22 February 2013

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Respondent,*	)	ANSWER TO ORDER TO SHOW CAUSE
&	)	Misc. Dkt. No. 2013-05
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party in Interest,*	)	
v.	)	
Airman First Class (E-3) L.R.M., *Petitioner.*	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

ISSUES PRESENTED

I.

WHETHER THIS HONORABLE COURT HAS THE AUTHORITY UNDER THE ALL WRITS ACT TO ADDRESS THIS PETITION AND WHETHER THE COURT SHOULD ISSUE A WRIT OF MANDAMUS.

II.

WHETHER THE MILITARY JUDGE CREATED LEGAL ERROR BY DENYING L.R.M. THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHT ACT AND THE UNITED STATES CONSTITUTION.

STATEMENT OF THE FACTS AND HISTORY OF THE CASE

The government accepts Appellant's statement of the facts and history of the case.

ARGUMENT

I.

THIS COURT HAS JURISDICTION TO CONSIDER PETITIONER'S WRIT OF MANDAMUS UNDER THE ALL WRITS ACT, 28 U.S.C. § 1651, AND CASE LAW.

Standard of Review

A writ of extraordinary relief is an extreme remedy and should be granted only in "truly extraordinary circumstances." Rhea v. Starr, 26 M.J. 683, 685 (A.F.C.M.R. 1988). The party seeking mandamus relief has the burden of showing that it has a clear and indisputable right to the issuance of the writ. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953); Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979); Harrison v. United States, 20 M.J. 55 (C.M.A. 1985).

Law and Analysis

This Court is an Article I court with limited jurisdiction that is "narrowly circumscribed." Clinton v. Goldsmith, 526 U.S. 529, 535 (1999). This Court is empowered to issue writs pursuant to the All Writs Act. 28 U.S.C. § 1651(a). The All Writs Act is not an independent grant of jurisdiction, nor does it enlarge the Court's existing statutory jurisdiction. Id.; Goldsmith, 526 U.S. at 535 (internal citations omitted). Rather, the Act provides that "all courts established by Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and

principles of law." Id. The Act requires two separate determinations: first, whether the requested writ is "in aid of" the court's existing jurisdiction; and second, whether the requested writ is "necessary or appropriate." Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008); Goldsmith, 526 U.S. at 534-35.

The precise contours of the phrase "in aid of" have not been well-defined by the courts. In Denedo, however, our superior Court stated that a petition for extraordinary relief is "in aid of" the Court's jurisdiction when the 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. The Supreme Court subsequently affirmed that portion of Denedo: "As the text of the All Writs Act recognizes, a court's power to issue any form of relief – extraordinary or otherwise – is contingent on that court's subject-matter jurisdiction over the case or controversy." United States v. Denedo, 556 U.S. 904, 911 (2009).

A writ petition may be "in aid of" this Court's statutory jurisdiction even though it addresses an interlocutory matter, where no finding or sentence has yet been entered in the court-martial. *See, e.g.,* United States v. Lopez de Victoria, 66 M.J. 67, 75 (C.A.A.F. 2008)(Ryan, J., dissenting)(noting that an Article 62 appeal is an interlocutory matter which by its nature

has no finding, sentence, or convening authority action); Courtney v. Williams, 1 M.J. 267, n.2 (C.M.A. 1976); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943). In Dew v. United States, 48 M.J. 639, 645 (A. Ct. Crim. App. 1998) our sister-service Court of Criminal Appeals concluded, "[t]his Court may exercise extraordinary writ authority in aid of our actual or potential jurisdiction." Thus, the United States agrees with Petitioner that this Court may hear interlocutory petitions for extraordinary relief.

The question of whether this Court has jurisdiction to entertain the petition and whether the petition should issue are two very distinct considerations. Under the broad authority granted by the All Writs Act, this Court has jurisdiction over the petition because it is "in aid of" this Court's subject matter jurisdiction.

The current legal controversy, i.e., whether L.R.M. can be heard through her counsel during certain limited evidentiary hearings and to receive any motions or accompanying documents reasonably related to those hearings, arises out of a general court-martial involving an allegation of sexual assault falling within the subject matter jurisdiction of the UCMJ. Although L.R.M. is not a party to the criminal action, the President has afforded certain procedural rights through his delegated authority from Congress through Article 36, UCMJ, to protect her

privacy, which includes providing her a reasonable opportunity to "attend the hearing and be heard." Mil. R. Evid. 412(c)(2) and 513(e)(2). A function of a writ of mandamus is for the superior court to fulfill its supervisory role by deciding whether the subordinate court erred by exceeding its authority in a ruling or decision that is contrary to statute, settled case law, **or valid regulation**. Dew v. United States, 48 M.J. 639, 648 (A. Ct. Crim. App. 1998). As a predicate matter, it is within this Court's supervisory jurisdiction to interpret the legal contours of a victim's rights in the trial proceedings within the very narrow class of evidentiary rules at issue in this case. This case presents a limited question of law, which has resulted from the trial judge's decision to fetter the manner in which L.R.M. may be heard under the rules of evidence. As this Court has previously held, "the exercise of its supervisory authority over the Air Force judicial system extends, at least, to 'cases that may potentially reach this Court.'" San Antonio Express-News v. Morrow, 44 M.J. 706, 709 (A.F. Ct. Crim. App. 1996) (citing Dettinger v. United States, 7 M.J. 216, 220 (C.M.A. 1979)); Fletcher v. Covington, 42 M.J. 215 (C.A.A.F. 1995) (stay issued by CAAF in non-judicial punishment proceedings under Article 15, UCMJ). "As the Air Force's highest tribunal, this Court exercises jurisdiction to supervise 'each trier of the military justice process' to ensure that

justice is done." Id. Moreover, this Court "has a responsibility to ensure that the Air Force system of justice functions fairly, not just in the eyes of all the parties, but also in the eyes of the American public [it] serve[s]." Id. Therefore, this Court has jurisdiction to entertain the petition.

II.

THE VICTIM'S RIGHT TO BE HEARD UNDER MIL. R. EVID. 412 AND 513 ENCOMPASSES THE RIGHT TO BE HEARD THROUGH COUNSEL. THEREFORE, THIS COURT SHOULD GRANT PETITIONER'S REQUEST FOR EXTRAORDINARY RELIEF BECAUSE L.R.M. HAS NO ADEQUATE MEANS TO ATTAIN THE RELIEF SHE DESIRES, THE RIGHT TO ISSUANCE OF THE WRIT IS CLEAR AND UNDISPUTABLE, AND THE WRIT IS NECESSARY AND APPROPRIATE.

Standard of Review

The standard of review described above in Issue I is incorporated herein.

Law and Argument

A writ of mandamus or prohibition is a "drastic remedy . . . [which] should be invoked only in truly extraordinary situations." Murray v. Haldeman, 16 M.J. 74, 76 (C.M.A. 1983) (citing United States v. LaBella, 15 M.J. 228, 229 (C.M.A. 1983)).

> As the writ is one of the most potent weapons in the judicial arsenal, three conditions must be satisfied before it may issue. First, the party seeking issuance of the writ must have **no other adequate means**

> **to attain the relief he desires**-a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is **clear and indisputable.** Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is **appropriate under the circumstances.**

Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 381 (2004) (internal quotation marks and brackets omitted; emphasis added) (quoting Kerr v. United States Dist. Court for Northern Dist. of Cal., 426 U.S. 394, 403 (1976); *Bankers*, 346 U.S. at 384; and Ex parte Fahey, 332 U.S. 258, 260, (1947)).

In Dew v. United States, 48 M.J. 639, 648-49 (A. Ct. Crim. App. 1998), the Army Court of Criminal Appeals developed a structural balancing test for determining whether a writ of mandamus should be issued:

> (1) The party seeking relief has no other adequate means, such as direct appeal, to attain the relief desired;
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal;
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> (3) The lower court's order is clearly erroneous as a matter of law;
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> (4) The lower court's order is an oft-repeated error, or manifests a persistent disregard of federal rules;
>
> (5) The lower court's order raises new and important problems, or issues of law of

first impression.

Petitioners need not satisfy all of these factors; rather, they are intended to be balanced by the courts. Id. at 649.

a. This Court should not impose a lower threshold for issuing writs of mandamus for crime victims.

The United States does not believe this Court should adopt a lower standard to issue petitions for extraordinary relief for crime victims as proposed by Petitioner. (Pet. Br. at 10.) As will be discussed below in Section II.e.3., based on precedent from our superior Court, and absent action by Congress or the President, the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771 (2009), is not applicable to military courts-martial. Therefore, the federal cases cited by Petitioner applying a lower legal threshold for issuing writs of mandamus for crime victims is wholly inapplicable under military law. Even if this Court were to find that the CVRA applies to military courts-martial, this Court would engage in an extreme deviation of military precedent by applying the lower threshold advocated by Petitioner when the law in this area is well settled. Therefore, this Court should apply the traditional test described above for issuing writs of mandamus for crime victims.

b. The issues raised by Petitioner are ripe for adjudication.

The United States acknowledges that a question may exist regarding whether L.R.M., through her counsel, has sufficiently

asserted her rights under Mil. R. Evid. 412 and 513 to render this controversy ripe for adjudication by this Court. *See* United States v. Chisholm, 59 M.J. 151 (C.A.A.F. 2003) (explaining that Article I courts, such as military courts, generally adhere to the prohibition against issuing advisory opinions as a prudential matter). The basis for this question arises from statements made by the victim's counsel during the Article 39(a) session where he declared that he did not intend to make a statement on L.R.M.'s behalf during the evidentiary hearings, but requested the right to do so should the need arise. (R. at 15, 61.) Despite these statements, the United States believes that L.R.M.'s counsel sufficiently asserted her rights and rendered the writ of mandamus ripe for adjudication by subsequently clarifying his position in the motion for reconsideration. In the prayer for relief, L.R.M.'s counsel expressly demands that the military judge reconsider his ruling and "[g]rant [L.R.M.] limited standing to be heard through counsel of her choosing in hearings related to M.R.E. 412, M.R.E. 513, CVRA, and the United States Constitution." (Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, Appendix H.) This assertion by counsel unequivocally demands enforcement of L.R.M.'s rights, to include being heard through counsel, which transforms this issue into a justiciable legal controversy.

c. L.R.M. has no other adequate means to attain the relief desired.

The United States agrees with Petitioner that issuance of the writ is appropriate because no other adequate means exist for her to obtain the relief desired. L.R.M. is not a party to the criminal action; she is only provided limited status to intervene and be heard under Mil. R. Evid. 412 and 513 in the interest of protecting her privacy regarding her prior sexual behavior and privileged communications with her mental health provider. Because the rules of evidence provide her limited status to intervene, she does not have the ability to seek an interlocutory appeal, nor can she assert her rights during normal appellate processing under Articles 66 and 67, UCMJ. Should this Court not entertain Petitioner's request for relief, the issue will be rendered moot after the court-martial has been completed. *But see* Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 603 (1982) (finding an exception to the doctrine of mootness for disputes that are capable of repetition, yet evading review).

d. The trial court's ruling raises a legal issue of first impression in the military justice system; a legal question that will continue to recur.

As has been demonstrated by Appendix C of the petition, The Judge Advocate General of the Air Force has enacted a pilot program which designates Special Victims' Counsel (SVC),

consistent with 10 U.S.C. §§ 1044 and 10 U.S.C. 1565b, to provide legal assistance to crime victims. The parameters of the program are described in the Special Victims' Counsel Rules of Practice and Procedure, dated 24 January 2013, which envision that SVCs may represent crime victims during evidentiary hearings under Mil. R. Evid. 412, 513, and 514, as permitted by the military judge.[1] Rule 4.6. The scope of eligibility for this program includes all Air Force active duty, reserve, and Guard victims who are in Title 10 status, as well as limited representation for adult dependents of Department of Defense service members and service members of other military branches. *See* Rules 1.1-1.5. Consequently, this program will result in the repeated detailing of SVCs to represent crime victims for the purpose of providing legal assistance through the court-martial process. It is reasonably foreseeable that this question will continue to be repeated until a Court of superior authority defines the scope of the SVCs representation during these limited evidentiary hearings.[2] As this is a newly enacted

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[1] The United States recognizes the SVCs' Rules of Practice and procedure are not binding on this Court. The Rules are merely referenced to characterize the SVCs broad scope of representation as envisioned by the pilot program to illustrate the need for resolution of this prevailing question.

[2] This case is representative of the confusion the SVC Program has generated within our military justice practice, considering the Petitioner, the trial counsel, the trial defense counsel, the military judge, and the Appellate Government Division--acting as a representative of the Air Force as a Respondent--have all taken differing positions on a legal issue that would appear to be straightforward, but is deceptively complex. These differing opinions illustrate the need for this Court to exercise its supervisory authority to provide an answer to what has quickly become a controversial

program in the history of the Department of Defense, Petitioner correctly concludes this is a matter of first impression for Air Force courts-martial. Thus, military judges will be left to determine the scope of victims' rights on an ad hoc basis without guidance or oversight if this Court declines to issue the requested writ. All participants in our criminal justice system will benefit from timely guidance from this Court.

e. The lower court's order is clearly erroneous as a matter of law.

1. The right to be heard under the Military Rules of Evidence must encompass the right to be heard through counsel.

The President has provided crime victims who serve as witnesses in military courts-martial a limited right to be heard under Mil. R. Evid. 412, 513, and 514; a right which reasonably includes being heard through counsel to present facts and legal argument.

Military case law has recognized a limited right of intervention in similar circumstances. Military law authorizes interested persons in a criminal proceeding to object to a subpoena compelling witness testimony or production of evidence when compliance is unreasonable or oppressive. *See* United States v. Wuterich, 66 M.J. 685 (N.M. Ct. Crim. App. 2008) (Wuterich I) *overruled by* United States v. Wuterich, 67 M.J. 63

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issue of law that is certain to be repeated.

(C.A.A.F. 2008) (Wuterich II); United States v. Wuterich, 68 M.J. 511 (N.M. Ct. Crim. App. 2009); R.C.M. 703(e)(2)(F). As demonstrated by Wuterich I and Wuterich II, the right of limited intervention in the motion to quash context encompasses the right to be represented by counsel and advocate legal arguments to demonstrate why compliance is not required. These cases also demonstrate the interested party's right to seek a writ of mandamus with military appellate courts to resolve questions of law despite not being a party to the action as defined by R.C.M. 103(16). Similar to R.C.M. 703(e)(2)(F) in providing a right to challenge a subpoena, the President has expressly stated the victim/patient has a right to attend and be heard in evidentiary hearings under Mil. R. Evid. 412 and 513.

The Supreme Court and our superior military Court have also determined the press' interest in having access to an open proceeding is an enforceable right. ABC, Inc. v. Powell, 47 M.J. 363, 365 (C.A.A.F 1997); Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596 (1982). The right to an open proceeding is twofold: (1) the accused has a Sixth Amendment right to an open proceeding; and (2) "the public," as enforced through the press, has an implicit right to compel an open proceeding, absent a compelling reason permitting closure, which is derived from the First Amendment. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980). ABC, Inc.

illustrates that even if the press does not join in the accused's right to compel an open proceeding under the Sixth Amendment, the press has an individual right and standing to complain if access is denied independent of the accused. ABC, Inc., 47 M.J. at 365. This demonstrates a common law exception to the standing rule. Although Petitioner's standing does not rest on constitutional grounds, the President has granted her limited standing in specified evidentiary hearings to be heard. Under this Court's supervisory authority, this Court should recognize Petitioner's standing, consistent with the President's intent, for the limited purpose of being heard through counsel.

The next question for this Court to consider is whether the President intended to provide Petitioner the right to be heard through counsel. The term "to be heard" is a legal term of art within the MCM. Throughout the MCM, the President has provided the parties an opportunity "to be heard" before a military judge rules on legal issues, which includes making arguments orally and in writing. *See* R.C.M. 806(d), Discussion (the military judge should not issue a protective order without first providing the parties an opportunity to be heard); R.C.M. 917(c) (requiring the military judge to give each party an opportunity to be heard on a motion for finding of not guilty); R.C.M. 920(c) (providing the parties an opportunity to be heard on the proposed findings instructions); R.C.M. 920(f) (giving the

parties the right to be heard on an objection on instructions outside of the presence of the members); R.C.M. 1005(c) (authorizing the parties a right to be heard on proposed sentencing instructions); R.C.M. 1102(b)(2) (requiring each party have an opportunity to be heard before ruling on legal issues raised in post-trial hearings); Mil. R. Evid. 201(e) (providing the parties a right to be heard on the propriety of taking judicial notice). The foregoing regulatory provisions similarly provide the right to be heard, which in practice includes the right to be heard through counsel, but more importantly, the right to argue points of law. The President decidedly chose to use the term, "to be heard," which in all other contexts within military justice practice includes the right to have an attorney speak on the party's behalf and argue points of law. The intentional use of this phrase demonstrates an awareness by the President that crime victim's have a right to be heard through counsel.

To be clear, the United States only interprets Mil. R. Evid. 412 and 513 as conferring a regulatory right for a crime victim to be heard through counsel during these limited evidentiary hearings. It is the United States position that nothing in the plain language of the Rules authorize a victim to seek reconsideration of a military judge's ruling, appeal the ruling, or petition an appellate court to challenge the

correctness of the judge's substantive decision concerning Mil. R. Evid. 412 and 513. In this same vein, nothing in the Rules impose an obligation on the parties to provide Petitioner copies of motions related to these evidentiary proceedings. If the President or others involved in the administration of military justice believe that such rights should apply in courts-martial, the appropriate route is through amendments to the MCM or, if necessary, legislative changes. Even though Petitioner asks this Court to decide an issue that is currently within the scope of her rights under Mil. R. Evid. 412 and 513, constraints placed upon her limited standing should not permit her, or any other petitioner, to challenge the accuracy of a trial judge's ruling on the substantive issue.

2. L.R.M.'s right to privacy regarding her past sexual behavior and right to protect privileged communications to her psychotherapist are not grounded in the Constitution.

L.R.M.'s right to privacy under Mil. R. Evid. 412 and right to protect privileged communications under Mil. R. Evid. 513 are derived from the military rules of evidence, not the Constitution of the United States.[3] In fact, the congressional history of the CVRA serves as the best evidence to demonstrate

[3] Petitioner's claim that she has a constitutional due process right to be represented by counsel is equally unmoving. The principles derived from Powell v. Alabama, 287 U.S. 45 (1932) involve the Supreme Court's interpretation of an accused's right to counsel as a matter of due process of law as applied through the Fourteenth Amendment to the States. Petitioner's situation is wholly inapposite to the due process considerations raised by Powell.

that victims' rights do not involve constitutional implications.

