

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES

v.

A1C Nicholas E. Daniels
49 Civil Engineering Squadron
Holloman AFB, NM

)
)
) JUDICIAL RULING: STANDING
) OF SPECIAL VICTIM'S
) COUNSEL
)
) 29 January 2013
)

FACTS

1. Airman First Class (A1C) Daniels (hereafter the accused) is charged with two specifications of violating Uniform Code of Military Justice (UCMJ) Article 120. The government specifically alleges that on or about, on 13 August 2012, the accused forcibly committed sexual acts upon [REDACTED]. Both specifications were referred to trial by General Court-Martial on 28 November 2012.

2. On 22 January 2012, Captain (Capt) Seth Dilworth was appointed Special Victims' Counsel (hereafter SVC). Capt Dilworth is assigned to the Cannon AFB, Office of the Staff Judge Advocate. On or about 23 January 2012, SVC informally motioned this court for specific relief. This court ordered Capt Dilworth to formally note his appointment and inform the court of his intention to appear on behalf of [REDACTED].¹

3. The SVC motions this court to grant him standing to represent [REDACTED] to motion this court for various reliefs including the production of documents and to represent [REDACTED] in pretrial motions hearing involving alleged prior consensual sexual acts under Military Rule of Evidence (MRE) 412 or other applicable military rules of evidence hearings. The government does not oppose the SVC appearing on behalf of [REDACTED] but opposes the SVC providing legal arguments to the Court during such hearings. The defense opposes any appearance of the SVC in the trial.

4. One purpose of the SVC program is, among other purposes, to preserve the dignity of victims of sexual assault, as well as advance and protect the rights of victims of sexual assault committed by personnel assigned or attached to the Department of the Air Force.

5. There is, at present, no rule of professional responsibility or regulation prohibiting the SVC from assisting the trial counsel to perfect the government's case against the accused.

6. There is no discernable difference between the government's trial strategy and [REDACTED] interests. Thus, this court-martial finds that there is a close alignment between the SVC and trial counsel.

¹ For ease of reading this ruling, Trial counsel (hereafter government) and Special Victim's Counsel (hereafter SVC) are distinguished.

LAW AND ANALYSIS

1. There are four issues before this court-martial. These issues, though interrelated, are also severable as follows:

- a. Does [REDACTED] through the SVC have standing to motion this court for relief in the production of documents?²
- b. Does the SVC have standing to represent [REDACTED] during applicable hearings arising from the Military Rules of Evidence at trial?³
- c. If the SVC has standing for either (a) or (b), on what party does the burden of proof fall?
- d. If the SVC has standing for either (a) or (b), what are the ramifications to the accused's rights to a fair trial?⁴

If this court-martial finds that the SVC has standing to represent [REDACTED] (or in the alternative [REDACTED] as standing to be represented by a counsel under either (a) or (b)) as asserted, this court, in the exercise of its discretionary authority must determine if it should, in the interests of a fair trial, permit the SVC to motion this court for any relief.

I: RIGHTS OF AN ACCUSED TO A FAIR TRIAL

2. This court-martial will review these four issues within the axiom that courts sit, not to pass judgment on the wisdom of a statute, and by implication a regulation or military policy, but rather whether the statute, regulation, or policy comports with the rights of an accused.⁵ Those rights, as noted by the Court of Appeals for the Armed Forces in *United States v. Romano*, 46 M.J. 269, 274 (CAAF, 1997), are: the Constitution, followed by the Uniform Code of Military Justice, the Manual for Courts-Martial, departmental regulations, service regulations, and the common law. While a lower source on the hierarchy may grant additional or greater rights than a higher source, those additional rights may not conflict with a higher source. *Id.*

3. The right to a fair trial is enumerated in the Sixth Amendment to the United States Constitution. See e.g. *Strickland v. Washington*, 104 S.Ct 2052, 2063 (1984); *Gillmore v. Taylor*, 508 U.S. 333 (1993); and, *Estelle v. Smith*, 451 U.S. 454 (1981); The Amendment reads in full:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence

² This court is not commenting on the authority of the Secretary of the Air Force to enact a regulation requiring a staff judge advocate or trial counsel to provide an SVC with all copies of motions and attachments submitted to the court, prior to trial. Additionally, from this point forward the issues of standing before the court will be captioned as the SVC standing, even though it is [REDACTED] who may assert standing through the SVC.

