidence or call any witnesses in support or opposition of the admissibility of this evidence. With nothing before the Military Judge establishing that such an encounter even took place, LT ■■■ testified under oath that no such encounter occurred. The Military Judge, however, accepted the proffers of both Defense Counsel and Trial Counsel that the Accused testified under oath to such an encounter at the Article 32, UCMJ investigation.⁵

⁵ The parties and the military judge referenced a previous Article 39(a) or R.C.M. 802 conference where they discussed this evidence. Neither LT ■■■ nor ■■■ counsel were present for this and have no knowledge of the substance of the statements made by the parties and the military judge. Although a military judge is not asked to determine if evidence offered under Military Rule of Evidence 412 is true, a proffer by a party is not evidence. *See, e.g., United States v. Thompson*, 29 C.M.R. 68, 71 (C.M.A. 1960); *United States v. Alexander*, 32 M.J. 664, 667 n.3 (A.F.C.M.R. 1991) (stating counsel and judges must be careful to establish a proper factual basis for evidentiary rulings). "To overcome the prohibition of Mil. R. Evid. 412, the defense must establish a foundation demonstrating constitutionally required relevance, such as 'testimony proving the existence of a sexual relationship that would have provided significant evidence on an issue of major importance to the case. . . .'" *United States v. Carter*, 47 M.J. 395, 396 (C.A.A.F. 1997) (citing *United States v. Moulton*, 47 M.J. 227, 229

LT ■ did not receive meaningful notice and was not afforded a meaningful opportunity "to be heard" prior to this ruling. Neither LT ■ nor ■ counsel was provided an opportunity to review the Accused's sworn testimony prior to the Military Judge making her ruling. Neither LT ■ nor ■ counsel was permitted an opportunity to review statements of witnesses who were present at the house when the XXXXXXXXXXXXXXXXXXXX took place to determine if such witnesses corroborated the Accused's version of events. To be clear, neither LT ■ nor ■ counsel was provided anything other than mere proffers of counsel that would support a finding that such an encounter took place (or did not take place). Unlike the parties, who presumably had access to the entire NCIS report of investigation and Article 32 investigation report and transcript for many months, LT ■ was left to present facts and legal argument to the Military Judge

(C.A.A.F. 1997)). Similar to this case, in *Carter*, the alleged victim testified at an Article 39(a) session and disputed the defense proffer of evidence under Military Rule of Evidence 412. The defense did not call any witnesses to support its proffer. CAAF found, "[i]n these circumstances, and in view of the denial of the prosecutrix, we hold that the military judge did not abuse his discretion in finding that appellant failed to establish a sufficient foundation to demonstrate that the evidence was constitutionally required to be admitted under Mil. R. Evid. 412." *Id.* at 397. Even though the evidence at issue in this court-martial fell likely falls under the exception contained in Mil. R. Evid. 412(b)(1)(B), the evidence is still subject to the relevancy requirement and balancing tests under Mil. R. Evid. 401 and 403.

based solely on the marginal and bias information contained the pleadings.

Similarly, LT [REDACTED] was deprived of her opportunity "to be heard" on the Defense motion to produce LT [REDACTED] mental health records under Mil. R. Evid. 513. Again, the Trial Counsel presented no evidence to support opposing the Defense motion. The Defense produced a single document at the hearing that allegedly documented LT [REDACTED] prescription medications at the time of the alleged sexual assault and argued that it supported reasonable grounds that LT [REDACTED] may suffer from serious mental disorders. Neither LT [REDACTED] nor [REDACTED] counsel was provided any investigative materials related to how and under what circumstances this record was obtained or with relevant witness statements to LT [REDACTED] behavior that would indicate whether or not she did or did not suffer serious mental disorders at the time of the alleged offenses or when she made her report to authorities.⁶

The Military Judge deprived LT [REDACTED] of meaningful notice and a meaningful opportunity "to be heard" and demonstrated a lack of fairness and respect for LT [REDACTED] dignity and privacy when she

⁶ LT [REDACTED] may, of course, conduct her own thorough investigation into the facts and circumstances alleged by the parties in their pleadings. In this case, LT [REDACTED] would have had to seek to interview the Accused and re-interview numerous party-goers, duplicating much of the work already performed by trained investigators.

failed to order disclosure of relevant investigative materials. Although LT [REDACTED] and VLC were present during a hearing, LT [REDACTED] was the only participant in the courtroom who did not have access to relevant investigative materials.

Conclusion

LT [REDACTED] did not create the military justice system; nor did [REDACTED] cause the events that forced the system upon [REDACTED]. [REDACTED] is simply asking that the rights afforded to [REDACTED] under the military justice system have meaning. LT [REDACTED] therefore asks this Court to issue a stay of the trial proceedings in the general court-martial of *United States v. [REDACTED]*, to set aside the Trial Court's rulings of December 16, 2013, made under Mil. R. Evid. 412 and 513, and to direct the Trial Court to provide LT [REDACTED] investigative materials relevant to the motions made by the Parties under Mil. R. Evid. 412 and 513. Only then, will [REDACTED] be afforded [REDACTED] right to receive meaningful notice and to be afforded a meaningful opportunity "to be heard."