In 1995, victims' rights advocates made an effort to enact a federal constitutional amendment to the Sixth Amendment designed to place victims' rights on a firm foundation. *See* Paul G. Cassell, In Defense of Victim Impact Statements, 6 Ohio St. J. Crim. L. 611, 614-15 (2009). To place victims' rights in the Constitution, victims' advocates approached the President and Congress with a proposed amendment. Id. at 615. As a result of the discussions, Senators Jon Kyl, Orrin Hatch, and Dianne Feinstein, with the backing of President Bill Clinton, introduced a federal victims' rights amendment. *See* 142 Cong. Rec. S3792 (Daily ed. 22 April 1996) (statement of Sen. Kyl). Although the proposed amendment received significant backing in Congress, it never succeeded in attracting the required two-thirds support. As a result, in 2004, the victims' rights movement instead pressed for a far-reaching federal statute designed to protect victims' rights in the civilian federal criminal justice system. In exchange for setting aside the federal amendment in the short term, victims' advocates received nearly universal congressional support for a "broad and encompassing" statutory victims' bill of rights. 150 Cong. Rec. S4261 (daily ed. 22 April 2004) (statement of Sen. Feinstein). Consequently, on 30 October 2004, the 108th Congress passed the Justice for All Act, Pub. L. 108-405, 118 Stat 2260, which

encompassed the Crime Victims' Rights Act codified in 18 U.S.C. § 3771. The congressional history of the CVRA demonstrates that victims' rights are not embedded in the Constitution.

In contrast, a military victim's right to be heard at evidentiary hearings stems from the Military Rules of Evidence. Although the Supreme Court of the United States has created a class of cases creating fundamental liberty interests involving the right to privacy existing within the penumbra of the Constitution, Loving v. Virginia, 399 U.S. 1 (1967) (fundamental right to marriage); Skinner v. Oklahoma, 316 U.S. 535 (1942) (fundamental right to procreation); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (fundamental right for a woman to choose to have an abortion before fetal viability); Eisenstadt v. Baird, 405 U.S. 438 (1972) (the fundamental right to use contraceptive devices); Lawrence v. Texas, 539 U.S. 558 (2003) (fundamental right to private consensual sexual conduct), no federal criminal court has extended this zone of protection to include victims' rights, nor has Petitioner cited to any mandatory authority. Even though the Supreme Court has carved out a narrow class of protected liberty interests, these interests are not absolute. As illustrated by United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004) (finding the accused's conduct fell outside the liberty interest in private, consensual sexual activity between adults because of the compelling military interest), constitutionally

protected liberty interests and privileges can yield to more compelling federal interests. Similarly, the constitutional right for the accused to present a complete defense may bow to accommodate other legitimate interests in the criminal trial process. Rock v. Arkansas, 483 U.S. 44 (1987); *see also* Ogden v. Kentucky, 488 U.S. 227 (1988); Delaware v. Van Arsdall, 475 U.S. 673 (1987); Holmes v. South Carolina, 547 U.S. 319 (2006). This measured balancing of rights between the trial partcipants is conducted on a routine basis. Mil. R. Evid. 412 and 513 were specifically designed to promote the balance between the witness' privacy interest and the accused's compelling interest in gaining access to constitutionally required evidence. *See* United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011) (describing the appropriate balancing test for protecting the victim's privacy interest against the accused's constitutional interest in presenting a complete defense); United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006) (explaining the psychotherapist-patient privilege rule contains several exceptions, including a provision stating that there is no privilege when admission or disclosure of a communication is constitutionally required). Contrary to Petitioner's claim, Mil. R. Evid. 412 and 513, in their current form, strike an appropriate balance between guarding the victim's privacy interest and providing the accused a constitutional right to prepare a complete defense. As far as

victims' rights are concerned, nothing contained within these rules implicates constitutional considerations, and Petitioner's position goes too far in this regard.

3. The CVRA, 18 U.S.C. § 3771, is inapplicable to military courts-martial without Congressional or Presidential action.

The CVRA, 18 U.S.C. § 3771, is not controlling law in the military justice system. Congress exercises control over discipline in the military through the UCMJ, and although military courts frequently look to civilian statutes for guidance, the military and civilian justice systems are separate as a matter of law. United States v. McElhaney, 54 M.J. 120, 124 (C.A.A.F. 2000). Title 18 of the United States Code, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence do not directly affect proceedings under the UCMJ except to the extent that the UCMJ or MCM specifically provides for incorporation of such changes. Id. Congressional intent to separate military justice from the civilian federal criminal system requires military appellate courts to exercise great caution in overlaying a generally applicable statute specifically onto the military justice system. Id. Congress intended the deliberative process of amending the MCM to prevail over uncritical application of statutes outside the UCMJ. Id.; *see, e.g.,* Articles 36 and 134 (clause 3), UCMJ, 10 U.S.C. §§ 836 and 934; Mil. R. Evid. 101(b)(1), Manual for Courts-Martial,

United States (2012 ed.) (MCM).

Our superior Court has previously declined to apply § 502 of the Victims' Rights and Restitution Act of 1990, 42 U.S.C. § 10606, to courts-martial (expressing a preference for a victim's presence in the courtroom at trial) in United States v. Spann, 51 M.J. 89 (C.A.A.F. 1999). The Court observed that the essentially civilian nature of the federal statute was in conflict with Mil. R. Evid. 615 (which has since been amended by the President to reflect the rejected statute), and added that the President had not amended the rule to address whether, or how, the civilian procedures should apply in military proceedings under Article 36, UCMJ. The Court emphasized that Congress intended the deliberative process of amending the MCM to prevail over "uncritical application of statutes outside the UCMJ." Spann, 51 M.J. at 93.

The CVRA shares a similar fate as the federal statutes in McElhaney and Spann. The CVRA does not contain language expressly extending its applicability to military courts-martial. It is commonly accepted that when a statute's language is plain, the sole function of the courts, at least where the disposition required by the text is not absurd, is to enforce it according to its terms. United States v. Watson, 71 M.J. 54 (C.A.A.F. 2011). The plain language of the CVRA appears to envision application and enforcement of its provisions in the

federal civilian criminal justice system. *See* 18 U.S.C. §§ 3771(c)(1), (d)(3-4, 6), (f). The statute repeatedly refers to the enforcement of victims' rights through the federal district courts, involves coordination with the Attorney General, and implements procedures and rights that do not currently exist in the courts-martial process, e.g. seeking restitution. Although subsection (b)(1) employs broad language by stating that the rights listed in subsection (a) should be afforded "[i]n any court proceeding involving an offense against a crime victim," the federal courts, including courts in the military justice system established under Article I, are courts of limited jurisdiction. United States v. Lopez de Victoria, 66 M.J., 69 (C.A.A.F. 2008). The CVRA, located in Title 18 of the Code, is only applicable under military law if the text of the statute clearly indicates it is plainly applicable in the military context. The CVRA does not contain such plain language.

Additionally, the President has not acted to incorporate the CVRA into military law through his delegated powers under Article 36, UCMJ. Given the detailed construct of the CVRA, it is imperative for the President or Congress to decide which CVRA rights will be applied in the military context and how those rights will be enforced through the trial and appellate construct. The victim's "right to be heard" cannot reasonably be said to have derived from CVRA considering that the versions

of Mil. R. Evid. 412 and 513 instituting the victim's right to be heard significantly predates the CVRA. *Compare* Mil. R. Evid. 412, MCM 1995, and Mil. R. Evid. 513, adopted on 6 October 1999,[4] *with* 18 U.S.C. 3771, effective 30 October 2004, Pub.L. 108-405, Title I, § 101. The President's inaction to adopt the CVRA is even more compelling considering that he took swift action to amend Mil. R. Evid. 615 after our superior Court's holding in Spann to specifically adopt provisions of the Victim Rights and Restitution Act of 1900 and the Victim Rights Clarification Act of 1997. *See* Drafter's Analysis of Mil. R. Evid. 615, MCM A22-51 (2012 ed.). However, no action has been taken yet by the President or Congress to incorporate the CVRA into military practice despite having over eight years to adopt a workable framework. Constrained by our superior Court's guidance in McElhaney and Spann, the government believes that L.R.M.'s right to be heard through counsel is not derived from the CVRA without further action from the President or Congress. However, the United States recognizes Congress' overwhelming support for the CVRA and the important rights it has created for crime victims, and, thus, recommends that the Joint Service Committee on Military Justice strongly consider amending the MCM to incorporate these rights into the UCMJ or the RCMs given the undeniable need to place victims' rights in the military on

[4] Executive Order No. 13140, §2a, 64 Fed. Reg. 55116 (1999), effective for "communications made after 1 November 1999." 64 Fed. Reg. 55120.

equal footing with the rights afforded to victims in the civilian justice system. In the meantime, the United States reiterates its position that the victim's right to be heard through counsel for this limited purpose can and should co-exist with rights afforded to the accused.

CONCLUSION

WHEREFORE, this Honorable Court should grant Petitioner's writ of mandamus relying on a strict application of Mil. R. Evid. 412 and 513 and order the trial judge to provide Petitioner an opportunity to be heard through counsel, to include arguing points of law orally and in writing, in any evidentiary hearings under the foregoing rules.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division, and counsel for Petitioner on 22 February 2013 via electronic filing.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

Airman First Class (E-3) L.R.M., USAF *Petitioner,* v. Lieutenant Colonel (O-5) JOSHUA KASTENBERG, USAF, *Respondent* & Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party In Interest.*	))))))))))))))))))))	PROPOSED BRIEF OF *AMICUS CURIAE* NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF L.R.M.'s PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS Misc Dkt. No. 2013-05

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

It is undisputed that the preservation of defendants' constitutional rights is a fundamental duty of courts. An equally fundamental duty is to ensure that once rights are granted, regardless of to whom they are granted, they are protected. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."). Thus, courts have an obligation to ensure the meaningful enforcement of victims' rights no less so than defendants' rights.[1]

[1] Courts have an independent obligation to ensure that victims are afforded their rights. *See* 18 U.S.C. § 3771(a)(8), (b) ("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)[,]" which include "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy."); *see also United States v. Turner*, 367 F. Supp. 2d 319, 320-38 (E.D.N.Y. 2005) (concluding that to give effect to all parts of the Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA), the court had an independent obligation to establish procedures to assure compliance with the CVRA, not merely to rule on the victims' applications for relief).

Practitioners and jurists, educated in a system that has largely omitted discussion of victim participation in criminal justice proceedings, may fear that victims' independent participation to protect their rights necessarily violates defendants' constitutional rights. These fears stem, in part, from the mischaracterization of the criminal justice system as a "zero-sum" game in which affording one participant rights necessarily diminishes the rights of the defendant. But courts are commonly tasked with weighing different rights and interests in the just adjudication of a matter, and, as the practice of victim participation across the country has demonstrated, criminal justice proceedings are able to accommodate limited victim participation for the purpose of asserting and enforcing victims' rights without the feared negative repercussions.[2]

In this case, a rape victim's statutory, rule-based, and constitutional rights to be present, to be heard, to privacy, and to be treated with dignity, respect, and fairness are at stake. The

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[2] *See, e.g.*, *Carter v. Bigelow*, No. 2:02-CV-326 TS, 2011 WL 6069214, at *4 (D. Utah Dec. 6, 2011) (granting the victim's motion to strike the petitioner's motion to amend his habeas petition in part because it concluded that "disallowing amendment is necessary to protect [the victim's] statutory right to a proceeding free from unreasonable delay and his right to be treated with fairness"); *United States v. Heaton*, 458 F. Supp. 2d 1271, 1272-73 (D. Utah 2006) (relying on victims' CVRA rights in the context of the dismissal of charges and observing that a "victim is not treated justly and equitably if her views are not even before the court"); *United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 1868682, at *2 (D.N.H. July 22, 2005) (order) (balancing the right of defendant to adequately prepare for trial and the victim's right under the CVRA to proceedings free from unreasonable delay, and holding that a continuance would be granted over the victim's objection, but that because victims have statutory rights under the CVRA, and because the court has a statutory obligation to ensure those rights are afforded, "the parties are hereby put on notice that no further continuance will be granted in the absence of extraordinary circumstances"); *United States v. Broussard*, 767 F. Supp. 1536, 1544 (D. Or. 1991) (rejecting the defendants' claim that the state statutory provision guaranteeing child-victims the right to have expedited proceedings violated their Sixth Amendment right to adequately prepare for trial)*; see also* Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-By-Clause Analysis*, 5 Phoenix L. Rev. 301, 315-16 (2012) ("Crime victims' rights do not stand in opposition to defendants' rights but rather parallel to them."); Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. Rev. 255, 339 (2005) ("Absent victim standing and with the state in control of rights enforcement, victims' rights are artificially framed as rights conflicting with defendants' rights, even though victims' rights are centrally rights against the government."). For materials discussing the central participatory role played by crime victims historically in the criminal justice process, *see, e.g.*, *Fundamentals of Victims' Rights: A Brief History of Crime Victims' Rights in the United States*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), Nov. 2011, *available at* http://law.lclark.edu/live/files/11822-fundamentals-of-victims-rights-a-brief-history-of; Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 New Eng. J. on Crim. & Civ. Confinement 21, 21-32 (1999).

victim has standing to assert these rights and yet is being prevented from meaningfully doing so. The outcome eviscerates the protections afforded by victims' rights, violates the victim's due process rights, and disregards the court's obligation to ensure that all rights are protected.

I. MILITARY VICTIMS HAVE INDEPENDENT STANDING TO ASSERT AND TO SEEK ENFORCEMENT OF THEIR RIGHTS THROUGH COUNSEL.

A. The Victim Meets the Requirements for Standing.

At its most fundamental, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Standing need not be explicitly provided by Congressional mandate or by rule; rather, a determination of standing may be based on the satisfaction of the traditional three-part test. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (holding that an individual or entity has standing to assert rights in court if three elements are met: 1) the litigant has suffered an "injury in fact"; 2) there is a causal connection between the injury and the conduct complained of; and 3) the injury is redressable by a favorable decision of the court). Military courts employ this same test for standing. *See, e.g., United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008) (citing *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003)). Nothing in Military Rules of Evidence 412 or 513 alters this traditional analysis. Consequently, the analysis of victim standing to assert rights is straightforward.

Under Military Rules of Evidence 412 and 513, victims have the explicit rights to attend the proceedings and to be heard. *See* Mil. R. Evid. 412(c)(2) ("The . . . victim *must* be afforded a reasonable opportunity to attend and be heard" on the issue of the admissibility of past sexual behavior and/or alleged sexual predisposition) (emphasis added); Mil. R. Evid. 513(e)(1) ("The patient *shall* be afforded a reasonable opportunity to attend the hearing and be heard" on the issue of the disclosure of patient records or communications that are covered by the

psychotherapist-patient privilege) (emphasis added); *see also* 18 U.S.C. § 3771(a) (guaranteeing victims of crime, *inter alia*, the rights: to reasonable protection; to reasonable, accurate, and timely notice of proceedings; to not be excluded from proceedings; to be reasonably heard at proceedings; and to be treated with fairness and with respect for the victim's dignity and privacy).[3]

The victim in this case asserted her right to be heard through counsel on the topics addressed by Military Rules of Evidence 412 and 513, and an injury occurred when she was denied her right to be heard through counsel. *Cf. Warth*, 422 U.S. at 500 (finding that "the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing" and observing that standing may also be granted by legislative action, "either expressly or by clear implication") (internal citations and quotations omitted). The victim's inability to assert her right to be heard meaningfully, through counsel, arises as a direct result of the military judge's adverse ruling. This injury is redressable by the reversal of that military judge's decision and by permitting the victim's counsel to appear and to

[3] In addition to the victim's rights to attend the proceedings and be heard, the victim's rights to privacy, to be present, and to be treated with dignity, respect, and fairness are also at stake in these proceedings. *See, e.g.*, 18 U.S.C. § 3771(a)(8) (articulating a victim's right to "be treated with fairness and with respect for the victim's dignity and privacy"); *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (recognizing that the United States Constitution provides a right to personal privacy, which includes an "individual interest in avoiding disclosure of personal matters"); *Roe v. Wade*, 410 US 113, 152 (1973) ("[A] right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."). The Supreme Court has recognized that "rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Michigan v. Lucas*, 500 U.S. 145, 150 (1991) (stating that Michigan's rape shield statute represents a valid determination that rape victims deserve these protections). The purposes underlying rape shield provisions include protecting victims' privacy and fostering victims' initiation of and participation in criminal proceedings. *See, e.g., United States v. Gaddis*, 70 M.J. 248, 253-54 (C.A.A.F. 2011) (citing the drafters' analysis); *United States v. Ramone*, 218 F.3d 1229, 1235 (10th Cir. 2000) (citing the advisory committee note accompanying Federal Rule of Evidence 412 and observing that the purpose of rape shield provisions is to "safeguard the victim against invasion of privacy, potential embarrassment, and stereotyping"). The victim also asserted her right to be present during the trial, but this issue is not briefed here, as the military judge indicated that "the issue is not ripe." Feb. 9, 2013 Judicial Ruling at 1 ¶ 1(b).

argue on her behalf in proceedings relating to Military Rules of Evidence 412 and 513. *See, e.g.*, *Lujan*, 504 U.S. at 560-61; *Wuterich*, 67 M.J. at 69. The analysis in this case should end here.[4]

Notably, party status is not—nor has it ever been—a prerequisite to or substitute for engaging in this standing analysis. Indeed, it is not uncommon for victims to be granted standing for limited purposes in connection with criminal proceedings.[5] In the context of personal information and privilege, specifically, it is well-accepted that an individual with rights and interests at stake—including a crime victim—has standing to challenge the production of

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[4] Any reliance on the *dicta* in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), to mandate a different outcome is misplaced. Contrary to the posture of *Linda R.S.*, the victim here is not seeking to compel or prevent a criminal prosecution. Rather, the victim seeks merely to exercise those rights explicitly afforded to her under the Military Rules of Evidence and 18 U.S.C. § 3771. As the Court in *Linda R.S.* observed, statutes may confer upon victims legal rights, "the invasion of which creates standing, even though no injury would exist without the statute." *Id.* at 617 n.3. Further, nowhere does the victim seek to usurp the role of either party to the criminal prosecution. The victim seeks only the opportunity to be heard in a meaningful fashion as part of the ongoing criminal proceedings. Victims' rights do not infringe on prosecutorial discretion or result in the usurpation of the government's role in criminal proceedings; rather, they merely grant victims the ability to assert and seek enforcement of limited, specific rights within the context of those proceedings. *Cf.* 18 U.S.C. § 3771(d)(6) (providing that victims' rights under the CVRA shall not "be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction").