³ (a) and (b) are sufficiently related so that the analysis on standing applies to each

⁴ Because of the court's belief that the implications of the right to an independent and impartial judge are also present, this court has taken the unusual step of an expanded analysis beyond defense counsel's response.

⁵ See e.g. statement of Chief Justice Roberts in *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services et al.*, ___ U.S. ___ (2012).

4. An accused also has the right to an impartial military judge, which encompasses the appearance of impartiality. See e.g. *United States v. Martinez*, 70 M.J. 157 (CAAF, 2011); also, *United States v. Butcher*, 56 M.J. 87 (CAAF, 2001); and *United States v. Kincheloe*, 14 M.J. 40 (CMA, 1982). This court is concerned with the right to an impartial judiciary in appearance. Although this right is not expressly enumerated in the Sixth Amendment, it is nonetheless a matter of Constitutional importance. See, *United States v. Taylor*, 47 CMR 445 (ACMR, 1973). While it is true that in military case law, impartiality is generally concerned where a military judge makes extrajudicial comments unfavorable to an accused, makes comments unfavorable to either party before the trier of fact, or engages in a relationship which brings the judge's impartiality into question, it is also true that a judge cannot exist as an advocate for the prosecution, a victim, an accused, or a policy. See e.g. *United States v. Conley*, 4 M.J. 327 (CMA, 1978).

II: STANDING OF SVC TO REPRESENT A VICTIM

5. The right to be heard, as noted below, in analyzing the MREs, is traditionally limited to a person making their opposition to an act known, and doing so, in laypersons terms. Standing though, for the purpose of this ruling denotes the right to present an argument of law before a court, which is fundamentally different than the opportunity to be heard. An argument of law encompasses motioning the court to compel the government to produce documents. Although no appellate decision exists governing standing in the context of "the right to be heard" within a rule of evidence, the general principle of standing is far narrower than the right to be heard; it is the right to advance a legal argument.⁶ See e.g. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) [citizen standing non-existent over congressmen serving in the reserves]; *Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004) [standing means the assertion of rights]; *United States v. Salvucci*, 448 U.S. 83 (1980) [possessor of a seized item must have a legitimate expectation of privacy in the item to assert standing]; and *Hatch v. Reardon*, 204 U.S. 152 (1907) [Standing denotes a constitutional right]. Concededly *Schlesinger*, *Kowalski*, and *Salvucci* do not advance a specific holding to the instant issue, but broadly each decision clearly equates standing, to the right to advance a legal argument. Congress could have certainly provided for statutory standing in the applicable rules of evidence, but has not done so.⁷

6. Standing, particularly third party standing, has been noted as an increasingly complex issue for the courts, but this is so particularly in civil trials. Several commentators have advanced theories of third-party standing in criminal jurisprudence, lamenting that there is, at present, no venue for third party standing for victims in criminal trials; or, have explained the reasons why no such standing currently exists. See Tania Tetlow, *Granting Prosecutors Constitutional Rights*

⁶ If this court denied [REDACTED] the right to personally appear and be heard in a pretrial hearing under MRE 412 or 513, she would have standing to appeal the denial. But this is not the issue before this court.

⁷ Though not directly stemming from the issue of standing, there may also be a constitutional infirmity to permitting a third party, whether an SVC or other non-enumerated party to speak on behalf of a victim. The Confrontation Clause may very well apply in an MRE 412 or an MRE 513 hearing, because the right to be heard equates to the right to testify. Concededly, the Court has been silent on the right to be heard being coupled with the right to confront. Yet, such hearing could be deemed a critical stage of a trial. See e.g. *United States v. Wade*, 388 U.S. 218, 224 (1967) [line-up a critical stage of trial.] See also, e.g., *Pointer v. Texas*, 380 U.S. 400 (1965): "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal".

to Combat Discrimination, *Jour. Const. Law*, 1117-1149 (2012); and, Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in all the Wrong Places*, 2239-2264 (1999); also, Harold Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 *Am. U. L. Rev.*, 275-293 (1989); and, Henry P. Monaghan, *Third Party Standing*, *Columbia L. Rev.* 277-316 (1984). It would be a significant departure from courts-martial jurisprudence or, for that matter, American criminal law jurisprudence, to permit a third party to advance a legal interest against an accused or defendant at trial. From the nation's founding, the authority to prosecute has vested solely in the government. See Monaghan, *infra*.