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Certificate of Filing and Service

I certify that a copy of the foregoing writ petition was filed with the Court in accordance with Rule 5.2 at NMCCAOJAGCODE07@navy.mil and electronically served by email on the Military Judge, LT [REDACTED]—through his Trial Defense Counsel and by facsimile the Appellate Defense Division and Appellate Government Division on January 3, 2014.

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Prior to the scheduled motion session, VLC submitted a "Motion for Materials Necessary to Exercise Substantive Legal Rights on Behalf of [LT] ██████" seeking copies of LT ██████ statements to Naval Criminal Investigative Service agents, LT ██████ testimony at the Article 32, UCMJ, pretrial hearing in the subject case, a copy of the charge sheet and "other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime." *Id.*, Appendix P at 7-8. The stated purpose of the request is so that LT ██████ and VLC may be meaningfully informed and therefore exercise "[LT ██████] substantive legal rights to 'confer' with government counsel and be 'heard' by the court" *Id.*, Appendix P at 9. The Government opposed VLC's motion, arguing that the Rules for Courts-Martial afforded LT ██████ no entitlement to the requested information; furthermore, since LT ██████ had been provided copies of the defense motions and was appearing at the Article 39a session via video-teleconferencing (VTC), she received the notice and opportunity to be heard afforded by MIL. R. EVID. 412 and 513. *Id.*, Appendix Q at 1-2.

On 16 December 2013, the Respondent, Lieutenant Colonel ██████ USMC, heard VLC's motion to compel production, and the defense MIL. R. EVID. 412 and 513 motions. VLC and LT ██████ appeared via VTC. Petition at 7. After hearing argument, the Respondent denied VLC's motion, citing a failure to demonstrate necessity for the requested information. However, the Respondent ordered the Government to provide VLC with a copy of the charge sheet. *Id.* at 8. After next hearing the defense MIL. R. EVID. 412 motion, the Respondent ruled from the bench allowing certain evidence to be admitted at trial and made several other rulings pertaining to the remaining evidence sought under MIL. R. EVID. 412. *Id.* at 9. Finally, after hearing the defense motion for discovery under MIL. R. EVID. 513, the Respondent ordered, over the VLC's objection, the production of LT ██████ mental health records no later than 27 December 2013 for an *in camera* review. *Id.* at 9-10.

Also on 16 December 2013, VLC requested via email copies of the Respondent's written rulings and findings of fact on the VLC's motion to compel production, and the defense MIL. R. EVID. 412 and 513 motions. *Id.*, Appendix T. That same day, the Respondent replied to VLC via email that "██████ will not do written rulings." *Id.* On 26 December 2013, VLC requested that the Respondent delay her *in camera* review of LT ██████ mental health records in order to provide VLC and LT ██████ an opportunity to pursue relief through a Writ of *Mandamus* to this Court. *Id.*, Appendix U. The following day, 27 December 2013, the Respondent

replied to VLC that she had already received and reviewed *in camera* the requested records. *Id.*, Appendix V. On 30 December 2013, the Respondent issued an order for an *Ex Parte* Article 39a session to be held on 6 January 2014, because "the court has determined portions of the [mental health records of LT ■] are relevant and should be released to defense counsel. However, there are other portions of the records that this court will allow [LT ■] and [VLC] to be heard on, prior to making a determination regarding releasing the privileged information." *Id.*, Appendix W.

VLC, on behalf of LT ■, now requests that this Court: 1) issue a Stay of Proceedings in the subject case; 2) set aside the Respondent's rulings of 16 December 2013 on the defense MIL. R. EVID. 412 and 513 motions; and 3) issue a Writ of *Mandamus* directing the Respondent to order production to VLC and LT ■ of "investigative materials relevant to the motions and responses made by the Parties under Mil. R. Evid. 412 and 513." *Id.* at 1.

Based on the foregoing, it is, by the Court, this 8th day of January 2014,

ORDERED:

1. The proceedings in the subject case are hereby **STAYED** under further notice of the court;
2. That the United States shall provide to the court an authenticated transcript of the proceedings to date on or before 22 January 2014;
3. That, the Respondent shall, on or before 22 January 2014, provide this Court with written findings of fact and conclusions of law on the defense MIL. R. EVID. 412 and 513 motions, unless findings of fact and conclusions of law were made orally on the record and included in the transcript of proceedings.

For the Court

R.H. TROIDL
Clerk of Court

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NMCCA (51.2)



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responses made by the Parties under MIL. R. EVID. 412 and 513" is hereby **DENIED**.

For the Court

R.H. TROIDL
Clerk of Court

Copy to:
NMCCA (51.2)

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