[5] *See, e.g.*, 18 U.S.C. § 3771(b)(1), (d)(1) (specifying that the "crime victim or the crime victim's lawful representative, and the attorney for the Government" may assert a crime victim's rights in district court); *In re Dean*, 527 F.3d 391, 393 (5th Cir. 2008) (observing that, in the lower court proceeding, "[a]ll victims who wished to be heard, personally or through counsel, were permitted to speak" and that "[t]he victims and their attorneys supplemented their appearances at the hearing with substantial post-hearing submissions"); *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (finding that although the federal rape shield provisions make no explicit reference to the standing of victims to appeal adverse rulings, "this remedy is implicit as a necessary corollary of the rule's explicit protection of the privacy interest Congress sought to safeguard," as "[n]o . . . party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of the victim's rights"); *United States v. Mahon*, No. CR 09-712-PHX-DGC, 2010 WL 94247 (D. Ariz. Jan. 5, 2010) (slip copy) (filing a notice of appearance is a reasonable procedure for receiving copies of filings and ensuring the protection of a victim's rights); *Melissa J. v. Superior Ct.*, 190 Cal. App. 3d 476, 479 (Cal. Ct. App. 1987) ("The victim is not considered a party to a criminal proceeding. However, where the court has issued an order concerning [the victim's rights], the victim may assert his or her legitimate rights by the procedures available to parties."); *Ford v. State*, 829 So. 2d 946, 947-48 (Fla. Dist. Ct. App. 2002) (approving victim's petition for writ of certiorari for review of victim's rights in connection with a criminal proceeding); *State of New Jersey in the Interest of K.P.*, 709 A.2d 315, 320 (N.J. Sup. Ct. 1997) ("It is difficult for the court to imagine that the Legislature intended to give victims these expansive rights, yet specifically intended that they should not be a factor for the court to consider . . . . The court finds that the legislative intent is more in line with considering the victim's position as opposed to ignoring it. The court finds a victim is a constructive equivalent to a party in the case."); *see also* Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. Rev. at 270 ("When victims are exercising either their broad or specific rights, they are no longer merely witnesses or third parties in the criminal process. Rather, victims are 'participants' in the criminal process. Being a participant means the 'crime victim [has] rights of intermittent participation in the criminal [trial] process.'") (citation omitted).

materials.[6] In addition, in the context of media challenges to court rulings, nonparties are routinely granted standing for the limited purpose of asserting and protecting specific rights.[7] There is no legitimate basis for differentiating between nonparty litigants such that one class (the media) has standing to assert rights in connection with criminal proceedings, but another class (crime victims) does not. Under any reasonable application of the standing analysis, the victim has standing to be heard in a meaningful manner at Military Rule of Evidence 412 and 513 proceedings.

B. Due Process Requires that the Victim's Standing to Be Heard Includes the Right to Be Heard Through Counsel.

The rights guaranteed to victims must be interpreted through the lens of due process; consequently, victims' rights implicated by Military Rules of Evidence 412 and 513 proceedings must be afforded in such a way that the rights are meaningful. *See, e.g., Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (observing that fundamental aspects of due process include the opportunity to be heard in a "meaningful manner" and to be treated fairly). In this context, victims' standing to assert and seek enforcement of their rights must contemplate that victims may be represented by counsel.

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[6] *See, e.g.*, Fed. R. Crim. P. 17(c) ("After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object."); R.C.M. 703(f)(4)(C) (providing that a person in custody of records may request relief from production from a military judge); Mil. R. Evid. 501(b) ("A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to: (1) Refuse to be a witness; (2) Refuse to disclose any matter; (3) Refuse to produce any object or writing; or (4) Prevent another from being a witness or disclosing any matter or producing any object or writing."); *In re Grand Jury Subpoena Dated Dec. 17, 1996*, 148 F.3d 487, 490 (5th Cir. 1998) ("A third party has standing to challenge a grand jury subpoena where the third party has a claim of privilege respecting information or materials sought by the subpoena."); *In re Grand Jury*, 111 F.3d 1066, 1074-76 (3d Cir. 1997) (holding that privacy interests guaranteed by statute confer standing on wiretapping victims to quash a subpoena served on the interceptor of the communications); *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 852 (9th Cir. 1991) (finding no standing where documents sought did not pertain to a challenger to a subpoena and where the subpoenas were not directed to the challenger).

[7] *See, e.g., Press-Enterprise Co. v. Superior Court.*, 464 U.S. 501, 503 (1984) (accepting without analysis the media's standing to assert and protect First Amendment rights); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 598-600 (1982) (same); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 560-63 (1980) (same).

Indeed, as the Supreme Court has acknowledged in other contexts, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *see also Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970) (quoting *Powell* and observing that even in cases where an individual is not entitled to court-appointed counsel, he or she "must be allowed to retain an attorney if he [or she] so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the [represented person]. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing").[8]

The Supreme Court has also observed that, "[h]istorically and in practice, in our own country at least, [a hearing] has always included the right to the aid of counsel when desired and provided by the party asserting the right." *Chandler v. Fretag*, 348 U.S. 3, 9 (1954) (quoting *Powell*, 287 U.S. at 68). Importantly, this due process right to be heard through counsel is not limited to counsel for criminal defendants: "If *in any case, civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Id.* at 10 (quoting *Powell*, 287 U.S. at 69) (emphasis added); *see also Guajardo-Palma v. Martinson*, 622 F.3d 801, 803 (7th Cir. 2010) (observing that even when a prisoner is not entitled to appointed counsel at public expense, a judge may not refuse to accept filings from a lawyer who represents that prisoner, whether that lawyer is being

[8] *Cf.* ABA Formal Op. 95-396 (July 28, 1995) (observing that "[t]he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. Implementing this fundamental premise, the anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests"); ABA Formal Op. 91-359 (Mar. 22, 1991) ("The profession has traditionally considered that the presumptively superior skills of the trained advocate should not be matched against those of one not trained in the law.").

paid or is providing services on a pro bono basis, as prisoners are entitled to the fundamental right to access the courts);[9] *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980) (finding that in both civil and criminal cases, "the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement").

The assistance of counsel is particularly critical in the context of this case, as the legal issues raised in military rape shield and privilege proceedings require the military judge and the interested participants to engage in complex legal analysis. *See, e.g., Gaddis* 70 M.J. at 253-56 (requiring several pages to examine the legal test that is employed as part of the Military Rule of Evidence 412 analysis); *United States v. Jenkins*, 63 M.J. 426, 428-30 (C.A.A.F. 2006) (discussing over the course of a number of pages the analysis pursuant to Military Rule of Evidence 513). Because victims' privacy rights, among others, are inherently intertwined with the technical legal analysis conducted by the military judge in these circumstances, anything a victim chooses to convey to the military judge in the course of exercising his or her right to be heard will necessarily implicate that legal analysis.

Indeed, contrary to the government's position and the military judge's conclusions, nothing in Military Rules of Evidence 412 or 513 limits victims' right to be heard to "factual matters" or "testimony on [the victim's] privacy interests," Gov. Resp. to Special Victims' Counsel's Mot. for Recons. at 7 ¶¶ 41-42, or to communicating with the court only "in laypersons terms," Jan. 29, 2013 Judicial Ruling at 3, as opposed to providing "legal argument," Feb. 9, 2013 Judicial Ruling at 3 ¶ 9. In fact, the structure of the rules itself conceives of the

[9] All individuals, including crime victims, have a fundamental right to access the courts. *See, e.g., Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir. 2003) ("Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment."); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (noting that access to courts is a fundamental right).

victim's right to be heard as something separate from any evidence the victim may provide if called as a witness to testify during the hearing. *See, e.g.*, Mil. R. Evid. 412(c)(2) (distinguishing the victim's role as a potential witness who may offer "relevant evidence" from the victim's right to "a reasonable opportunity to attend and be heard" in connection with rape shield proceedings); Mil. R. Evid. 513(e)(2) (distinguishing the victim's role as a patient who is called as a witness from the victim's right to attend and be heard at the hearing).

The victim in this case has the explicit right to be heard with respect to the pretrial production of private information and the admissibility of evidence that also implicates other rights, including her privacy rights, and these rights exist in the context of complicated and technical pretrial legal arguments. To deny a victim who has secured the assistance of counsel the benefit of the attorney's knowledge and skills in asserting the victim's legal rights is to deny that victim access to the very tools that are necessary to ensure that those rights are meaningful. The requirements of due process simply do not allow for such an outcome.

C. The Independent Nature of Victims' Rights Renders "Alignment" Analysis Irrelevant.

Victims of sexual assault have privacy rights and interests that are individually held and personal to them. Indeed, these rights and interests cannot be said to be shared by any other participant in the criminal justice system. *See, e.g.*, Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. Rev. at 270-74 (observing that "[v]ictims . . . possess independent rights to participate at certain stages of the criminal process" and collecting cases evidencing the personal nature of victims' rights, even in circumstances where prosecutors are authorized to act to enforce a victim's rights).[10] In fact, it is well-established that

[10] *See also State ex rel. Romley v. Superior Court*, 891 P.2d 246, 249 (Ariz. Ct. App. 1995) (finding that, under the state's victims' rights laws, the state must represent the victims' restitution rights and cannot waive those rights on the victims' behalf); *People v. Brown*, 54 Cal. Rptr. 3d 887, 896 (Cal. Ct. App. 2007) ("Victim restitution may not

counsel representing the government does not represent the victim in a case; to the contrary, prosecutors have a duty to represent the interests of the government. *See, e.g.*, Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 Lewis & Clark L. Rev. 559 (2005) (discussing the issue of prosecutorial neutrality in the context of ethical obligations, conflicting duties, and victims' rights); *see also Romley*, 891 P.2d at 250 (recognizing that at times "the wishes of the victim may be adverse to those of the prosecution," and reiterating the well-established principle that a prosecutor does not "represent" the victim in a criminal trial); *Commonwealth v. Beal*, 709 N.E.2d 413, 416 (Mass. 1999) (observing that "the prosecution pursues a conviction on behalf of the Commonwealth as a whole, not on behalf of the individual complainant, and prosecutions can go forward even against the wishes of the complainant") (internal citation omitted); *State v. Eidson*, 701 S.W.2d 549, 554 (Mo. Ct. App. 1986) (finding that the affidavit of non-prosecution filed by the victim was not binding on the prosecutor because "the prosecutor represents the State[,] not the victim"). As such, alignment or non-alignment of the position advanced by either the attorney representing the government or the attorney representing the defendant with the victim's position is irrelevant to a standing analysis.

Indeed, as trial counsel for the government acknowledges, victims' interests in the suppression of rape shield-protected information may not always align with the interests of the parties in the case. Gov. Resp. to Special Victims' Counsel's Mot. for Recons. at 6 ¶ 39

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be bargained away by the People."); *People v. Valdez*, 30 Cal. Rptr. 2d 4, 9 (Cal. Ct. App. 1994) (finding that because the "Legislature left no discretion or authority with the trial court or the prosecution to bargain away the victim's constitutional and statutory right to restitution," the victim's right to restitution could not be "the subject of plea negotiations"); *Wilson v. Commonwealth*, 839 S.W.2d 17, 21 (Ky. Ct. App. 1992) (holding that the rights guaranteed to crime victims in Kentucky "belong to the victim independent of the Commonwealth, and cannot be plea bargained away without the crime victim's actual approval"); *People v. Meconi*, 746 N.W.2d 881, 885 (Mich. Ct. App. 2008) (Sawyer, J. concurring) (finding that the prosecutor's express agreement to a sequestration order could not waive the victim's constitutional right to be present at trial because, *inter alia*, "[t]he right of the victim to attend the trial belongs to the victim, not the prosecutor").

(acknowledging that the government could choose not to oppose defense efforts "for a myriad of reasons"). Victims simply cannot rely on the government or the defense to advance their interests, as neither party "shares these interests to the extent that they might be viewed as a champion of the victim's rights." *Doe*, 666 F.2d at 46. To deny victims the ability to advance their rights—and to instead force them to rely on the unsure prospect that a party to the criminal proceeding will happen to align with and vigorously advocate a position that mirrors their own—eviscerates their rights and protections, transforming those rights, and the rape shield provision itself, from a shield intended to protect victims into merely a sword to be wielded by the parties in pursuing their own interests.

D. The Military Judge's Discretionary Powers Do Not Extend to Excluding Participants' Views From Consideration Once Standing Is Established.

The military judge relied in the alternative on what seems to be an assertion of broad discretionary power to refuse to allow a participant to assert and protect a legally cognizable right, even after standing has been established. The military judge did not provide—and amicus has been unable to locate—any authority in support of such a broad discretionary power.[11] Indeed, such a broad exception to the principle that violations of rights must have a remedy would effectively raze the standing analysis, as well as the constitutional guarantee of access to the courts. *See, e.g.*, *Marbury*, 5 U.S. (1 Cranch) at 163; *Chappell*, 340 F.3d at 1282 ("Access to

[11] Indeed, only in one narrow circumstance involving the separation of powers doctrine does it seem that courts have exercised their discretion to refuse to hear from a participant in the justice system who has established standing. *See, e.g.*, *Melcher v. Federal Open Market Committee*, 836 F.2d 561, 565 (D.C. Cir. 1987) (holding that "if a legislator could obtain substantial relief from his fellow legislators through the legislative process itself, then it is an abuse of discretion for a court to entertain the legislator's action"). *But see Chenoweth v. Clinton*, 181 F.3d 112, 114-15 (D.C. Cir. 1999) (questioning the propriety of the doctrine of equitable discretion as applied in *Melcher* and elsewhere, as the circuit's precedent allowed trial courts to find that plaintiffs had standing, which "got them into court just long enough to have their case dismissed [through the exercise of the court's equitable discretion] because of the separation of powers problems it created."). The circuit court's skepticism was bolstered by the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811, 829 (1997), which denied standing to members of Congress outright rather than exercising any equitable judicial powers, finding that the members of Congress did not have a sufficient "personal stake" in the dispute and that they failed to allege a "sufficiently concrete injury" to establish standing.

the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment."); *Ryland*, 708 F.2d at 971 (noting that access to courts is a fundamental right).

II. AFFORDING VICTIMS STANDING TO ASSERT RIGHTS THROUGH COUNSEL IN A MILITARY RULE OF EVIDENCE 412 OR 513 HEARING DOES NOT VIOLATE THE DEFENDANTS' CONSTITUTIONAL RIGHTS.

Affording crime victims their rights in proceedings pursuant to Military Rules of Evidence 412 and 513 does not violate defendants' constitutional rights. As noted above, the Military Rules of Evidence provide that victims have the right to attend and be heard at hearings relating to privileged material and hearings on the admissibility of evidence of their sexual behavior or predisposition; these provisions reflect the inherently prejudicial nature of such evidence with respect to the victims' privacy interests. *See* Mil. R. Evid. 513; Mil. R. Evid. 412(c)(2), (c)(3) (requiring, *inter alia*, that the military judge find such evidence to be relevant to a permissible purpose and "that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy"). These rights may be exercised by victims in the court martial process—and the victims' privacy interests protected—without impinging upon the defendants' constitutional rights.

A. Such Discrete Moments of Victim Participation Do Not Result in a Per Se Violation of a Defendant's Fair Trial Rights.

As the United States Supreme Court has explained, "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Federal appellate court decisions have clarified that in the context of reviewing a defendant's petition for habeas corpus, a colorable claim of prejudice to a defendant's fair trial right must allege the denial of a specific constitutional right; general references to "fair trial" or "due process" will not suffice to

place a trial court on notice of the nature of the alleged constitutional infirmity. *See, e.g.*, *Slaughter v. Parker*, 450 F.3d 224, 236 (6th Cir. 2006) (finding that "[w]hile a petitioner need not cite 'chapter and verse' of constitutional law, 'general allegations of the denial of rights to a fair trial and due process do not fairly present claims that specific constitutional rights were violated'"); *Casey v. Moore*, 386 F.3d 896, 913 (9th Cir. 2004) (explaining that "[e]ven where a petitioner argues that an error deprived him of a 'fair trial' or the 'right to present a defense,' unless the petitioner clearly alerts the court that he is alleging a specific federal constitutional violation, the petitioner has not fairly presented the claim").[12]

Within the rubric of the right to a "fair trial," the only specific constitutional rights of the defendant identified by the military judge (or any party) in the proceedings below or that could possibly be implicated by affording the victim her right to be heard through counsel at Military Rules of Evidence 412 or 513 hearings are the right to the appearance of an impartial tribunal and the right to confrontation. Neither of these rights would in fact be threatened if the victim is

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[12] The Second Circuit has expounded on the requirement that a defendant present the denial of a specific constitutional right, and not rely on broad claims of "denial of a 'fair trial'" as follows:

> The more specific the description of the right in question- *e.g.*, assistance of counsel, double jeopardy, self-incrimination-the more easily alerted a court will be to consider a constitutional constraint couched in similarly specific terms. The greatest difficulty arises when in the state court the petitioner has described his claim in very broad terms, such as denial of a 'fair trial.' The concept of fairness embraces many concrete notions, ranging from such fundamental matters as the right of the defendant to know the charges against him, to such lesser interests as his right to have each count of the indictment charge him with no more than one criminal violation, *United States v. Gibson*, 310 F.2d 79, 80 n. 1 (2d Cir.1962); Fed. R. Crim. P. 8(a); or the right to have access to reports by informant witnesses to law enforcement officials, *United States v. Sanchez*, 635 F.2d 47, 65-66 (2d Cir.1980) ; or the right to present information in mitigation of punishment before being sentenced after conviction, Fed. R. Crim. P. 32(a). Obviously not every event in a criminal proceeding that might be described as 'unfair' would be a violation of the defendant's rights under the Constitution. *See, e.g., Kirksey v. Jones*, 673 F.2d 58, 60 (2d Cir.1982) ('Alleging lack of a fair trial does not convert every complaint about evidence or a prosecutor's summation into a federal due process claim.').

Daye v. Attorney General of State of N.Y., 696 F.2d 186, 193 (2d Cir. 1982).

afforded her due process right to be heard in a meaningful manner—that is, through counsel advancing legal arguments regarding her rights.

B. Affording Victims Standing to Assert Their Rights in Pretrial Evidentiary Hearings Does Not Create a Per Se Appearance of Partiality.

One court has described the relationship between a defendant's fair trial right and impartiality as follows:

> There are two ways in which a plaintiff may establish that he has been denied his constitutional right to a fair hearing before an impartial tribunal. In some cases, the proceedings and surrounding circumstances may demonstrate *actual bias* on the part of the adjudicator. In other cases, the adjudicator's pecuniary or personal interest in the outcome of the proceedings may create an *appearance of partiality* that violates due process, even without any showing of actual bias.

Stivers v. Pierce, 71 F.3d 732, 741 (9th Cir. 1995) (citations omitted) (emphasis in original). *See also Wilkens v. Lafler*, No. 10-1089, 2012 WL 2686101, at *5 (6th Cir. July 6, 2012) (citation omitted) ("Fair trial is a neutral trial conducted to accord participants in the proceedings their due process rights . . . . A petitioner may show that a procedure violated his right to a fair trial either by identifying an inherently prejudicial practice or by demonstrating actual prejudice."); *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999) ("An accused has a constitutional right to an impartial judge.").

With respect to the appearance of judicial partiality or bias—as opposed to evidence of actual bias—the Supreme Court has identified three circumstances that implicate defendants' due process right to a fair trial and mandate recusal.[13] *Crater v. Galaza*, 491 F.3d 1119, 1131 (9th Cir. 2007). There is no evidence to suggest the first two—in which "a judge 'has a direct,

[13] *See also* R.C.M. 902(a) (addressing the appearance of bias and requiring disqualification of a judge when "that military judge's impartiality might reasonably be questioned"); Canon 2.11(A) of the ABA Model Code of Judicial Conduct (2011) (providing that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned"). Further: "RCM 902(a) . . . has language virtually identical to that found in 28 U.S.C. § 455(a), which calls for Federal judges, magistrates, and justices to disqualify themselves 'in any proceeding in which [their] impartiality might reasonably be questioned.' The exhortation of the statute is designed to foster the appearance of justice within the judicial system." *Wright*, 52 M.J. at 140-41.

personal, substantial pecuniary interest in reaching a conclusion against [one of the litigants],'"[14] or in which "a judge becomes 'embroiled in a running, bitter controversy' with one of the litigants"[15]—are at issue in this case. The third circumstance, in which the judge must recuse himself if he "acts as 'part of the accusatory process[,]'" appears to be the one that concerned the military judge. *Id.* (quoting *In re Murchison*, 349 U.S. at 137).