7. It is true that the media possesses standing to motion a court as a third party, but the right to a public trial is the public's right as well as the accused and this is a right specifically enumerated in the Sixth Amendment. See e.g. *United States v. Harvey*, 64 M.J. 13, 20 (CAAF, 2006); and *United States v. Berry*, 16 CMR 842 (CMR 1954). It is also true that the Court has held that sentencing proceedings are not trials within the meaning of the Sixth Amendment. See e.g. *Walton v. Arizona*, 497 U.S. 639 (1990); and *Martin v. Ohio*, 480 U.S. 228 (1987). Thus it should not be of surprise that a victim might be afforded certain statutory standing rights in sentencing hearings, which are not present in findings.

8. The SVC, with the government in support, cites this Court to 18 U.S.C. 3771 et seq. Known as the Crime Victim's Rights Act, to date, no military court of appeal has considered the application of 18 U.S.C. 3771 to courts-martial. This may be because most of the challenges to 18 U.S.C. 3771 appear to originate from United States District Courts limiting the ability for victims to testify in sentencing proceedings. Courts-martial sentencing proceedings are fundamentally different from federal trials. But see *Walsh v. Hagee*, ___ F.Supp.3d 2012 (DC DC 2012), in which the United States District Court for the District of Columbia infers that this act is applicable to the military. *Id.*, at 8. Thus, this court shall consider the statute as partly applicable and partly providing definition to the instant issue insofar as it is read in tandem with below noted regulations. 18 U.S.C. 3771 reads, in pertinent part:

(a) Rights of Crime Victims.— A crime victim has the following rights:

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case...

(b) Rights Afforded.—

(1) In general.— In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

9. 18 U.S.C. 3771 does not explicitly provide a victim the right to be represented by counsel at any pretrial hearing. Nonetheless, this court will conduct its analysis as though the expressed legislative intent applies to this end.

10. The SVC also cites this court to Air Force Guidance Memorandum (AFGM) 51-504, dated 21 January 2013 to Air Force Instruction (AFI) 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, dated 27 October 2003. AFGM 51-504 established the Air Force Special Victim's Counsel. Para. 1.2.9, permits an appointed SVC to represent a client in a court-martial or administrative proceeding. The rule does not appear to limit representation to instances where the client is an accused or the client is the respondent or subject in an administrative proceeding. AFGM 51-504 places no requirement on a court-martial to favor the admission of an SVC to third-party standing. The AFGM is silent on the subject of mandatory third-party standing.

11. The SVC additionally cites this court, for admittedly limited purposes, to the "Special Victim's Counsel Rules of Practice and Procedure," dated 24 January 2012. Although these rules, which have no precedential or regulatory effect on courts-martial state⁸:

a. The SVC program does not increase a victim's standing in court-martial hearings and other military justice proceedings beyond the standing victims are currently afforded under existing law and rules (e.g., evidentiary hearings under MREs 412, 513, and 514). The SVC program will provide organic counsel from the AF JAG Corps, vice limiting victims to hiring private civilian counsel, who often lack experience in military matters and practice under the UCMJ. Victims, whether represented by SVC or civilian counsel, are not parties to a court-martial under RCM 103 and do not have the same entitlements as parties under the UCMJ.

b. Rule 4.1. *Advocacy During Military Justice Process* states:

SVC may advocate a victim's interests to any actor in the military justice process, including, but not limited to, commanders, convening authorities, the SJA, TC, the accused's MDC, and, to the extent authorized by the MCM, military judges. This includes matters in which the government is required to consult with the victim under federal law and areas delineated in the SVC Charter.

c. Rule 4.6. *Standing under the UCMJ* states:

Victims, whether represented by SVC or civilian counsel, are not parties to a court-martial under RCM 103 and do not have the same entitlements as litigation parties under the UCMJ.

UCMJ Proceedings. MREs 412, 513, and 514 afford victims a reasonable opportunity to attend these evidentiary hearings and be heard. SVCs may represent victims in these and

⁸ For an agency to be bound by a regulation, it must first promulgate the regulation within its internal rules and conduct its action in full compliance with those rules. On this point see e.g. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954); See also the general rule applied to the Military Establishment, "A government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties and interests." *United States v. Dunks*, 24 USCMA 71, 51 C.M.R. 200, (1976). See particularly, *Harmon v. Brucker*, 355 U.S. 579 (1958). Air Force regulations are governed by AFI 33-360, *Publications and Forms Management*, and there is no indication that the SVC rules apply to courts-martial, or have been promulgated in compliance with AFI 33-360 to that effect. There is no express statement in the AFGM that mandates third party standing.

other UCMJ proceedings where victims are afforded standing, as permitted by the presiding military judge.

12. Even if the SVC rules were to be read alongside of the AFGM and 18 U.S.C. 3771, there is little precedential weight in either the rules or the statute to the question before this court-martial based on the plain reading of the Military Rules of Evidence.

13. Military Rule of Evidence (MRE) 412 is silent in its entirety as to whether a person considered as a victim may be represented by counsel in an admissibility or discoverability hearing. MRE 412 reads in pertinent part:

(c) Procedure to determine admissibility.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

14. MRE 513 is likewise silent in its entirety as to whether a person considered a victim may be represented by counsel in an admissibility or discoverability hearing. MRE 513 reads in pertinent part:

(e) Procedure to determine admissibility of patient records or communications.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court - martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

15. MRE 514 is likewise silent in its entirety as to whether a person considered a victim may be represented by counsel in an admissibility or discoverability hearing. MRE 514 reads in pertinent part:

(e) Procedure to determine admissibility of victim records or communications.

(1) In any case in which the production or admission of records or communications of a victim is a matter in dispute, a party may seek an interlocutory ruling by the military judge.

(2) Before ordering the production or admission of evidence of a victim's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the victim, and offer other relevant evidence. The victim shall be afforded a reasonable opportunity to attend the hearing and be heard at the victim's own expense unless the victim has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court - martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

16. To support the contention that an SVC has the legal authority to serve as a third-party representative, the SVC cites, in addition to the authorities previously noted, *inter-alia*: *Powell v. Alabama*, 287 U.S. 45 (1932);⁹ *Gravel v. United States*, 408 U.S. 606 (1972); and, *Kenna v. District Court*, 435 F.3d 1011 (CA 9, 2006)¹⁰. For reasons further elaborated below, reliance on each of these three decisions is misplaced.

17. In *Warth v. Selden*, 422 U.S. 490 (1975), the Court held that the doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Id.*, at 498. It is true that federal courts have permitted third parties to move to quash grand jury subpoenas directed to another person where a litigant has sufficiently important, legally-cognizable interests in the materials or testimony sought to give the litigant standing to challenge the validity of that subpoena. *See, e.g., Gravel v. United States*, 408 U.S. 606 (1972). However, narrowly, third party standing is typically only recognized in courts-martial when constitutional issues such as the right to a public trial is limited by the government, and a third party contests a limitation on the public's right to an open trial, or when the holder of a business record contests the necessity of expending funds for a custodian to travel to trial. *See e.g. ABC v. Powell*, 47 M.J. 363 (CAAF 1997).

18. To date, the Court has never granted third party standing to protect the equal protection rights of victims. Instead, the Court has enabled prosecutors to assume the role of protecting the interests of victims. Private parties, including victims, have no legally cognizable interest in the prosecutorial decisions of the federal government. What the SVC is advancing is more along this line of analysis, than a simple "right to be heard" through a third party, in particular a representing counsel of a victim. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); and *Diamond v. Charles*, 476 U.S. 54 (1986):

a. In *Linda R.S. v. Richard D.*, the Court found that a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of others. Thus, if a state

⁹ Although the SVC misnames this decision as *Powell v. State*, the citation is correct and this court will conduct its analysis through the citation, rather than case-name.

¹⁰ The full name of this decision is *Keim v. United States District Court for the Central District of California*

refuses to prosecute a father delinquent in child support payments, even though a child may suffer harm, neither the mother of the child, nor the child has standing in federal court to force the state to enforce its own statutes. *Linda R.S.*, 410 U.S., at 618

b. In *Diamond v. Charles*, admittedly a multi-faceted decision, Eugene F. Diamond, a physician opposed to abortion, sued the state of Illinois to enforce its statutes which restricted abortion services and criminalized certain violations. Because Illinois had not conducted any prosecutions for relevant statutory violations, as a result of a lower court decision finding the statutes unconstitutional, the Court held Diamond lacked standing to enforce the state to enforce its statute. *Diamond*, 476 U.S., at 64.