In *Murchison*, the Court reversed convictions of defendants in cases in which the judge had acted not only as a grand jury to bring contempt charges against the petitioners, but also then proceeded to try, convict, and sentence them. 349 U.S. at 135. The Court explained that: "[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.* at 136. But whether the Supreme Court's concern in *Murchison* was solely with the judge's appearance of interest in the outcome of the prosecution, or also with the circumstances that served to align him with the prosecution, no such concerns are implicated in this case. The only issue before the military judge here is the whether the victim has standing to assert her rights, including her explicit right to be heard, through counsel, at hearings that directly implicate her rights. The military judge affording the victim her rights no more aligns him—in appearance or substance—with the prosecution or the victim, than the military judge affording the defendant his rights aligns the judge with the defendant.[16]

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[14] *Crater*, 491 F.3d at 1131 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

[15] *Id.* (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971)).

[16] *See United States v. Gallion*, No. 07-39, 2008 WL 1904669, at *6 (E.D. Ky. Apr. 29, 2008) (denying motion to recuse in a case in which defendants alleged, *inter alia*, that the judge's order requiring the addition of the victim's attorney to the service list in the case was a "bizarre practice" that revealed the judge's bias against them, and explaining that the order was issued pursuant to the "clear provisions" of the CVRA, including the victim's right to notice).

It is the very nature of the judicial function to preserve and protect rights; the fact that the right protected belongs to one participant or another is of no moment—the military judge has a duty to protect rights, regardless of to whom they attach. *See, e.g., Marbury* 5 U.S. (1 Cranch) at 163 ("The very essence of civil liberty certainly consists in the right of *every individual* to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.") (emphasis added).

The cases cited by the military judge do not support a contrary conclusion. For example, in *United States v. Martinez*, the court explained that the test of whether a military judge's impartiality requires recusal under R.C.M. 902(a) is "whether," applying an objective standard and, "taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions." 70 M.J. 157, 158 (C.A.A.F. 2011). The court then applied that standard and concluded that defendant's fair trial rights were not prejudiced by the conduct of the supervising judge in privately conferring with the prosecutor and then accompanying the presiding judge into his chambers during recess and deliberations. *Id.* at 155-56, 159-60. *See also United States v. Butcher*, 56 M.J. 87, 89-92 (2001) (assuming, arguendo, that the military judge should have recused himself for attending a party hosted by the prosecutor and playing tennis with the prosecutor the next day, failure to do so did not require reversal, where any risk of injustice was considerably diminished because incidents occurred near the end of trial, well after the military judge had completed his essential rulings); *United States v. Kincheloe*, 14 M.J. 40 (C.M.A. 1982) (concluding that appellate judge was not subject to disqualification because of his participation as trial counsel in a special court-martial which had convicted defendant of unauthorized absences six years earlier).

The courts' holdings in the other two cases cited by the military judge, in which the courts determined that the military judges erred to the prejudice of the defendants, are very different factually and do not lend support to the military judge's determination that affording the victim's right to be heard through counsel will violate defendant's rights. For example, in *United States v. Taylor*, the court determined that the military judge had "abandoned his impartial role as the judge and assumed the role of an advocate to perfect the case against" defendant where:

> [I]n each instance when the prosecution was in apparent trouble the military judge rose to his rescue. The leading questions of the judge by supplying the omitted items of proof for the Government, and laying the foundation for admission of evidence, as well as directing attention of the trial counsel to defects in his proof, participating in the obtaining of a stipulation from the defense as to value, and eliciting evidence on examination from the appellant to be used as a basis for a later charge to the court on the crucial issue in the case, clearly indicated his prosecutorial bent. We cannot conclude from his overall conduct that his concern was solely for the elucidation of the facts, a search for the truth, or development of evidence for the jury.

47 C.M.R. 445, 452 (A.C.M.R. 1973). *See also United States v. Conley*, 4 M.J. 327 (C.M.A. 1978) (finding that where key burden for successful prosecution of bad check offenses was matching signatures on checks with defendant's signature in his official record, due process in military context required military judge, who in openly conceding his inability to arrive at decision without utilization of his own expertise raised inference that government had relied on such particular judge to supplement its case against defendant). In both *Taylor* and *Conley*, the military judges' conduct was concluded to have involved "assum[ing] the role of the advocate" by taking on, in one case, critical aspects of the prosecutor's role—including questioning witnesses and obtaining defense stipulations—and in the other, by assuming the role of a government witness. Affording the victim her right to be heard through counsel at M.R.E. 412 and 513 hearings neither places the military judge in the position of acting as an advocate for one of the parties nor has him assume the role of a government witness.

Further, it is the outcome of the hearings regarding Military Rules of Evidence 412 and 513—that is the admission or non-admission of the evidence—that could, in theory, implicate defendant's fair trial rights (because it would prevent defendant from introducing this evidence at trial), not the mere assertion of counter-arguments to its admission or exclusion by the victim or her attorney. In fact, so long as the military judge, after hearing argument from all interested participants, makes legally correct rulings, there is no violation of defendant's rights.

C. Affording Victims Standing to Assert Their Rights in Pretrial Evidentiary Hearings Does Not Implicate Defendants' Confrontation Rights.

The military judge in his decision states in a footnote that defendant's Confrontation Clause rights may be implicated if he were to "permit[] a third party, whether an SVC or other non-enumerated party to speak on behalf of a victim[,]" as "the right to be heard equates to the right to testify." Jan. 29, 2013 Judicial Ruling at 3 ¶ 5, n.7. But the military judge misconstrues the reach of the Confrontation Clause right as interpreted by the Supreme Court and the nature of a victim's right to be heard at a pretrial hearing of this nature.

"The Confrontation Clause of the Sixth Amendment provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Williams v. Illinois*, 567 U.S. ---, 132 S.Ct. 2221, 2232 (2012). Notably, the United States Supreme Court has described the confrontation right as a *trial right*. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (plurality opinion) (emphasizing that the right to confront is a trial right and that the Court has never held that a defendant has a right to pretrial discovery under the Confrontation Clause); *accord Coleman v. Calderon*, 150 F.3d 1105, 1112 (9th Cir.), *reversed on other grounds*, 525 U.S. 141, 145 (1998) (per curiam); *People v. Hammon*, 938 P.2d 986, 989-93 (Cal. 1997) (discussing *Ritchie*, declining to conclude that defendant has a Sixth

Amendment confrontation right to pretrial discovery of the victim's privileged records, and disapproving of line of cases that concluded otherwise).

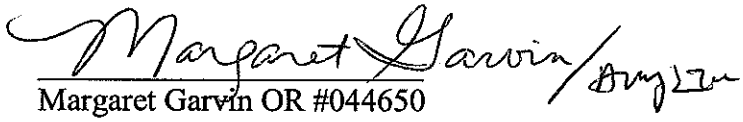
Further, the issue of the victim's right to be heard at the hearings regarding Military Rules of Evidence 412 and 513 is separate and distinct from the issue of whether she offers testimony at the hearing. As the military judge himself concedes, the Supreme Court has not "coupled" the right to be heard with the right to confront. Jan. 29, 2013 Judicial Ruling at 3 ¶ 5, n.7. And, as noted above, the structure of the rules conceives of the victim's right to be heard as something separate from any evidence the victim may provide if she is called to testify as a witness during the hearing. *See, e.g.,* Mil. R. Evid. 412(c)(2) (distinguishing the victim's role as a potential witness who may offer "relevant evidence" from the victim's right to "a reasonable opportunity to attend and be heard" in connection with rape shield proceedings); Mil. R. Evid. 513(e)(2) (distinguishing the victim's role as a patient who is called as a witness from the victim's right to attend and be heard at the hearing). As a result, defendant's Confrontation Clause rights are not implicated by the victim's exercise of her right to be heard, through counsel, in connection with these proceedings; the only rights at risk of being violated by the military judge in this case are those of the victim.

CONCLUSION

Rights, once afforded—regardless of to whom they are afforded—must be protected. It is undisputed that the victim in this case has rights. Based on a straightforward legal analysis, she has standing to assert those rights. Well-established law and policy make clear that for rights to be meaningful they may, at times, require the assistance of counsel. Merely hearing from counsel for a participant with legally protected rights when those rights are at risk simply can not inject prejudice or bias into a tribunal. As the Supreme Court has noted, "justice, 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." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.); *see also 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"). Justice in this case requires recognizing victim standing to assert her rights through counsel.

Date: February 22, 2013 Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that on February 22, 2013, a copy of the foregoing was delivered to the Air Force Court of Criminal Appeals and to:

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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Respondent,*	)	Misc Dkt. No. 2013-05
&	)	
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party In Interest,*	)	REPLY TO UNITED STATES ANSWER TO ORDER TO SHOW CAUSE
v.	)	
Airman First Class (E-3) L.R.M., USAF, *Petitioner.*	)	Panel No. 2

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

On 22 February 2013, the United States submitted an answer to this court's order to show cause. In that answer they agreed that this Court should issue a writ of mandamus and order the trial judge to allow L.R.M. the opportunity to be heard through counsel in hearings pursuant to Mil. R. Evid. 412 and 513. We file this reply to further clarify issues raised in the Government's brief.

I.

THIS COURT MAY DECIDE THE ISSUE OF A1C L.R.M.'S RIGHT TO BE HEARD THROUGH COUNSEL ON NARROW GROUNDS

If this Court determines that L.R.M. has the right to be heard through counsel under Mil. R. Evid 412 and Mil. R. Evid. 513 it need analyze the issue no further. However, if this Court determines it should consider and rule upon the issue of the applicability of the Crime Victims' Rights Act (herein "CVRA") and the United States Constitution to victims in courts-martial, then

it should conclude that L.R.M. has standing to assert her right to privacy and dignity as guaranteed to her under the CVRA and her right to informational privacy stemming from the United States Constitution. Three potential violations of due process are at play in this case. The first being the deprivation of rights as articulated in Mil.R. Evid. 412 and 513, insofar as the government has created a process based on statute and regulation it must conduct that process fairly. The second violation stems from the requirement that when the government seeks to invade an individual's fundamental right to informational privacy, it must accord the individual due process by weighing that right against competing interests. The third deprivation is of the due process required when the government invades rights created by statute, namely the CVRA.

II.

THE CONSTITUTIONAL RIGHT TO PRIVACY GIVES A1C L.R.M. THE RIGHT TO DUE PROCESS OF LAW WHICH MEANS A HEARING THAT BALANCES THE RIGHT TO BE FREE FROM DISCLOSURE OF INTIMATE PERSONAL DETAILS AGAINST OTHER INTERESTS

The Respondent has taken the position that, for L.R.M., no constitutional right to privacy exists in this case. We respectfully disagree. While acknowledging that the right to privacy regarding intimate personal matters has been recognized by the Supreme Court, the Respondent seemingly asserts that a victim does not have a constitutionally recognizable right to privacy regarding the matters at issue. (Resp. Br. at 18.) That position is simply not tenable based on binding precedent. *See e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992). Even before the *Casey* decision, the Court in *Whalen* and *Nixon*, while upholding the constitutionality of the statutes at issue in those cases, noted that an element of constitutionally protected privacy rights includes, "the individual interest in avoiding disclosure of personal matters…" *U.S. v. Nixon*, 433 U.S. 425, 457 (1977) (quoting, *Whalen v. Roe*, 429 U.S. 589, 599-

600 (1977)). Assessing an individual's legitimate expectation of privacy is part of the constitutional analysis that must occur before information is disclosed to the public by government action. "When information is inherently private, it is entitled to protection." *Fraternal Order of Police, Lodge 5 v. City of Philadelphia,* 812 F.2d 105, 116 (3d Cir.1987); *See also, York v. Story,* 324 F.2d 450, 455 (9th Cir.1963)("We cannot conceive of a more basic subject of privacy than the naked body.") *cert. denied,* 376 U.S. 939 (1964).

The privacy interests that are protected from disclosure by the Constitution include the highly personal and "intimate aspects of human affairs" that are at issue in the present case. *See, Eagle v. Morgan,* 88 F.3d 620, 625 (8th Cir. 1996)(quoting, *Wade v. Goodwin,* 843 F.2d 1150, 1153 (8th Cir.) *cert. denied,* 488 U.S. 854, 109 S.Ct. 142, 102 L.Ed.2d 114 (1988)). Private information is protected under the U.S. Constitution when it is of "[a] particular class of information [that] well-established social norms recognize the need to maximize individual control over its dissemination and used to prevent unjustified embarrassment or indignity." *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court,* 165 P.3d 488 (2007) (Ultimately holding that names and salaries of public employees when balanced against the public's need for information about government figures should be releasable). Intimate details of a person's sexual history fall squarely within that protected sphere. It is clear that A1C L.R.M. has a right to privacy and dignity and that her status as a victim does not eviscerate that right. It is foreseeable that a compelling interest might override the right to privacy in a given case; however that does not mean that the right does not exist because of her status as a victim. It appears that in asserting that A1C L.R.M.'s right to privacy and dignity are not grounded in the Constitution, the Respondent has simply jumped to

the conclusion that an accused's right to a fair trial would outweigh a victim's right to privacy. Such a conclusion might ultimately be true in a given case, but the fact that one person's right might be more compelling than another in a given circumstance does not mean that the other's right simply ceases to exist. (Resp. Br. at 16-20).

Both the right to a fair trial and the right to privacy are grounded in the Constitution. By reporting a sexual assault, L.R.M. has not waived her right to privacy and opened up her intimate sexual history to public scrutiny--it is the governmental action in prosecuting the accused that might compel this information, thereby putting her right into jeopardy. Because there is a constitutionally protected right to privacy that includes the avoidance of disclosure of personal matters, L.R.M. is entitled to due process through limited non-party standing to be heard prior to government action that deprives her of that right. *See*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

III.

THE CVRA APPLIES TO VICTIMS OF CRIME IN COURTS-MARTIAL AS IT IS A STATUTE OF GENERAL APPLICABILITY INTENDED TO APPLY TO ALL VICTIMS OF FEDERAL CRIMES THAT IS CONSISTENT WITH MILITARY LAW AS UNDERSTOOD BY *U.S. V. DOWTY, U.S. V. MCELHANEY* & *U.S. V. SPANN*

The CVRA protects the rights of all victims of federal offenses, including those within the military justice system. The fact that L.R.M.'s assailant was a military member, does not--nor should it--deprive her of rights as a Unites States citizen. "Congress has plenary control over ***rights***, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies" (emphasis added). *United States v. Dowty*, 48 M.J. 102,

106 (C.A.A.F. 1998)(quoting *Weiss v. United States*, 510 U.S. 163 (1994). The paradoxical result advocated by the Respondent is that a United States citizen victimized in the United States would have fewer rights if victimized by a military member. Victims who are sexually assaulted by military members would suffer the additional misfortune of being informed that their congressionally mandated federal rights to be treated with "dignity" and "privacy" do not apply. Victims, military or civilian, hauled into military courts should not have to suffer the further indignity of being told they are the only victims of a federal offense in the United States without the right of privacy or dignity.

While military members' rights are at times different than the rights of civilians, absent an explicit and clear military necessity, military members are afforded the same statutory and constitutional rights. *Dowty*, 48 M.J. at 107 ("in the absence of a valid military purpose requiring a different result, generally applicable statutes are normally available to protect service members."). Since both Congress and the President took action in response to *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999), there is nothing in the Manual for Court-Martial that is contrary or inconsistent with the recognition of victim rights as described in the CVRA. As the Court of Appeals for the Armed Forces has recognized, absent clear inconsistency or contrary purpose, there is a "general direction to apply civilian procedures." *Dowty*, 48 M.J. at 107.

Not only are there no contrary provisions or inconsistent purposes remaining in the Manual for Court-Martial, the existing provisions are entirely consistent with the recognition and protection of victim's rights. *See generally*, Mil. R. Evid. 303; Mil. R. Evid. 502; Mil. R. Evid. 503; Mil. R. Evid. 513; Mil. R. Evid. 514, discussion of R.C.M. 806 (recognizing prohibitions on degrading

questions, various privileges and accordant rights therewith, and the ability to close the courtroom to avoid "embarrassment or extreme nervousness.") Further, the now defunct version of Mil. R. Evid. 615 that in 1999 appeared contrary to federally created victim's rights was repealed and superseded both by an amendment to the Military Rules of Evidence and by subsequent passage of the CVRA. Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002); Crime Victims' Rights Act, 18 U.S.C. § 3771 (2004). The purpose and language of the CVRA is wholly aligned and consistent with current military law. In applying the CVRA to victims in courts-martial, this Court would not be "overlaying a generally applicable statute specifically onto the military system" with "uncritical application," which has been a concern of military appellate courts. *See, United States v. McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000). Instead, this Court would be applying the law as written by Congress that fits logically within the military justice system.

The rights provided by the CVRA are not alien to those currently provided to victims within the Department of Defense. For eight years, the Department of Defense has expressly instructed, *inter alia*, that a victim has the right to "[b]e treated with fairness and respect for the victim's dignity and privacy." Department of Defense Directive 1030.01, Page 2. That directive and its accompanying instruction, Department of Defense Instruction 1030.2, implemented 42 U.S.C. § 10606, the predecessor to the CVRA. Virtually all of the rights provided by the CVRA are included in this DoD Directive and Instruction and were further implemented in Air Force Instruction 51-201 Chapter Seven, which states unequivocally that a victim has the right to "[b]e treated with fairness and respect for the victim's dignity and privacy." Air Force Instruction 51-201, *Administration of Military Justice*, 21 December 2007, updated by Air Force Guidance

Memorandum 25 October 2012. In considering whether a general statute has modified the UCMJ or applies to courts-martial, *Dowty* considered as factors whether the statute interfered with a fundamental principle of military law and whether or not the military had implemented any of the rights contained in the legislation. 48 M.J. at 110-11. The Department of Defense has for eight years instructed its trial counsel and law enforcement officials that a victim's rights to privacy and dignity are paramount. A victim's rights to privacy and dignity have themselves become a fundamental principle, having been included in instructions and directives for eight years with little reverberation in the greater body of military law. While the current Department of Defense and Air Force Instructions reference the implementation of 42 U.S.C. § 10606, that statute was superceded in 2004 by the CVRA. Hence, current DoD Directives and Instructions, Air Force Instructions, and Military Rules of Evidence should be read to incorporate the CVRA. Congress clearly intended to incorporate the rights mentioned in 42 U.S.C. § 10606 into the CVRA and simply "moved" those rights from one volume and section to another in order to aid practicioners is locating those rights. H.R. REP. 108-711, pt. A, at pg 2. ("Crime victims have a listing of rights in Title 42 of the United States Code. However, because those rights are not enumerated in the criminal code, most practitioners do not even know these rights exist.") The clerical laxity in not updating the departmental instructions with the title of the correct and then operative legislation, the CVRA, is of no right-depriving import.