19. The basic principle of law regarding privileges, is that non-constitutional privileges are to be narrowly construed. See e.g. *In re Grand Jury Subpoena*, 662 F.3d 65 (CA 1, 2011) [attorney-client privilege given narrow construction]; and *United States v. Banks*, 556 F.3d 967 (CA 9, 2009) [Marital privilege applied narrowly because broad extension obfuscates truth seeking function of trial]. MRE 412 and MRE 513 make no provision under the "right to be heard" to include the right to be heard through third parties, or by legal counsel.

20. *Gravel v. United States*, cited by SVC, involved more than a question of standing. 408 U.S., at 608 f.n. 1. The decision involved the twin issues of separation of powers and legislative privilege, components critical to the Constitutional efficacy of government. The central issue in *Gravel* was not one of third-party standing, but rather, whether a senator's aide was immune from prosecution if the aide acted at the behest of the senator, and in concert with the senator's duties. Because there was a significant question of whether a senator and his or her aide could be considered as one person under a legislative privilege, the Court granted review. The Court accepted that a legislator could intervene as a third-party to quash a grand jury subpoena, on the basis of this question. The decision originated from Senator Michael Gravel's act of reading aloud portions of what had become known as "the Pentagon Papers," during a public works subcommittee hearing on June 29, 1971. Senator Gravel's conduct was protected in the plain text of the Constitution in what is known as "the Speech and Debate Clause," but he went beyond Congress and arranged for the papers to be published by the Beacon Press, a commercial publishing firm in Boston. In response, the Justice Department sought indictments for "gathering and transmitting defense information" as well as the unauthorized conversion of public records against Gravel's aides who participated in the transaction. Both offenses were codified in the United States criminal code and perhaps chargeable against the aides, but not chargeable against a senator. The lower courts ruled that the Constitution protected only what had occurred in a committee hearing, but not the republication of documents in a commercial press. The lower courts disagreed with the Justice Department that a senator's aide and the senator were different entities, even when in committee. In its decision, the Court noted that Senator Gravel's conduct in committee was constitutionally protected, as was that of his aide. However, the transference of government documents to a commercial printing house was not protected from a grand jury indictment.

21. *Powell v. Alabama*, also cited by the SVC is of no application in the instant issue. Perhaps one of the more important decisions in American jurisprudence, in *Powell*, the Court, in reviewing the trial and death sentences of the "Scottsboro Boys," held that because the trial judge pushed unprepared defense counsel to trial, this served to deny the defendants effective

representation.¹¹ Customarily, the federal judiciary had denied appellants *habeas* from state appeals, but the conditions of the trial in question, to include a mob atmosphere in a region rife with lynching, an initial refusal of local attorneys to represent African-American defendants, and an out of state counsel pushed into trial by a judge, before defense counsel could investigate the crime, constituted the issue before the Court. Although the Court did not directly rule on the conditions under which the "Scottsboro Boys," were prosecuted, the Court acknowledged that an angry white mob acted to intimidate defense counsel as well as potential defense witnesses and thereby subverted due process.¹² *Powell* began a line of counsel competency decisions, most notably, *Strickland v. Washington*, 466 U.S. 668 (1984). *Powell* only applies to an accused's right to prepared competent counsel. The SVC concedes that *Powell* provides dicta, but is not on point to the instant issue. However, in analyzing the instant issue, *Powell* provides no dicta, and the decision does not apply to a third party's right to be represented in a criminal hearing.