The passage of the CVRA marked a turning point for all victims in the United States. As the Respondent's brief makes clear, Congress's intent when passing the CVRA was sweeping. (Resp. Br. at 17). "Victims' advocates received nearly universal congressional support for a '"broad and encompassing"' statutory victims' bill of rights. 150 Cong. Rec. S4261 (daily ed. 22

April 2004) (statement of Sen. Feinstein)."(Resp. Br. at 17). The broad, encompassing, "plain meaning" of the words speaks volumes—"in ***any court*** proceeding involving an offense against a crime victim." 18 U.S.C. § 3771. Crime victim was defined to include any person directly or even proximately harmed as a result of any "federal offense."[1] *Id.* Furthermore, in addition to the mandate for courts to apply these rights, all "departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime" are held to task as well. *Id.*

The conclusion that the CVRA provides rights to U.S. citizens that can be exercised in military court is consistent with current law and controlling precedent. *See Dowty,* 48 M.J. at 102. In *Dowty*, the Court was forced to address the applicability of the Right to Financial Privacy, 12 U.S.C. §3401-3422 (RFPA). *Dowty*, 48 M.J. at 102. The RFPA was created in response to a Supreme Court decision denying the Fourth Amendment protection to certain types of searches and seizure of bank records. *Id.* at 106. In response, Congress created the RFPA which provided privacy rights to all U.S. citizens with regard to their banking records. *Id.* Just like the RFPA the CVRA has protections and rights that exist separate and apart from a courtroom. Indeed of the eight right creating provisions of the CVRA, six have clear application outside of courtroom. The CVRA is not simply a procedural evidentiary statute; rather, it is the codification of broad rights for all victims of federal offenses.

In *Dowty*, the Court was cautious in holding that the RFPA was applicable because the result would be directly inconsistent with a UCMJ provision. *Dowty*, 48 M.J. at 105 (noting conflict between RFPA and UCMJ Art. 43). In overcoming this inconsistency, the Court first noted that the RFPA created actionable rights for all service members. *Id.* at 108. Similar to the language

[1] All military offenses under the UCMJ are federal offenses. *See*, 10 U.S.C. § 877 et. al.

of the CVRA, the court in *Dowty* relied on the language from the act extolling its application by "any agency or department of the United States." *Id.*at 108; 18 U.S.C. § 3771. The Court further noted that although Congress could have excluded the Department of Defense, the Act "provides **no exemption** for the Department of Defense in general or **military disciplinary matters** in particular"[2] (emphasis added). 48 M.J. at 109. Likewise, there is no military disciplinary exemption in the CVRA. 18 U.S.C. § 3771. After finding the RFPA created rights for service members, the Court had to determine if the Act's provisions regarding the statute of limitations would apply in military courts, affecting UCMJ Art. 43. *Dowty,* 48 M.J. at 110-11. The RFPA mandated that the tolling provision apply to "any applicable statute of limitations" accordingly that Court found with "no reservations" that the RFPA was applicable to the military's statute of limitations. *Id.*at 110. The CVRA uses similar sweeping language. 18 U.S.C. § 3771.

In *Dowty*, the Court of Appeals for the Armed Forces explicitly rejected the argument that Congress was required to use any specific language when passing legislation that had the effect of modifying prior legislation. 48 M.J. at 109 ("Congress is not required to use specific language"). Further, the court rejected an argument that an intervening amendment to UCMJ Art. 43 had any effect on their analysis. *Id*. at 110. After the passage of the RFPA, Congress amended UCMJ Art. 43--extending the statute of limitations from 3 to 5 years and modifying some of the exceptions. *Id.* Congress did not in those amendments acknowledge, embrace, reference, or codify the tolling exception from the RFPA. *Id.* Appellant argued that Congress's inaction or silence with regard to the RFPA's application to UCMJ Art. 43 suggested their intent. *Id.* The court rejected this "repeal by implication" argument. *Id.* at 110. In finding the RFPA

[2] In applying a rule of evidence, the presumption that federal statutes and regulations apply to trial by court-martial is even stronger. *See*, Mil. R. Evid. 1102 (Requiring the President to affirmatively opt out of the existent Federal Rules of Evidence before they are automatically applied to Military Rules of Evidence).

applicable, significant to the court was the absurdity of ruling otherwise—that active duty military members would have recognizable privacy rights in civilian courts, but military courts would be forbidden from enforcing the corollary response to the exercise of those rights. *Id*. at 111. No such absurdity was tolerated in *Dowty*, nor should it be in the present case.

Resolving the applicability of the CVRA to military courts is a simpler issue than the application of the RFPA in *Dowty*, 48 M.J. at 106. Unlike *Dowty*, where the Court was cautious because of the direct inconsistency between the RFPA and the UCMJ, there is no need for such caution here. The CVRA is consistent with all existing provisions of military law.

Both *McElhaney* and *Spann* were mentioned in the Respondent's Brief. (Resp. Br. at 20-23). *Spann*, 51 M.J. at 89; *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000). In *McElhaney*, , the court addressed an issue similar to *Dowty*, namely, whether to enforce a federal law that was inconsistent with existing military law. 54 M.J. at 120. Unlike in *Dowty*, *McElhaney* did not deal with the creation of broad encompassing federal rights. *McElhaney*, 54 M.J. at 120; *Dowty*, 48 M.J. at 106. Instead, *McElhaney*, addressed the narrower issue of the Congressional update to federal child abuse laws. 54 M.J. at 120. Congress extended the statute of limitations for child abuse cases. *Id.* The military already had crimes for child abuse victims and already had a statute of limitations. UCMJ Art. 128; Art. 134. The court noted, first, that Congress's language in the new statute seemed to limit the application to federal district court—as opposed to the language of the CVRA "in ***any court*** proceeding involving an offense against a crime victim." 54 M.J. at 125-126;Victims of Child Abuse Act, 18 U.S.C. § 3283; Crime Victims' Rights Act § 3771. Second, the court noted that the law appeared to only apply to crimes "prosecuted by the

Department of Justice" as opposed to the language of the RFPA and CVRA "any agency or department of the United States." *McElhaney*, 54 M.J. at 125-6; *Dowty*, 48 M.J. at 106. Not surprisingly, the court ultimately held that the new contrary and inconsistent statute of limitations did not repeal *sub silentio* the existing UCMJ Art. 43. *McElhaney*, 54 M.J. at 120. *McElhaney* and *Dowty* when read together, reveal only what *Dowty* actually stated: absent clear inconsistency or contrary purposes, there is a "general direction to apply civilian procedures," and "in the absence of a valid military purpose requiring a different result, generally applicable statutes are normally available to protect service members." *Dowty*, 48 M.J. at 106-7.

The decision in *Spann* now serves as a historical marker and turning point for victim's rights in the military justice system. *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999). In *Spann*, the Court addressed whether the Victim's Rights and Restitution Act, 42 U.S.C. § 10606 repealed by implication the then existing Mil. R. Evid. 615. 51 M.J. 89. At the time of *Spann*, the military's existing evidentiary rule of sequestering witnesses was entirely inconsistent with the rights putatively created by the new law. Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002). In 1999, there were only three existing exceptions to the general rule of sequestration, (1) the accused, (2) a representative of the United States designated by trial counsel, and (3) a person whose presence is shown by a party to be essential to the presentation of the party's case. *Spann*, 51 M.J. at 90. In addition to the inconsistency, it was unclear if the Victim's Rights and Restitution Act actually created any rights. *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997). While Congress had previously passed the Victim's Rights and Restitution Act to create rights for victims, it was dubious at the time, even in federal courts, that any actionable rights were created. *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997)(holding that victims had

no appellate standing because the act did not create legally recognizable rights). The court in Spann was "primar[ily] concern[ed with] the lack of clarity lack of 42 U.S.C. § 10606 in federal civilian trials." *Spann*, 51 M.J. at 92. It was the ambiguities of the language, legislative history and judicial interpretation that kept the court from applying the statute. *Id*. Faced with an ambiguous provision that was inconsistent with military law and not apparently creating any federally recognizable rights, the Court, for good reason, found that Mil. R. Evid. 615 was not "repealed by implication" by 42 U.S.C. § 10606. This contrasts with the position the court took in *Dowty*, where the clarity of the language, argued in favor of applying the RFPA's tolling provision. *Id*. at 109 (citing *Dowty*, 48 M.J. 102). Similarly, the CVRA's language is also clear as to its intent and general applicability.

The decision in *Spann* prompted both congressional and presidential action to correct the apparent inconsistency between military law regarding victim's rights and their intent to protect those rights. Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002); Crime Victims' Rights Act, § 3771. First, the President fixed Mil. R. Evid. 615. Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002); Federal Rule of Evidence 615 and subsequently Mil. R. Evid. 615 were both amended to add a fourth exception forbidding automatic sequestering of "a person authorized by statute to be present." Both federal cases and the analysis of the amendments of Rule 615 make clear that "a person authorized by statute to be present" refers to victims protected by victim's rights legislation.[3] *United States v. Edwards*, 526 F.3d 747 (11th Cir. 2008)(holding that CVRA is a statute under the fourth exception of Fed. R. Evid. 615 and that the accused has no Constitutional right to exclude witnesses); *See generally*, SALZBURG,

[3] *See*, Mil. R. Evid. 101, which directs a court-martial to apply federal district court interpretation of rules of evidence.

SCHINASI, & SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL § 615.02[5]. Next, Congress, in response to the *McVeigh* decision passed the CVRA. *McVeigh*, 106 F.3d at 325. The CVRA superseded the earlier victim's rights legislations "mov[ing]" and "amplify[ing] the current rights." H.R. REP. 108-711, pt. A, at pg 2. The newly drafted legislation worked. The CVRA ushered in a renaissance in federal courts where victim's were afforded limited participant standing through counsel to exercise their rights. *In re Dean*, 527 F.3d 391 (5th Cir. 2008); *Brandt v. Gooding*, 636 F.3d 124, 136 (4th Cir. 2011); *Kenna v. United States*, 435 F.3d 1011 (9th Cir. 2006); *Pann v. Warren*, 2010 WL 2836879 (E.D.Mich. 2010); *United States v. Mahon*, 2010 WL 94247 (D. Ariz. 2010). Federal courts throughout the country have uniformly recognized that victim's now have standing to assert their rights created by the CVRA. *Id.* The decision in *Spann* was based on the existing landscape of victim's rights. 51 M.J. at 89. At the time, they were inconsistent with military law and it was uncertain whether they even existed as drafted. *Id.* The current landscape could not be more certain. Since the time *Spann* was decided, there has been new legislation, updated Department of Defense Directives and Instructions, updated Air Force Instructions and updated Military Rules of Evidence. Each have all provided significant rights for victims. Accordingly, this Court should recognize the applicability of the CVRA, and permit L.R.M. standing to assert those rights.

CONCLUSION

Wherefore we respectfully request this Honorable Court to hold that A1C L.R.M. has the right under the U.S. Constitution, the CVRA and Mil.R.Evid. 412 and 513 to be heard through counsel and order the lower court to permit her counsel to make arguments in these matters on her behalf.

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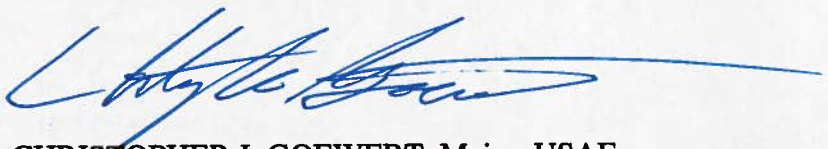
CERTIFICATION OF COMPLIANCE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division and to the Air Force Appellate Government Division on 27 February 2013 via electronic filing.



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Airman First Class (E-3) L.R.M., USAF *Petitioner*	))))	REAL PARTY IN INTEREST'S RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS
v.	))	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF *Respondent*	))))	Misc. Dkt. No. 2013-05
&	))	
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party in Interest,*	)))	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Relief Sought

COMES NOW Airman First Class (A1C) Nicholas E. Daniels, USAF, Real Party in Interest, by and through his undersigned counsel, and requests this Honorable Court deny petitioner's request for extraordinary relief in the above captioned case.

DECISIONAL ISSUES PRESENTED

I.

DOES THIS COURT HAVE JURISDICTION TO ISSUE EXTRAORDINARY RELIEF AT THE REQUEST OF A NON-PARTY SEEKING A REMEDY THAT COULD NOT BE PROVIDED ON A DIRECT APPEAL?

II.

SHOULD THIS COURT GRANT A1C L.R.M.'S PETITION UNDER THE ALL WRITS ACT WHERE JUDGE KASTENBERG HAS NOT USURPED ANY AUTHORITY, THIS IS NOT AN EXTRAORDINARY SITUATION,

AND A1C L.R.M. DOES NOT HAVE A CLEAR AND INDISPUTABLE RIGHT TO THE RELIEF SHE SEEKS?

III.

WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C L.R.M. THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL, WHEN THERE IS NO SUCH RIGHT ESTABLISHED UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHT ACT NEITHER PROVIDES SUCH A RIGHT NOR APPLIES TO THE MILITARY, AND NO SUCH RIGHT HAS EVER BEEN RECOGNIZED IN MILITARY PRACTICE.

History of the Case and Statement of Facts

Arraignment in the case of *United States v. Daniels* was held on 29 January 2013. Prior to the arraignment, defense counsel submitted a motion under Military Rules of Evidence (MRE) 412 and 513 seeking to admit evidence involving A1C L.R.M. Appendix F of Petitioner's Petition. Prior to entering pleas, Judge Kastenberg took up motions. *Id.* At a motions hearing, Judge Kastenberg allowed Capt Dilworth, A1C L.R.M.'S special victims counsel (SVC) to argue why he believed he had standing. *Id.* Capt Dilworth admitted his client's interests aligned with the government and he did not intend to make a statement for her or argue on her behalf. *Id.* Capt Dilworth later changed his position and asked to reserve the right to argue on A1C L.R.M.'s behalf. *Id.* The military judge treated his motion to reserve the right to be heard later under MRE 412 as "a motion in fact," that is, as a motion to represent A1C L.R.M. at any MRE 412 hearings by making arguments on her behalf. *Id*.

Judge Kastenberg heard argument from the SVC, trial counsel, and senior defense counsel. *Id.* The military judge denied the SVC's request for standing. *Id.* The military judge ordered the case continued until 18 March 2013. On 1 February 2013, the SVC filed a motion to reconsider Judge Kastenberg's ruling. Appendix H of Petitioner's Petition. The trial counsel filed a response to the motion to reconsider stating, "[T]he Government objects to Special Victim

Counsel presenting legal or factual argument or moving the court for the admission or suppression of evidence." Appendix I of Petitioner's Petition. Judge Kastenberg reconsidered the motion, but denied relief on 9 February 2013. Appendix K of Petitioner's Petition.

On 14 February 2013, A1C L.R.M. filed a petition with this Honorable Court for a writ of mandamus. On 20 February 2013, this Honorable Court issued a show cause order to the government to show cause why the writ should not be issued. On 22 February 2013, the government filed a response. The government's response took a different position than the government took at trial. On appeal, the government argued that the writ should be granted and Judge Kastenberg ordered to provide the petitioner the opportunity to be heard through counsel, "to include arguing points of law orally and in writing, in any evidentiary hearings under the foregoing rules." Gov. Brief at 24.

JURISDICTION

This Court has no jurisdiction to grant the petitioner's request for extraordinary relief. The petitioner cites only one source of authority as providing jurisdiction: the All Writs Act, 28 U.S.C. § 1651. Petition at 4. But as the Supreme Court has repeatedly held, the All Writs Act is not a jurisdiction-granting statute. *See, e.g.*, *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). Thus, the petitioner clearly errs by citing it as a basis for this Court's jurisdiction. Tellingly, the petitioner cites no other source of authority for this Court's jurisdiction. Nor does any such alternative basis for jurisdiction exist. As the Supreme Court observed in *United States v. Denedo*, 556 U.S. 904, 911 (2009), "a court's power to issue any form of relief" under the All Writs Act "is contingent on that court's subject-matter jurisdiction over the case or controversy." This Court does not have and will never have jurisdiction over any case or controversy involving

A1C L.R.M, a non-party in the court-martial below. In *Clinton v. Goldsmith*, the Supreme Court observed:

> Since the Air Force's action to drop respondent from the rolls was an executive action, not a "findin[g]" or "sentence," § 867(c), that was (or could have been) imposed in a court-martial proceeding, the elimination of Goldsmith from the rolls appears straightforwardly to have been beyond the CAAF's jurisdiction to review and hence beyond the "aid" of the All Writs Act in reviewing it. Thus, this Court has no jurisdiction to issue the requested writ of mandamus.

Goldsmith, 526 U.S. at 535 (footnote omitted). Here, the military judge's refusal to allow A1C L.R.M.'s counsel to participate in another servicemember's court-martial was not a finding or sentence that was (or could have been) imposed in a court-martial proceeding. Accordingly, this Court is without jurisdiction to grant the requested relief.

The conclusion that this Court has no jurisdiction is especially appropriate given this Court's status as an Article I tribunal. "[E]stablished principles of statutory construction mandate . . . a narrow interpretation of" an Article I court's jurisdiction-granting statute. *Bowen v. Massachusetts*, 487 U.S. 879, 908 n.46 (1988) (quoting *Delaware Div. of Health & Social Services v. Dep't of Health & Human Services*, 665 F. Supp. 1104, 1117-18 (D. Del. 1987)). An Article I court "is a court of limited jurisdiction, because its jurisdiction is statutorily granted and it is to be strictly construed." *Id*. (quoting *Delaware Div. of Health & Social Services*, 665 F. Supp. at 1118); *see also Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999) ("the CAAF's independent statutory jurisdiction is narrowly circumscribed"); *Denedo*, 556 U.S. at 912 ("[I]t is for Congress to determine the subject-matter jurisdiction of federal courts. . . . This rule applies with added force to Article I tribunals, such as the NMCCA and CAAF, which owe their existence to Congress' authority to enact legislation pursuant to Art. I, § 8 of the Constitution.").

Because this Court has no jurisdiction to grant the requested relief, the petition must be denied. But even if this Court were empowered to grant the requested relief, it should decline to do so.

ARGUMENT

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF MANDAMUS BECAUSE JUDGE KASTENBERG HAS NOT USURPED ANY AUTHORITY, THIS IS NOT AN EXTRAORDINARY SITUATION, AND A1C L.R.M. DOES NOT HAVE A CLEAR AND INDISPUTABLE RIGHT TO THE RELIEF SHE SEEKS.

Standard of Review

"The writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983)). "The petitioner must establish a clear and indisputable right to the requested relief." *United States v. Denedo*, 66 M.J. 114, 126 (C.A.A.F. 2008) (citing *Cheney v. United States District Court*, 542 U.S. 367, 381 (2004)), *aff'd*, 556 U.S. 904 (2009).

A. There has been no clear abuse of discretion or usurpation of power.

This case does not satisfy the requirements for issuance of a writ of mandamus. "To justify reversal of a discretionary decision by mandamus, the judicial decision must amount to more than even 'gross error'; it must amount 'to a judicial "usurpation of power"' or be 'characteristic of an erroneous practice which is likely to recur.'" *Labella*, 15 M.J. at 229 (internal citations omitted). Petitioner's attempt to win recognition of a never-before-known right for a non-party to have counsel appear on her behalf before the court-martial of another servicemember, does not and cannot meet that standard.

Judge Kastenberg made a thorough analysis of the facts and the law and applied the law to the facts. After his careful analysis, he found a witness at a court-martial does not have

standing to be heard through counsel. There has never been a right to be heard through counsel for a witness at a court-martial. Additionally, Judge Kastenberg indicated that even if it was permissible to allow a witness's counsel to address the tribunal, he would exercise his discretion against allowing A1C L.R.M.'s counsel to do so in this case. *See* Appendix G of Petitioner's petition. Such an exercise of discretion is not reviewable by a petition for writ of mandamus.

Likewise, Judge Kastenberg's ruling was not a usurpation of power. As a military judge, he was expressly authorized to rule on the petitioner's request. *See* Art. 51(b), UCMJ, 10 U.S.C. § 851(b) (2006); R.C.M. 804(e). Thus, far from usurping authority, the military judge was exercising authority provided to him by Congress and the President.

Nor has Judge Kastenberg denied the petitioner any rights recognized by the Military Rules of Evidence (MRE). The rules do not provide A1C L.R.M. a right to be heard *through counsel*. Judge Kastenberg never denied A1C L.R.M. the right to be heard. In fact, Judge Kastenberg did the opposite, pointing out that A1C L.R.M. can be heard pursuant to MREs 412 and 513. *See* Appendix J of Petitioner's petition.

B. This is not characteristic of erroneous practice likely to recur.

Judge Kastenberg did not adopt any erroneous practice, much less one likely to recur. There is no statute, regulation, or case law granting a complaining witness the right to be heard through counsel at another servicemember's court-martial. It is not an erroneous practice to treat the complaining witness in this case in the same manner that the American military justice system has treated complaining witnesses since General Washington commanded the Continental Army. If that system is to be restructured, that is the task of Congress acting pursuant to its constitutional authority to make rules and regulations for the land and naval forces, or the President acting pursuant to his delegated rulemaking authority. *See* U.S. Const., art. I, § 8, cl. 14; Article 36, UCMJ, 10 U.S.C. §

836. It is not the function of an Article I Court to redraft the statutory and regulatory system adopted by Congress and the President; it would be even less appropriate to do so through the vehicle of a writ of mandamus.

C. This is not an extraordinary situation.

"[N]ot every case is suitable for consideration upon a petition for extraordinary relief—whether by the accused or by the Government." *Murray v. Haldeman*, 16 M.J. 74, 76 (C.M.A. 1983) (emphasis added). "[M]ere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ…it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *United States v. DiStefano*, 464 F.2d 845, 850 (2d Cir. 1972).

The military judge's decision not to allow her to address the court-martial through counsel is not an "extraordinary situation." In fact, it is the opposite. The course followed by Judge Kastenberg has been the norm for the entire history of the American military justice system. The petitioner still has the same rights as every other complaining witness at a court-martial. As such, mandamus is unavailable. *See, e.g., Rhea v. Starr*, 26 M.J. 683, 684 (A.F.C.M.R. 1988) (noting that mandamus relief was not available to resolve "an area of the law not previously addressed by an appellate military court" because "for this very reason . . . the trial judge's ruling . . . was not contrary to statute, *settled decisional law*, or valid regulation."),

D. A1C L.R.M.'s right is not clear and indisputable.

An extraordinary writ is an extreme remedy and should be granted only in truly extraordinary circumstances. *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384-85 (1953)("Mandamus, prohibition and injunction against judges are drastic and extraordinary

remedies."). It is for this reason that the party seeking the writ has the burden of showing it has a clear and indisputable right to its issuance. *Rhea* 26 M.J. at 685.

A1C L.R.M. has failed to show a clear and indisputable right to relief. The lack of an indisputable right is indicated by even the trial counsel's position disputing the purported right at trial. There is no military case law granting A1C L.R.M. the right to be heard through counsel at a court-martial. Instead, A1C L.R.M. relies on irrelevant third-party case law and the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, which does not apply to the military justice system.

The cases A1C L.R.M. cites are distinguishable from the case on hand. For example, while *Powell v. Alabama*, 287 U.S. 45 (1932), is a seminal case for ensuring a *party* to a case has the right to counsel, as A1C L.R.M. pointed out:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear *a party* by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id. at 69 (emphasis added).

But A1C L.R.M. is not a *party*. *Powell* therefore recognizes no rights that she possesses. The petitioners in *Powell* were three criminal defendants who had been sentenced to death. *Id*. at 50. A1C Daniels faces the possibility of confinement for life without eligibility for parole. A1C L.R.M. faces no risk to her life, liberty, or property. Hence, unlike the petitioners in *Powell*, she has no due process right or Sixth Amendment right to be represented by counsel.

E. Under controlling Supreme Court case law, A1C L.R.M. has no due process right to address the court-martial through counsel.

Complaining witnesses at courts-martial have never had the due process right to be heard through counsel. Congress has never conferred such a right on a complaining witness.

"Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio v. United States*, 483 U.S. 435, 447 (1987). Before recognizing any purported due process right of a complaining witness to be heard through counsel at another servicemember's court-martial, this Court must apply the test set out in *Weiss v. United States*, 510 U.S. 163 (1994).

Weiss requires an extremely deferential review of any due process challenge to military justice procedures. In rejecting a due process challenge to the lack of fixed terms of office for military judges, the *Weiss* Court observed that courts-martial "have been conducted in this country for over 200 years without the presence of a tenured judge, and for over 150 years without the presence of any judge at all." *Id.* at 179. Similarly, courts-martial have been conducted for over 200 years without counsel for complaining witnesses being permitted to argue about what evidence is admissible or subject to discovery by the defense. Neither Congress nor the President has ever provided any such right to a complaining witness. As *Weiss* demonstrates, the courts may not use the Due Process Clause to impose such a requirement where the branch of government constitutionally tasked with regulating the land and naval forces has not done so. *See* U.S. Const., art. I, § 1, cl. 14.

F. The Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA) does not apply to the military.

Judge Kastenberg did not err by denying A1C L.R.M.'s request to be heard through counsel. As conceded by the government's answer, the CVRA does not apply in the military. *See* Gov. Brief at 8. "The rights described in subsection (a) shall be asserted in the *district court* in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the *district court* in the district in which the crime occurred." 18 U.S.C. § 3771(d)(3) (emphasis added). District court is defined as "each district court of the United States created by chapter 5

of title 28, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, and the District Court of Guam." 18 U.S.C. § 3006A(j).

Courts-martial are not included as district courts. Courts-martial are created by convening authorities acting under the authority granted to them by Congress in the exercise of its Article 1, § 8, clause 14 authority to prescribe rules for government of land and naval forces. *Walsh v. Hagee*, __ F. Supp. 2d __, Civil Action No. 11-2215, 2012 WL 5285133 (D.D.C. Oct. 26, 2012), does not support the proposition that the CVRA applies to courts-martial. Indeed, it indicates the opposite. In *Walsh*, the Court observed:

> The CVRA provides crime victims with several rights including "[t]he right to be reasonably protected from the accused." 18 U.S.C. § 3771(a)(1). Such protection must be sought in the district court where a defendant is being criminally prosecuted, or in the district court in the district where the crime occurred. 18 U.S.C. § 3771(d)(3).

Id. 2012 WL 5285133, at *8. Because this case does not arise in a district court and because Petitioner does not seek to invoke the CVRA in a district court, that statute is inapplicable.

Even if this case were being prosecuted in federal district court, the CVRA would not grant A1C L.R.M. the right to be heard through counsel during the findings stage of a contested criminal trial. The CVRA gives complaining witnesses the right to "be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771 (a)(4). Petitioner misinterprets § (d)(1) as implying a complaining witness is entitled to be heard though counsel since it talks about legal representative; however, Petitioner fails to acknowledge § (e), which says, "[I]n the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights

under this chapter….” 18 U.S.C. § 3771(e). A1C L.R.M is over 18 years of age, competent, and alive; therefore, she would not be entitled to have a representative speak on her behalf even in a U.S. district court proceeding. And even if she were, a motions hearing is not a stage at which the CVRA provides an alleged victim with the right to be heard. Accordingly, the CVRA does not and cannot establish a right to the relief that A1C L.R.M. seeks. Mandamus, therefore, is unavailable.

Conclusion

A1C L.R.M. has failed to provide any support for the proposition that this Court has jurisdiction to issue her requested writ of mandamus. She has also failed to provide any case law supporting the premise that the right to be heard through counsel is afforded to a court-martial witness. Congress is free to change the UCMJ and the President is free to change the *Manual for Courts-Martial* if either wants to establish a previously unknown right for complaining witnesses to address the court-martial through counsel. But to date, neither has done so. Judge Kastenberg did not err by denying a right that does not exist.

WHEREFORE, A1C Daniels respectfully requests that this Honorable Court deny petitioner’s petition for Extraordinary Relief in the Nature of a Writ of Mandamus.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that copies of the foregoing was sent via email to the Court, petitioner's counsel, Judge Kastenberg, and served on the Appellate Government Division on 4 March 2013.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Airman First Class (E-3) L.R.M., USAF *Petitioner,* v. Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF *Respondent,* & Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party in Interest.*	))))))))))))))))	BRIEF OF AIR FORCE TRIAL DEFENSE DIVISION AS AMICUS CURIAE IN SUPPORT OF AIRMAN FIRST CLASS (E-3) NICHOLAS E. DANIELS, USAF, REAL PARTY IN INTEREST Misc. Dkt. No. 2013-05

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

COMES NOW the Air Force Trial Defense Division (JAJD), by and through its undersigned counsel, and pursuant to its contemporaneously filed motion for leave to appear as amicus curiae and Rule 15.1 of this Honorable Court's Rules of Practice and Procedure, and files this brief as amicus curiae in support of A1C Nicholas E. Daniels.

ISSUES PRESENTED

I.

WHETHER THIS HONORABLE COURT HAS THE AUTHORITY TO ADDRESS THE SUBJECT PETITION AND WHETHER A WRIT SHOULD BE ISSUED WHEN L.R.M. WAS NOT DENIED ANY COGNIZABLE RIGHTS.

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II.

WHETHER THE AIR FORCE SPECIAL VICTIMS' COUNSEL PROGRAM FUNDAMENTALLY ALTERS THE MILITARY JUSTICE SYSTEM AND PREJUDICES THE RIGHTS OF AIRMEN ACCUSED OF SEXUAL OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

History of the Case and Statement of Facts

JAJD accepts Petitioner's statement of the facts and history of the case.

ARGUMENT

I.

THIS HONORABLE COURT SHOULD DENY THE PETITION FOR A WRIT OF MANDAMUS.

As outlined by the Air Force Appellate Defense Division (JAJA) in its persuasive brief, an extraordinary writ is a drastic tool to be invoked only in truly extraordinary situations when there is a clear and indisputable right to the requested relief. Petitioner utterly fails to meet this standard, no additional argument in that regard is required, and her petition must be denied. As articulated by Lt Col Kastenberg, the military judge in the subject court-martial, Petitioner simply has no standing as a third party and she has not been denied any rights. However, the issues at stake are far greater than the application of well-established law to a single case. The Air Force Special Victims' Counsel Program (AFSVCP) in only its first month of existence has wreaked havoc across the military justice landscape and threatens to irrevocably disrupt the already precarious balance of our adversary system.

II.

THE AFSVCP FUNDAMENTALLY ALTERS THE MILITARY JUSTICE SYSTEM AND PREJUDICES THE CONSTITUTIONAL RIGHTS OF AIRMEN.

A. The AFSVCP is an ultra vires trial advocacy program born of political pressure that should be limited strictly to legal assistance.

As this Honorable Court considers the subject petition, it is critical for each judge to be aware of how and why the AFSVCP came into being. This unprecedented trial advocacy program is not rooted in statute, the MCM, or any lawful federal regulation—it is a legal fiction. The only authority cited to justify this seismic shift in our justice system is an advisory opinion from DoD/GC vaguely referencing legal assistance sections of Title 10, United States Code, which was then transposed in an equally vague manner under the guise of an Air Force Guidance Memorandum even though there was no immediate risk to life, safety, property, or mission as required by AFI 33-360, *Publications and Form Management*. This hastily assembled concept of operations is loosely based on one or two state programs that were presumably the product of careful debate and legislation, and which exist in a civilian world free of the inherently coercive environment of the military, where unlawful command influence treads precariously close at every turn in the process. The deck is already stacked against military members accused of an offense (e.g., convening authorizes control the entire process from start to finish, to include referral of charges against the accused, handpicking the court members, controlling defense access to expert assistance, funding defense witness travel, and the hiring of investigators—the defense has no independent budget for experts nor its own investigative staff) and this ultra vires program is a wild card that threatens to completely upend the entire system of justice.

JAJD first became aware of the AFSVCP in late 2012 when it was clear the idea had not been fully vetted but was already in the final stages of approval. Our military justice system is firmly rooted in the Anglo-American adversary tradition and until the advent of this program, the parties to a court-martial were well-defined and each knew their role. The fact that JAJD was completely cut out of the process until it was too late to provide meaningful input except,

ironically, to protect the rights of complaining witnesses (CWs) suspected of misconduct, is a clear indicator special victims' counsel (SVCs) were never intended to be neutral players but rather they were created to align with prosecutors and secure convictions.

From what little JAJD saw of the program's creation, due process concerns about an accused having to face not only a prosecution team but also an SVC juggernaut were summarily dismissed. Similarly, every rational question raised, to include SVC standing in court, their participation in interviews, the mechanics of how they should appear at trial, and the potential impacts on appeal were brushed aside without adequate resolution. A three-day training course was thrown together in short order even while the SVC standards and rules were still being changed on what seemed a daily basis. It was readily apparent that having a program in place was more important than having a program that worked fairly or coherently; this aircraft was intended to be built in flight without a destination.

The timing and haste with which the AFSVCP was put together is evidence it is a reaction to political pressure from a very small, very vocal constituency who believe sexual assault is out of control in the military. It is a solution to a problem that does not exist anywhere near the levels carelessly repeated by our senior leaders, and inflated estimates of sexual assault have greatly exacerbated this misperception. Sound problem-solving requires a dispassionate analysis of the facts to determine the size and scope of the issue at hand. The issue of sexual assault and how best to address it should not get a pass on this fundamental requirement simply because it involves a highly emotional subject. To the contrary, its emotional nature demands the most dispassionate factual analysis possible.

This Honorable Court must not lose sight of the fact that the U.S. Air Force Academy underwent a similar frenzied pitch of scrutiny more than a decade ago. Yet when all of the

hundreds of cases were forensically dissected, only a mere handful had merit. Over the past year, senior leaders and the media have repeated the grossly inaccurate estimate that 19,000 sexual assaults could have been perpetrated against military members in 2011, which is far more than the approximately 3,000 reported violations. This inaccurate number came from an overly-broad, anonymous Gallup poll rather than from sound, dispassionate investigation. Repeating an unsubstantiated number that equates an off-color remark or an unwelcome proposition with rape does a disservice to our system of justice, and the AFSVCP propagates a myth that prejudices the rights of every accused.

This program should be relegated to its proper place: advising CWs about their role in the process, educating them about the military justice system and the host of benefits the United States has authorized, and referring them to JAJD when they become suspected of misconduct or face adverse action so that we can protect their rights, just like we would with any Airman authorized to receive the benefit of our counsel. Denying Petitioner's request is the first step in restoring sanity and turning the tide of injustice that has washed over the judiciary in only the first month of the program's existence.

B. The AFSVCP has prejudiced the rights of the accused in courts-martial worldwide, and it will further subvert the course of justice over time.

As announced in the TJAG online news service (ONS) dated 9 Jan 13, and trumpeted in several national media outlets as well as by the Chief of Staff of the Air Force (CSAF) in his testimony before Congress two weeks later, the AFSVCP officially launched on 28 Jan 13. Subsequently, the ONS dated 27 Feb 13 assessed the program's inaugural month through some very rose-colored glasses. The signature piece gravely noted the SVCs were there to "protect [CWs] from questions the only purpose of which is to degrade, humiliate or intimidate." Such an allusion to unethical conduct by defense counsel is completely unfounded. JAJD is not aware of

any ethics complaints filed or pending against our personnel related to the treatment of these witnesses, whom we treat with dignity and respect as we uncover the truth. In this same ONS edition, TJAG stated SVCs had made a "profound and positive difference…without negatively impacting the rights of the accused." Contrary to what TJAG may have been told by his staff, JAJD's experience reveals a much different on-the-ground truth about the very real harm this program has wrought in only one month. SVCs are slowing down the process, prejudicing the accused's access to full discovery, distracting the parties from their critical duties, throwing the serious business of trial work into a state of disarray, and turning courts into carnivals. The following examples foreshadow the three-ring circuses headed the Air Force's way, and perhaps beyond, if Petitioner's request is granted.

US v. Summerfield, a GCM convened at Peterson AFB on 26 Feb 13, illustrates the wide-ranging wreckage the SVC program can cause to the fair and effective administration of justice as it spawns unnecessary and time-consuming trials within trials that have nothing to do with the guilt or innocence of the accused. The judge in this case granted the SVC standing. The CW did not appear for any hearings but the SVC was present for the entire trial, including closed sessions. The SVC was asked by the judge to address the court several times from the gallery, lending the proceedings a talk show atmosphere. One such instance was to invoke the spousal privilege for a witness who had taken the stand repeatedly. More shocking, during a 10 minute recess while the CW was still testifying and in the middle of cross-examination (she became flustered when confronted with an email from her government account that she had just denied ever sending), the TC, ATC, and SVC together met with the CW in TC's office, consoled the witness, asked her questions about the matter she was just cross-examined about, and then developed her redirect. The MJ denied any relief when DC found out about this improper

contact and even allowed the attorney-client privilege to be invoked to prevent cross-examination of the matters discussed between the SVC and CW during the break. Fortunately for the client and for justice, the CW's lie about her email (the defense was able to find the person who the CW claimed had sent the email from her account) resulted in an acquittal after the members repudiated the CW's perjured testimony after deliberating a mere 25 minutes.

In US v. Barker, a SPCM convened at Nellis AFB on 6 Feb 13, an SVC moved for limited participant standing. The defense moved to deny standing and the judge wisely granted the oral motion. The case is currently in a continuance, however, the judge was going to reconsider his MRE 412 ruling and allow the SVC to speak on behalf of the CW, and there is an appearance the judge could have been influenced by the pending petition before this Honorable Court. Critically, the SVC did not start making requests or filing pleadings until the day of trial, and this type of last-minute chaos invites delay and causes unnecessary distractions from substantive matters, most notably our clients' due process rights.

In US v. Davis, a GCM convened at JBSA-Lackland on 28 Jan 13, the SVC requested to attend the defense interview of the CW. During the interview, the ADC asked the CW questions regarding victim impact evidence, to which the witness had a very minimal response. The SVC then interrupted the interview, reminding the CW of what they had previously discussed. The CW maintained that she had suffered little to no impact. The SVC then requested a break. Upon returning to the interview, the CW said she wanted to supplement her response to the question on victim impact and then provided a lengthy response. This caused the ADC to ask what prompted the drastic change. The SVC then disclosed that they had discussed what she should say in response to that question. After the interview concluded, the ADC added the SVC to the witness

list, but the issue never became ripe because the accused was acquitted of the relevant charge. It is evident SVCs are stepping outside their role of advisor to one of coaching witnesses.