22. *Kenna v. District Court*, cited by the SVC, applies 18 U.S.C. 3771 to sentencing proceedings. It does not state that that the right to be heard means to be heard through counsel. Indeed, the issue in *Kenna* was whether a district court's limitation of victim statements in sentences to written submissions violated the right to be heard. The appellate court found that in the absence of legislative history, the district court's limitation was reasonable, but after reviewing the legislative history of the statute, the court determined that the right to be heard, meant the right to speak. *Kenna*, 435 F.3d., at 1016

III: BURDEN OF PERSUASION

23. Defense Counsel concedes that as the moving party, he bears the burden of persuasion. Nonetheless, this court believes it paramount to provide the following analysis. Assuming this court, and the SVC are in error on the question of standing, as previously noted, 18 U.S.C. 3771 creates a burden on an opponent of the rules' application in a trial, that is, the enablement of a victim to attend all court proceedings or other relief within the rules, to establish by "clear and convincing" evidence that the enablement of the rules would cause the witness' testimony to be materially altered. This burden shift, does not comport with due process. See e.g. *Mulaney v. Wilbur*, 421 U.S. 684 (1975) [burden shifting generally unconstitutional]. It is true that the Court has found the shifting of burdens to standards less than beyond a reasonable doubt constitutional in some exceptional instances, See e.g. *Clark v. Arizona*, 548 U.S. 735 (2006), these instances stem from defenses such as mental incapacity or insanity. In the instant case, it is the government's key witness, through the SVC who is asserting a right. To require the accused, or by implication a court, to find by clear and convincing evidence that the accused would not suffer prejudicial harm and not the moving party would have little parallel in jurisprudence.

IV: COURT'S EXERCISE OF ITS DISCRETIONARY AUTHORITY

24. Nonetheless, even if the shifting of the burden is to an accused or another party, the accused has met this burden. "Clear and convincing," has been defined as "evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence

¹¹ For a pertinent analysis of the Court, in establishing the paramount consideration of the right to counsel instead of concentrating on the effect of a racist mob influencing the courtroom proceedings in *Powell*, See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY, 124-132 (2004)

¹² *Id.*

beyond a reasonable doubt, the norm for criminal trials.” See e.g., *United States v. Goba*, 220 F.Supp 2d. 182 (WDNY, 2002), citing to Black’s Law Dictionary. See also, *United States v. Staten*, 466 F.3d 708 (CA 9, 2006). Based on the potential harm to the accused, this court finds that by clear and convincing evidence, the SVC has no standing to represent the interests of [REDACTED] in the instant court. Additionally, the public view of the fairness military justice system, in regards this court court-martial, and in particular, that of an impartial judiciary would be undermined by permitting the stacking of two parties to the trial, the government and the SVC, to argue evidentiary matters against the accused’s interest.

25. It is true that military judges, as established in the Military Justice Act of 1968 have evolved to bear some comparability, albeit within the limited jurisdiction of courts-martial, to United States District Court judges. See e.g. *Weiss v. United States*, 510 U.S. 163, 175-176 (1994). It may be argued that as commissioned officers, military judges are subject to regulations and orders, and therefore must give deference to those regulations or orders. Such an argument has little basis. Long, prior to the Military Justice Act of 1968, Colonel Winthrop, in his treatise, *MILITARY LAW AND PRECEDENTS* made clear that while a court martial exists as an instrument of the Executive Branch, it nonetheless must comport with the laws, to include, by implication, due process. WINTHROP, *MILITARY LAW AND PRECEDENTS*, 21-50 (2d, 1920).

26. In the instant issue, it is clear that the government and the SVC are at least impliedly aligned, particularly in the opposition to the use of evidence under MRE 412. It may be in other trials that the SVC and the trial counsel are not sufficiently in tandem, and if the SVC were to seek the court to compel to the government to accomplish its duties within the AFGM, assuming the SVC had standing to do so, this court might rule the SVC eligible to represent a victim in the Court. Nonetheless, the prospect of an accused having to face two attorneys representing two similar interests are sufficiently antithetical to courts-martial jurisprudence and would, this court finds by a clear and convincing evidence, if permitted, cause a significant erosion in the right to an impartial judge in appearance or a fair trial.¹³

CONCLUSION

This court readily recognizes that the goal of ensuring that the rights and dignity of victims of sexual assault, perpetrated by uniformed service-members and Departmental personnel, are protected is important. Nonetheless, the achievement of these goals remain subject to the legal limits on third-party standing. And, even if third-party standing exists as advanced by the SVC, this court finds that in the instant case, the recognition of third party standing would undermine the appearance of an impartial judiciary charged with the duty of maintaining a fair trial. WHEREFORE, the SVC motion to grant standing is DENIED, and if the court is in error, the SVC motion is DENIED per the court’s discretionary authority.