In US v. Soto, another GCM convened at JBSA-Lackland on 28 Jan 13, the SVC requested to attend the defense interview. The defense counsel agreed with the SVC's attendance so long as the SVC agreed he wouldn't disclose any information obtained during the interview, similar to the restriction placed on victim advocates. He refused, indicating that he would disclose anything that he thought would help his client to the TC or anyone else. DC then refused to conduct the interview and filed a motion for appropriate relief requesting that either the SVC not be allowed to attend or that he be precluded from disclosing the details. The judge denied the request. Based on the SVC's attendance, DC was forced to refrain from discussing several matters previously planned to be discussed with the CW in order to protect the defense's trial strategy from disclosure to TC by the SVC. There should be no doubt in anyone's mind that with this type of SVC behavior, the program had morphed into the right hand of the prosecution in only its first official day of existence.

US v. O'Connor, a GCM convened at Grand Forks AFB on 25 Feb 13, involved an officer charged with aggravated sexual assault and fraternization. During a pretrial CW interview, the SVC coached the witness on how to respond to DC's questions and at one point, held up his hand and said the CW would not answer any more questions despite a grant of immunity and order to testify the SVC had requested. During a 39a session on the matter, the judge made it clear the case would not go forward unless she consented to be interviewed. The CW was ultimately interviewed, but the SVC's shenanigans caused the trial to be delayed by two full days. Once motions began, the SVC was "heard" at the 412 and 513 motions from the witness box about the CW's privacy in a case where OSI obtained the accused's mental health

records, summarized them in the ROI, and attached them as exhibits. The judge ultimately ordered the release of the CW's mental health records, and her order said that the trial counsel could "show" the CW her mental health records. TC took this to mean they could make a copy for the CW to keep and in doing so, copied mental health records of the accused (different from what OSI had already improperly disclosed) and gave those to the CW, along with her own mental health records. A motion for mistrial ensued, but was denied. An additional day was spent on the record dealing with the mistrial motion and this SVC-induced disaster.

Finally, trial began. DC made a motion to exclude the SVC from the gallery, which was denied. The SVC then filed a motion to have the judge reconsider her ruling, which didn't make any sense because she had denied the defense motion. The judge emphasized that the SVC had ethical obligations to follow and that she expected every attorney to exhibit integrity and follow the rules. The government's theory of the case was substantial incapacitation; the CW claimed she was drinking and couldn't remember being assaulted. As such, a lot of her testimony centered around the things she could remember versus the things she couldn't. The defense called witness A, who testified that the CW was in his room at one point in the night. The CW had previously testified she didn't remember anything, including being in witness A's room. After the witness testified, the defense rested. The government provided rebuttal witnesses and then rested again. After this, SVC went to STC and said, "the CW now remembers being in witness A's room. She says that witness A grabbed her butt and said 'you deserved what happened.'" This statement had never come up in any interviews, at the Article 32, or at trial; witness A had just testified and now the CW magically recovered her memory. The CW wasn't present in the courtroom, so it is probable the SVC told her about the testimony. The STC asked when the SVC found out this information and the SVC said he knew before trial. Thus, when the

CW testified at the motions hearing about what happened in witness A's room, she lied, and the SVC knew she lied. Then, the CW testified during findings and lied (said nothing happened) and the SVC knew she lied. This all came out after witness A testified and both parties had rested. Fortunately for the client, the CW's parade of lies resulted in a not guilty verdict for sexual assault despite the SVC's best efforts to sabotage the fair administration of justice.

In US v. Schwartz, a GCM pending at the Presidio of Monterey, the defense is expending valuable time to craft a motion to address why both the CW and her attorney should be excluded from the courtroom during findings and why the CW does not have standing to contest a ruling under MRE 615. The judge already granted the defense's MRE 615 motion to exclude the CW and SVC. However, after the SVC petitioned for reconsideration and invoked the possibility of an appeal and stay in the proceedings, the judge requested briefs from trial and defense counsel on the issue, causing a delay in the proceedings. Additionally, the SVC was present for a pretrial interview and advised her client not to answer defense questions about the CW's history of past blackouts, even though that information is clearly discoverable, material, and relevant.

In US v. Jenkins, an Article 32 hearing was held at Aviano Air Base on 30 Jan 13. The SVC was present during defense counsel's interview of the CW and also attended the Article 32 hearing. At the conclusion of the CW's testimony, the IO took a break to finish summarizing the CW's testimony. The IO then had the CW review the summary. Without officially making an appearance, the SVC went straight to the IO and informed him that several changes had to be made to the summary. The IO made the changes, which were never announced to either the DC or the TC and were only discovered after the fact. SVCs are doing more than protecting rights—they are shaping evidence, and that overreach is unacceptable.

US v. Jones involved another Article 32 hearing held at Aviano Air Base the following day, 31 Jan 13. Due to an SVC's schedule, the ADC was unable to interview a fact witness until two days before the hearing. (This particular fact witness is a complaining witness in another sexual assault case that occurred on the same night and in the same room as the incident alleged against Amn Jones.) As a result of the delayed interview, the ADC had to make last-minute adjustments to various cross-examinations that had already been prepared. Ultimately, the SVC's refusal to allow her client to be interviewed prior to two days before the hearing did not result in a delay, but it certainly impacted the defense's preparation and it is clear such blocking tactics are going to have a profound impact as delays become the rule.

Another case at the Article 32 stage, US v. White at Travis AFB, demonstrates how quickly the SVC mission has crept into the pretrial process. In response to a discovery request made to the government, the SVC detailed to assist the CW injected herself into the proceedings and filed a written objection to the IO regarding DC's request for the CW's medical and mental health records. It is not unreasonable to believe SVCs will next demand to be part of charging decisions and to even be consulted on investigative steps. The AFSVCP has already bled into areas outside of its charter and there is no telling where SVCs will next venture or who will have the courage to finally listen to the defense's warnings about this unchecked program.

In a case at Patrick AFB where the investigation is still pending, JAJD's worst nightmare about the denial of defense services is becoming reality. A CW was read her rights under Article 31 for misconduct directly related to the sexual assault allegation. She wisely obtained the assistance of an ADC, who requested immunity on her behalf. After the launch of the SVC program, the CW elected to also have an SVC detailed to assist her because the government was still prosecuting the male accused. The strategic interests and experience levels between the

ADC and the SVC are vastly different, and JAJD has tremendous concerns in this case and others involving suspected CW misconduct that clients risk following the legal advice of SVCs who know absolutely nothing about defending clients and who wish only to assist the prosecution in sexual assault cases. As a result, these CW's will suffer adverse consequences. SVCs are not defenders and they should never have been put in JAJD's area of expertise.

Finally and most important, the accused in the case at bar, A1C Daniels, may be forced to wait many more months to get to trial if the SVC is given standing to intervene further with his right to a speedy and fair trial. A1C Daniels' day in court has already been delayed by five weeks due to the inability of TC to provide discovery in the possession of OSI, and JAJD has every reason to believe further delays are on the horizon if Petitioner is successful. We have been given a glimpse into the future of what the military justice system will look like in the Air Force and beyond if SVCs are given free rein to act as third parties in courts-martial, and it is a charred landscape littered with the remnants of what used to be the constitutional rights of the accused. It is a future that does not have to be, but unless this Honorable Court takes a stand to stop it, this inversion of justice will become the new normal.

C. The AFSVCP is the latest and boldest step in the continuing erosion of the constitutional rights of America's Airmen.

When considering the full context the AFSVCP, it is necessary to pause and ask why the ample resources of the Air Force Judge Advocate General's School (AFJAGS) have been brought to bear to represent Petitioner against A1C Daniels. AFJAGS is supposed to be the neutral center for education and training of the entire JAG Corps, and it should not take an advocacy role in any pending trial by court-martial. JAJD would note that the AFJAGS Commandant himself is acting as "Appellate Special Victims' Counsel" in Petitioner's brief and we are not privy to what authority is being relied upon to allow such representation. Like the

AFSVCP itself, we can only assume AFJAGS involvement is at the behest of The Judge Advocate General. Thus, A1C Daniels has had to face OSI investigators, senior trial counsel, assistant trial counsel, the legal office staff, the Number Air Force legal office staff, the MAJCOM legal office staff, all of AFJAGS, the SVC, the SARC, a victim advocate, AF/JA, as well as the full weight of the resources of the United States. We can only brace ourselves for what unknown horrors are coming next. The AFSVCP, however, is only the latest iteration of the slow but steady dissolution of our Airmen's constitutional rights, which began in earnest in only the last decade.

As this Honorable Court is well aware, the Code has been amended numerous times in recent years in what appears to be the result of a political effort to make convictions easier to obtain in a manner that would offend our Founding Fathers. Rape, as defined by Article 120, UCMJ, prior to 1 Oct 07 was clearly understood by trial practitioners and well-developed by case law. The wholesale changes enacted since then have thrown the military justice system into a state of turmoil. On top of changes to the law, the Air Force at the same time completely restructured the well-rooted balance of our military justice system by dismantling the judicial circuits that were the envy of our sister services. Circuit defense counsel, now known as senior defense counsel, in particular were tasked with additional administrative responsibilities that detracted from their in-court representation of clients. Similarly, chief circuit defense counsel, today called chief senior defense counsel, were reduced from five down to only three positions for worldwide coverage. These concurrent changes, however, were only the tip of the iceberg.

Over the past few years, the prevalence of sexual assault in the military became vastly overinflated, culminating in the unsubstantiated figure of 19,000 unreported offenses becoming "fact." The Congress became energized as a result of the misplaced reliance on these unreliable

numbers, which in turn put senior military leaders in a defensive position to display they were doing everything within their power to stop all sexual assaults, real or imagined. Unlawful command influence (UCI) is the mortal enemy of military justice and it is an easy line to cross. CSAF has made a number of statements that risk veering into the realm of UCI. He has said words to the effect that lower-level sexual offenses need to punished more harshly, that no matter the extenuating or mitigating circumstances an instructor sexually involved with a trainee in any manner should be kicked out of the service, and that he supports legislation making certain sexual offenses strict liability crimes. At the same time, JAJD is not aware of any public statements by CSAF being tempered with the importance of looking at the facts of each case individually, the right to a fair trial, and the presumption of innocence. There is a very real danger that commanders at every level will be influenced to make decisions divorced from any factual basis. For example, the Air Force routinely takes cases to trial despite Article 32, UCMJ, investigating officer recommendations to the contrary. The Catch-22 that results is that more cases without merit bring about a greater number of acquittals, which in turn makes it appear the Air Force cannot properly prosecute cases, which leads to more pressure to take any accusation, no matter how lacking in credible evidence, to court. Building the AFSVCP on top of this imbalanced publicity campaign greatly increases the risk of UCI seeping into the deliberative process.

The AFSVCP is also part of the larger, ill-conceived effort to incentivize victimhood, which in turn harms real victims of crime. Rather than fostering an environment that protects victims of sexual assault, the Air Force's approach to the issue has created powerful incentives for individuals who consented to sexual activity to later claim to have been victims. Subordinates who use sex to advance their careers and get caught can now easily claim they felt

compelled to participate in trysts. Airmen in technical training who violate restrictions against drinking alcohol can now easily claim they don't remember sex to escape disciplinary action. Troops who are unsure of what they did the night before are convinced to believe that because they cannot remember, they must have been raped without any factual basis. Airmen who do not like being stationed at a particular base need only claim they were assaulted to be moved, and they may then join one of several lawsuits aimed at the world's deepest pockets, the Department of Defense. This is on top of the longstanding motives of regret, revenge, and infidelity which are oftentimes present in sexual assault cases. Overall, these incentives both increase the number of false claims and hurt real victims.

Compounding the problem even further, the Air Force has fallen behind the Army, Navy, and Marine Corps' defense services. We are the only service without a Defense Counsel Assistance Program (DCAP), and JAJD is the only division within the Air Force Judiciary that does not have a senior civilian position, who would be perfectly suited for the important DCAP function. Furthermore, JAJD does not have the proper number of O-5 chief senior defense counsel positions to lead and mentor defense attorneys and paralegals in the field, and the division needs two more of these authorizations to pull even with the other services in that regard. Finally, although our 19 senior defense counsel positions are supposed to be pinned-on majors, nearly half of them are still captains. JAJD has made these deficiencies known without success and we are now at a point where the Air Force's defense capabilities are in danger of being permanently degraded. JAJD, which is tasked with defending the constitutional rights of America's Airmen, has been relegated to the role of neglected red-headed stepchild. Giving the AFSVCP and its new legion of SVCs standing in court would irrevocably tip the scales in favor

of the prosecution. This Honorable Court is the only bulwark against preventing such a colossal adverse change to our military justice system.

It is not too late to close this Pandora's Box.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that copies of the foregoing was sent via email to the Court, Petitioner's counsel, Judge Kastenberg, the Appellate Defense Division and the Appellate Government Division on 4 Mar 13.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, **Respondent** **v.** **Airman First Class (E-3)** **NICHOLAS E. DANIELS,** **USAF,** **Real Party in Interest** **v.** **Airman First Class (E-3)** **L.R.M.,** **USAF,** **Petitioner**	**BRIEF OF *AMICUS CURIAE* OF APPELLATE DEFENSE DIVISIONS FOR THE NAVY-MARINE CORPS AND COAST GUARD IN OPPOSITION TO L.R.M.'S PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS** Misc Dkt. No. 2013-05

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
AIR FORCE COURT OF CRIMINAL APPEALS

INTRODUCTION

A courts-martial is a unique and incomparable forum of justice to any other federal district court proceeding. By design, the power and authority over issues, persons, and remedies of a court-martial are exceedingly limited when compared to the federal courts of general jurisdiction. Further, a court-martial's power and authority, even when exercised over proper issues and parties, is temporally limited in existence. These substantive differences are distinct when compared to federal courts but serves the purpose of good order and discipline as intended.

Here, the Air Force Special Victim's Counsel ("SVC") for Petitioner (and the National Crime Victim Law Institute ("NCVLI")[1], *Amicus Curiae*, in support thereof) seeks an unprecedented alteration of the narrow courts-martial system. Moreover, Petitioner *et al.*, seeks an unequalled full application of the Crime Victim's Rights Acts (CVRA) and a wholesale imputation of CVRA federal circuit case law to military courts that is simply inapplicable to the military system. Finally, the Petitioner *et al.*, stretches further than their own cited cases in support of this unprecedented action and asks this Court to extend third party intervener status to crime victims to litigate motions on substantive issues related to the admission of *prima facie* evidence akin to a private prosecutor in a criminal court.

The Petitioner seeks too much and this Court cannot indulge such a loose and selective patchwork application of the CVRA and relevant case law to her peculiar claim. Even beyond the military justice system, the Petitioner seeks more than what has been allowed by the whole of American jurisprudence since the

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[1] Of note, the same *Amicus Curiae* party in support of the filings in the underlying case in their heavily cited *Kenna v. U.S. District Court for C.D.Cal.*, 435 F.3d 1011 (2006). *See* Docket #218, MOTION of Amicus Curiae, The National Crime Victim Law Institute for Leave to Participate as Amicus Curiae in support of Victim's Motion for Disclosure of Presentence Report, *United States v. Leichner*, No. 03-00568-cr (9th Cir. Apr. 25, 2006) (Appendix #1).

cessation of the private prosecutor system in favor of our current Government led system. This Court cannot be the first of the entirety of military or federal circuits to countenance a third party intervener in a criminal prosecution.

ARGUMENT

I. This Court lacks jurisdiction over Petitioner's mandamus.

A. A courts-martial is a court of exceedingly narrow temporal jurisdiction whose sole purpose is to adjudicate violations of the Uniform Code of Military Justice. Here, the Petitioner seeks review and enforcement of a third party civil/administrative claim. This Court has no jurisdiction to decide this matter.

> The current court-martial remains a temporary tribunal, convened by a commander to hear a specific case. It is not a part of the federal judiciary, nor is it subject to direct judicial review in that system. Instead, it is strictly a court of criminal jurisdiction, and its findings are binding on other federal courts.[2]
>
> Courts-martial are solely disciplinary, or penal, in nature. They may try only criminal cases and adjudge only criminal sentences. They have no authority to adjudge civil remedies such as the payment of damages or the collection of private debt . . . .
>
> The courts, in referring to the nature of the court-martial, often label it as a "creature of statute," a phrase that sets the appropriate tone for any discussion of court-martial jurisdiction. Practitioners working within the system of military justice must be ever cognizant that, only

[2] David A. Schlueter, *Military Criminal Justice: Practice and Procedure* § 1-7 (8th ed. 2012) (citations omitted).

> after a variety of jurisdictional prerequisites have been satisfied may a court-martial properly hear a case and render a valid judgment. The opportunities for jurisdictional defects are many, and the effect of any such defect is the same: the court-martial is void.[3]

This narrow statutory tool of commanders stands in stark contrast to the Article III district courts of general jurisdiction.[4] It is this vital difference that confuses the parties in favor of this action.[5]

The nature of the claims contained in this mandamus, while arising from a criminal context, are civil/administrative in nature; the Petitioner individually seeks enforcement of administrative[6] provisions contained within the DOD Instruction

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[3] *Military Criminal Justice: Practice and Procedure* § 4-2.

[4] *See* 18 U.S.C. § 1331 (1980); 18 U.S.C. § 3231 (1948).

[5] *See e.g.*, *United States v. Quintanilla*, 56 M.J. 37, 41 (C.A.A.F. 2001"There are important distinctions, however, between a military judge and a federal civilian judge, aside from the absence of tenure discussed in *Weiss*, *supra*. A federal civilian judge typically has jurisdiction over all cases arising under applicable federal law, but a military judge does not exercise general jurisdiction over cases arising under the UCMJ. A military judge may exercise authority only over the specific case to which he or she has been detailed.") (citing Art. 26, UCMJ; *Weiss v. United States*, 510 U.S. 163, 172, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994)). *See also Lawrence v. McCarthy*, 344 F.3d 467, 471 (5th Cir. 2003) *citing United States v. Boudreaux*, 35 M.J. 291, 293 (C.M.A.1992) ("Courts-martial come into existence only upon the referral of specific charges.").

[6] There is no textual support for the Petitioner's, *et al.*, contention that the CVRA applies in total to the military courts. Especially considering there is a controlling DOD Directive on the matter incorporating much of the same

governing victims and witnesses.[7] While it may be counterintuitive, the Petitioner's claim, though touching and concerning a court-martial, is not at its core a criminal claim (in this case, an action to determine breach and liability of the punitive articles of the UCMJ). The *res* of Petitioner's action, as an individual party, is best described as seeking injunctive relief for a civil/administrative right. As a non-party[8] to the court-martial, the Petitioner's claim must stand on its own merits and meet the jurisdictional requirements.[9] This claim is beyond the reach of a court-martial for even the most meritorious of civil or administrative claims, of which the claim at bar is not. While the pleadings give examples of an

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provisions. *See* DOD Directive 1030.01, Victim and Witness Assistance, April 23, 2007. Amicus' further rejects the claim that Petitioner is granted durable rights under this instruction vis-a-vis M.R.E. 412, 513 and 514. However, should this Court apply a rights theory to the DOD Instruction, it must agree that any enforcement thereof would be an action in civil or administrative realms as no other person but the accused is allowed to seek injunctive or legal remedy for infringing applications of DOD Instructions.