Although this court has denied the relief sought by [REDACTED] through SVC, this court believes that it would be remiss in not affording her the opportunity to seek relief through appeal. 18 U.S.C. 3771(d)(3) permits a victim to seek a writ of *mandamus*. *Mandamus* is also permissible writ in military law. See e.g., *Hasan v. Gross*, 71 M.J. 416 (CAAF 2012). Should

¹³ In argument defense counsel asserted that it is perceived “the deck is already stacked” against an accused because, *inter alia*, Article 25 permits the convening authority to choose members and the existence of timelines on the accused to get to trial. This court does not share those views, and believes that courts-martial rules fully comply with due process and in appearance. Nonetheless, it is the departure from those rules which may undermine the appearance.

██████████ seek relief through mandamus, this court will honor her right to do so. In reviewing *Kenna*, cited *infra*, it is clear that Congress intended that the courts of appeal would provide expedited review where a district court limits a victim's statutory right under 18 U.S.C. 3771. *Kenna*, 464 F.3d., at 1018.



JOSHUA E. KASTENBERG, Lt Col, USAF
Military Judge

From: [REDACTED] [_AFLOA/JAT](#)
To: [REDACTED] [_Capt USAF PACAF AFLOA/ADC](#); [REDACTED] [_Capt USAF HAF AFLOA/SVC](#)
Cc: [REDACTED] [_Maj USAF PACAF AFLOA/ADC](#); [REDACTED] [_Capt USAF PACAF 18 WG/JA](#); [REDACTED] [_Capt USAF PACAF 18 WG/JA](#); [REDACTED] [_TSgt USAF PACAF AFLOA DET OD7B/ADC](#); [REDACTED] [_SSgt USAF PACAF AFLOA/SVC](#); [REDACTED] [_Capt USAF PACAF AFLOA/JAIG](#)
Subject: RE: US v A1C [REDACTED] - MRE 412 Notice
Date: Wednesday, October 09, 2013 12:24:51 PM

Defense Counsel,
Your motion below is denied.
Provide the SVC with the 412 Motion.

-----Original Message-----

From: [REDACTED]
Sent: Wednesday, October 09, 2013 10:22 AM
To: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Subject: RE: US v A1C [REDACTED] - MRE 412 Notice

Your Honor, Trial Counsel, and SVC,
Please find attached Defense response to the SVC's motion.

Thank you,

v/r,
Capt [REDACTED], Capt, USAF
Area Defense Counsel

-----Original Message-----

From: [REDACTED]
Sent: Monday, October 07, 2013 10:10 AM
To: [REDACTED]
[REDACTED]
[REDACTED]
Subject: RE: US v A1C [REDACTED] - MRE 412 Notice

Your Honor,

Attached please find my motion requesting the Defense to provide its MRE 412 Motion to SVC. Please let me know if you have any questions or concerns.

V/r,
Capt [REDACTED]
[REDACTED], Capt, USAF
Special Victims' Counsel
AFLOA/CLSV

Kadena AB, Okinawa, Japan

DSN: [REDACTED]

-----Original Message-----

From: [REDACTED]

Sent: Saturday, September 28, 2013 6:05 PM

To: [REDACTED]

Subject: RE: US v A1C [REDACTED] - MRE 412 Notice

Good Evening Capt [REDACTED],
Please find attached Defense's MRE 412 Notice.
Thank you,

Very respectfully,
Capt [REDACTED]

[REDACTED], Capt, USAF
Area Defense Counsel

Kadena AB, Okinawa, Japan
AFLOA Det QD7B, Bldg 1460
Unit 5214
APO, AP 96368
DSN: [REDACTED]
Comm: [REDACTED]

CONFIDENTIALITY NOTICE: The sender of this electronic transmission is a military defense counsel. This electronic transmission may contain confidential information meant to reach only the intended recipient. It may contain confidential information, attorney work-product, or information protected under the attorney-client privilege. This information is protected from disclosure under the Freedom of Information Act, 5 USC 552, the Privacy Act, 5 USC 552a, Military Rules of Evidence, and other applicable privacy laws and regulations. Do not release without prior authorization from the sender. If you are not the intended recipient of this transmission or receive this transmission in error, please immediately notify the sender.