[7] DOD Directive 1030.01 §4.4.

[8] Rules for Court-Martial Rule 103(16) (2012) (Defining court-martial parties as accused, trial and defense counsels and their agents).

[9] This is not to suggest that a proper party to the court-martial cannot advocate ideals found within the victim protection directives. In fact, the Government and court are charged with "doing all that is possible . . . without infringing on the constitutional rights of the accused" to uphold the ideals. DOD Directive 1030.01 §4.2.

alleged victim filing for relief internal to a federal criminal trial, the divergent enabling jurisdictional details cannot be overlooked. As a court of general jurisdiction, the district court is fully empowered to independently hear such a third party civil claim. The fact that the claim is organized administratively under the connected court-martial does not change the *res* of the claim. A claim that a court-martial cannot not answer.

The Petitioner individually, and not through the trial counsel, seeks enforcement of certain provisions of the CVRA court-martial under the CVRA and the applicable DOD Directive. No matter the eventual merit of the CVRA claim, a court-martial has no authority to hear her argument as a third party. The Petitioner is not alone in being denied a particular form of relief from a court-martial. For example, a court-martial may not order restitution as a proper sentence.[10] Or, by the temporal nature of the court-martial, even an accused cannot seek injunctive relief for unlawful confinement until referral of charges.

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[10] LtCol David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment Under Rule for Courts-Martial 1003(b)*, 52 Naval L. Rev. 1 (2005).

B. In addition to this Court's lack of jurisdiction to decide this matter, a mandamus *is not proper to decide the trial court's issue.*

The A.F.C.C.A. ("CCA") has authority, as a court established by 10 U.S.C. § 866, to issue writs pursuant to 28 U.S.C. § 1651[11]:

> § 1651. Writs
>
> (a) The Supreme Court and 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.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.[12]

Although writs of mandamus to government officials, compelling them to perform ministerial functions, are almost as old as our Nation[13], the issue of such a writ to a presiding judicial officer is rare. "The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'"[14] "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the

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[11] *Dettinger v. United States*, 7 M.J. 216, 218 (C.M.A. 1979).

[12] 28 U.S.C. § 1651 (2012).

[13] *See Marbury v. Madison*, 5 U.S. 137 (1803).

[14] *Will v. United States,* 389 U.S. 90, 95 (1967).

invocation of this extraordinary remedy.[15] Furthermore, "the party seeking mandamus has 'the burden of showing that its right to issuance of the writ is 'clear and indisputable.'"[16] That a ruling of a trial judge is erroneous is insufficient basis for issue of the writ.

To justify issuance of mandamus, the ruling must be one that was outside the proper jurisdiction of the judge or court. "[T]he district judge's order upon the government to furnish names and addresses of witnesses to a defendant may be erroneous, a question we do not decide, but the ruling itself was within the court's jurisdiction."[17] As noted in the statute itself, a writ is only properly issued if it is "in aid of their respective jurisdictions and agreeable to the usages and principles of law."[18] The CCA has adopted this restrictive approach:

> The Supreme Court has said: The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. As we have observed, the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its

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[15] *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945).

[16] *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953).

[17] 389 U.S. at 95.

[18] 28 U.S.C. § 1651.

> duty to do so.'" And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of "jurisdiction," the fact still remains that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."[19]

This petition cannot satisfy the high burden to justify such a writ. As previously discussed, the military system does not have jurisdiction over the Petitioner's claim. Thus, any writ arising therefrom is not in aid of this Court's jurisdiction.

II. If this Court should decide that there is jurisdiction over the Petitioner's claim, the CVRA applies and that mandamus is the proper procedure, the Petitioner is not entitled to the relief sought as a non-party intervener to the court-martial.

A. There is no such position as a third-party intervener action in federal criminal law.

The Petitioner *et al.,* seeks an expansion of the rights of alleged victims in criminal courts heretofore unequalled in military or American jurisprudence.[20] In essence, the Petitioner

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[19] *Schmidt v. Boone*, 59 M.J. 841, 843 (A.F.C.C.A. 2004);, *rev'd. on other grounds sub nom.*, *United .States. v. Schmidt*, 60 M.J. 1 (C.A.A.F. 2004).

[20] While the arguments of Petitioner and the Government have shifted and expanded through the process of litigation, looking at the record and filings as a whole, amicus' understands the Petitioner and *amicus curiae* in favor of the mandamus to desire that this court establish:

1) Rights to discovery commensurate with an accused.

2) Rights to notice and service of all filings by either party.

seeks admission to a court-martial as a third party intervener, a procedural action relegated to the civil courts. Much of this expansion is founded upon the concept that the M.R.E. rules of exclusion concerning victim-witness testimony somehow, through the blurred filter of the CVRA and other right to privacy cases, are the source of substantive rights (sometimes casted as due process rights) to be represented by an attorney in relevant hearings and testimony.[21]

While novel to this Court, this theory is not.[22] However, this theory of granting third party status is unsupportable by

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3) A substantive right to privacy / due process right arising from M.R.E.s 412, 513, and 514.

4) The right for an SVC to represent the position of an alleged victim at her discretion before a court-martial no matter her adjudged level of competence or age.

5) Third party status for alleged victims in order to intervene in a court-martial and co-litigate with the Government hearings arising from M.R.E.s 412, 513, 514.

[21] *See* Government's Answer to Order to Show Cause Br. at 16; NCVLI's Proposed Brief of *Amicus Curiae* Br. at 3-18.

[22] "But if the feminist viewpoint does not demand special protection for female witnesses, it does suggest a different role for the trial judge. In the past, when witnesses were more closely identified with the party that called them, it was common to rely on that party to protect the witness from unfair cross-examination. But an examination of the realities of rape trials demonstrates that the interests of the victim-witness are not identical with the interests of the prosecutor. For this reason, it has been suggested that reform statutes **ought** to cast the exclusionary rule in the form of a privilege to refuse to disclose past sexual conduct and that the victim **ought** to have the assistance of appointed counsel to protect her interests when they conflict with the interests of the state. **Rule 412**

case law and the rules.[23] While the origin of this view cannot be definitively identified, at least one author on the topic

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did not incorporate these proposals; therefore, it is up to the judge to see that the rights of the victim are not sacrificed to the trial strategy of the prosecutor." 23 Alan Wright & Kenneth W. Graham, Jr., Fed. Prac. & Proc. Evid. § 5382, *Policy of Rule 412*, (1st ed. current through December 2012) (emphasis added).

[23] "On the issue of non-party appeals, there is an important distinction between civil and criminal cases. Civil cases often implicate the pecuniary rights of non-parties, such as the unnamed class member in *Devlin*. For instance, this court has allowed the children of a decedent to appeal from a wrongful death judgment obtained by the decedent's widow.

Criminal trials, on the other hand, place an individual citizen against the United States government. While non-parties may have an interest in aspects of the case, they do not have a tangible interest in the outcome. This distinction is evidenced by our procedural rules. The Federal Rules of Civil Procedure allow non-parties to intervene to assert their rights. The Federal Rules of Criminal Procedure contain no comparable provision. This distinction recognizes that non-parties often have a unique interest in civil cases. Because non-parties do not have a comparable unique interest in the outcome of criminal trials, we do not consider *Devlin* or *Plain* persuasive in this case . . . Congress neither explicitly nor implicitly provided in the VWPA a private right of action for victims." *United States v. Hunter*, 548 F.3d 1308, 1312-13 (10th Cir. 2008) (citations omitted). *See also United States v. Aguirre-Gonzalez*, 597 F.3d 46, 53 (1st Cir. 2010) ("[n]otwithstanding the rights reflected in the restitution statutes, crime victims are not parties to a criminal sentencing proceeding.") *See*, *e.g.*, *United States v. Palma*, 760 F.2d 475, 479 (3d Cir.1985) (under VWPA, "the victim . . . is not made a party to the sentencing proceeding"); *United States v. Brown*, 744 F.2d 905, 909-10 (2d Cir. 1984); *see also Ziskind*, 471 F.3d at 270. Thus, the baseline rule is that crime victims, as non-parties, may not appeal a defendant's criminal sentence. *See Hunter*, 548 F.3d at 1311; *United States v. Grundhoefer*, 916 F.2d 788, 793 (2d Cir. 1990) ("The victim as a non-party is accorded only a limited presence at a sentencing proceeding and has no right to appeal an inadequate remedy."); *United States v. Franklin*, 792 F.2d 998, 999-1000 (11th Cir. 1986) (dismissing appeal because

points to one of the CVRA's drafter's misunderstanding of the difference between private and public prosecutors in the American Justice System.[24] No matter the origin, the Petitioner's desires to have anything more than a factual voice in courts-martial hearings on M.R.E.s 412, 513, 514 is misplaced.[25] To allow such an entry and dual litigation against

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"[a]ppellant cites no statute, including the [VWPA], and we find none, that would give us the authority to entertain an appeal by a victim . . . who was not a party to the sentencing proceeding in the district court."); *see also* 18 U.S.C. § 3742 (providing that the government and the defendant, under appropriate circumstances, may appeal a criminal sentence?.. [A]ppellants point to a collection of civil cases in which courts have entertained direct appeals by non-parties.").

[24] *See* Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 Duke L.J. 237, 246 n.48 (delineating and rebutting Senator Diane Feinstein's, co-author of the CVRA, unfounded perspective that she was somehow restoring rights of victims held during an era of law in United States where private prosecution was allowed. Rebutting with the fact that victims never had private prosecutorial duties in the federal system.).

[25] Much has been written on the CVRA and its application. Amicus' do not seek to fully regurgitate the scholarly work, but direct this Court to the publications to show that no court has allowed a victim as an intervener status as a co-litigant in a criminal court in order to oppose 412, 513, 514 motions. Rather, the rights enforced were right to be heard (personally), right to notice of proceedings, right to privacy in identification, qualified right to be present in courtroom, right to prevent undue delay. *See* Blondel, *supra* note 38; Fern L. Kletter, J.D., Annotation, Validity, Construction, and Application of Crime Victims' Rights Act (CVRA), 18 U.S.C. 3771, 26 A.L.R. Fed. 2d 451 (2008); Amy Baron-Evans*, Rights and Procedures Under the Crime Victims' Rights Act and New Federal Rules of Criminal Procedure*, (April 30, 2009), http://www.fd.org/docs/select-topics---rules/rights-and-procedures-under-the-crime-victims-rights-act-and-new-federal-rules-of-criminal-procedure-for-victims.pdf (Attached in Appendix 1).

an accused would undoubtedly cast grave doubts upon the actual and perceived fairness of a court-martial.

This does not suggest that an attorney could not represent an alleged victim's factual disclosures should the victim be unable to do so herself. Furthermore, the cases cited in support of this contention are limited 1) to federal courts of general jurisdiction, and 2) to the enumerated rights to be heard at sentencing, given notice of proceedings, consult with the prosecution, to be treated fairly and respectfully (with no testimonial privilege attached to such right), to be present in courtroom (at appropriate times), to be protected from undue delay. There is no direction in these cases that this Court should take the unprecedented step to expand them to include a right to intervention at this court-martial; the first time a court would have allowed such an option according to a survey of the cases and academia on the topic.

B. A finding that Petitioner has standing, would significantly prejudice the Sixth Amendment fair trial rights of service members facing courts-martial.

Should this Court find that alleged victims have standing to assert themselves through their SVCs or other counsel in court-martial proceedings, a serious blow would be dealt to the fair trial rights of service members facing courts-martial. First, allowing an SVC to represent and assert the rights of an alleged victim at court-martial would effectively double the

prosecutorial efforts against the accused. In this instant case, the military judge recognized that "the government and the SVC are at least impliedly aligned, particularly in the opposition to the use of evidence under M.R.E. 412."[26] The alignment of interests between the prosecution and the alleged victim occurs routinely in the prosecution of sex offenses in the military, as the trial counsel litigates to exclude evidence under M.R.E. 412. The CVRA recognizes this alignment and specifically charges the prosecution with ensuring that an alleged victim is afforded the rights assured to them under that Act.[27] As such, the interests that petitioner argues should be advanced through the SVC are already adequately represented through the trial counsel. A decision by this Court that would allow the SVC to duplicate the efforts already put forth by the prosecution would serve to unfairly stack litigants against an accused within the court-martial.

Further, the alignment between trial counsel and SVC raises complicated issues regarding the prosecution's obligations to disclose all favorable evidence to an accused under *Brady v. Maryland*.[28] Not only would SVC's not be bound by the same *Brady* obligations as the government, they would be precluded from

[26] (Military judge's first ruling) p. 10.

[27] 18 U.S.C. § 3771(c)(1).

[28] 373 U.S. 83 (1963).

disclosing most *Brady* material to the government or defense. Disclosure of such favorable defense evidence would almost certainly be antithetical to the alleged victim's interest in the court-martial, which in most cases would include ensuring conviction and affirming their victimhood. Thus, the alignment between the government and the SVC creates the opportunity for this *de facto* prosecution team to skirt the government's *Brady* obligations by strategically controlling the flow of information regarding a case.[29] This type of double-team prosecution has the dangerous potential to undermine an accused's due process rights.

An alliance between the SVC and trial counsel further creates an appearance of impropriety that would undermine the public's perception of fairness in the military justice system. The perceived alliance between SVC and trial counsel is a result of their aligned interests in both immediate evidentiary issues and in the larger goal of convicting the accused. Their bases for achieving these goals, however, is divergent and creates perilous issues regarding a proceeding's actual and perceived fairness. A trial counsel, as a representative of the

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[29] *See* Jannice E. Joseph, *The New Russian Roulette: Brady Revisited*, 17 Cap. Def. J. 33, 54-58 (2004) (discussing complications arising under *Brady* between non-privileged communications between an alleged victim and his or her victim advocate, and suggesting that the way to avoid such conflicts is to separate the victim advocate program from the prosecution).

government, is not primarily concerned with the conviction of any one accused, but in the service of justice.[30] An SVC, however, as an attorney for alleged victim, is bound by a duty of loyalty to the client to protect her rights and lawfully assist her in her goal: the conviction of the alleged perpetrator. While both parties may align through their mutual interest in the conviction of the accused, their ethical bases for that position are divergent and cannot be reconciled. Therefore, the inevitable alignment of the government with the SVC would serve to impugn the quasi-judicial function of the prosecutor and undermine the actual and apparent fairness of the proceedings.[31]

The involvement of SVCs in the litigation of pre-trial motions is problematic even in scenarios in which their interests diverge from the prosecution's. For instance, one can envision a scenario in which both the trial counsel and defense counsel intend to introduce habit evidence of an alleged

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[30] *See* ABA Standards for Criminal Justice: Prosecution Function and Defense Function 3-1.2 (3rd ed. 1993) (describing the prosecutor as an "administrator of justice, an advocate, and an officer of the court," whose duty "it is to seek justice, not merely to convict").

[31] *See* Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/attorney Relationships*, 48 S. Tex. L. Rev. 695, 703-04 (2007) (distinguishing the prosecutor's ethical obligation to seek justice from the interests of an alleged sexual assault victim in criminal prosecutions).

victim's sexual behavior when engaging in consensual sex to show conformity or non-conformity with that habit on a particular occasion. In such a scenario, an alleged victim "must be afforded a reasonable opportunity to attend [the pre-trial hearing] and be heard."[32] However, the right for the alleged victim to attend and be heard regarding his or her privacy interest does not extend to advancing legal arguments regarding the admissibility of the evidence in question.

Further, allowing an SVC to advocate for the interests of an alleged victim at a pre-trial motions hearing opens the door to the SVC speaking on behalf of their client. In such a scenario, there is a serious danger that facts proffered by the SVC, rather than testified to by the alleged victim, may make their way into the military judge's findings of fact and ultimately become determinative as to the admissibility or availability of evidence M.R.E. 412 or M.R.E. 513.

The SVC-victim relationship also creates issues regarding an accused's Sixth Amendment right to confrontation. The inevitable alignment of the SVC with the prosecution in courts-martial has the potential to create an attorney-client relationship between the alleged victim and the prosecution, which would significantly diminish the amount of relevant

[32] MIL. R. EVID. 412(c)(2).

impeachment testimony a defense counsel could elicit from an alleged victim during cross-examination. As an alleged victim is now represented by an attorney who is a quasi-member of the prosecution team, information that an accused may normally be able to elicit on cross-examination, such as pre-trial witness preparation efforts, may be privileged. Otherwise relevant information learned by the alleged victim through pre-trial preparation with counsel may likewise potentially be privileged.

Further, an alleged victim's privacy interests would give standing to an SVC to argue the admissibility of evidence in per-trial motions hearings, or to object at trial to questions or evidence that would similarly pose a threat to the alleged victim's privacy interests. Such a scenario presents an erosion of an accused's right to confront the witnesses against him. It is also a scenario in which an SVC may be advocating for an alleged victim's legal interests in front of a members panel, effectively giving the victim an additional table in the courtroom. How would an SVC's role in a proceeding be explained to the member? Would they be referred to as the "Special Victim's Counsel"?

Allowing an SVC to advocate for an alleged victim's legal interests at court-martial presents a myriad of problems that create infringements up on a service member's constitutionally guaranteed rights to due process and a fair trial. SVC

representation at courts-martial is not necessary to uphold the very clearly established rights of alleged victims to be present and heard in certain contexts. Those rights are currently recognized and upheld through the duties and responsibilities of the trial counsel. The duplication of those efforts through an SVC would serve no other purpose than to open the veritable Pandora's Box of issues discussed above.

CONCLUSION

To support the Petitioner, *et al.*, in this case would fundamentally alter the American criminal justice system as we know it. No longer would an accused be subject only to the constitutionally limited prosecution by the Government, but now an unregulated personal and private prosecution by an embittered party unbound by any such Constitutional limitations. The long reaching potential effect of this is almost impossible to see as it is diametrically foreign to the system emplaced by the Founders of our jurisprudence. There is no concrete legal support for this foundational shift of justice. This Court cannot be the first domino to this chaos. The Petitioner must be denied.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the forgoing were delivered electronically to the Court on 4 March 2013, that a copy was delivered electronically to the Air Force Appellate Government Division, and to the Air Force Appellate Division and NCVLI as *amicus curiae*.

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Notes

VICTIMS' RIGHTS IN AN ADVERSARY SYSTEM

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ABSTRACT

The victims' rights movement argues that because the outcome of criminal prosecutions affects crime victims, the justice system should consider their interests during proceedings. In 2004, Congress passed the Crime Victims' Rights Act (CVRA), giving victims some rights to participate in the federal criminal justice system. This Note probes both the theoretical assumptions and practical implications of the CVRA. It demonstrates that the victims' rights movement revisits a long-acknowledged tension between adversary adjudication and third-party interests. It shows, however, that American law has resolved this tension by conferring party or quasi-party status on third parties. Despite some pro-victims rhetoric, Congress reaffirmed the public-prosecution model when it passed the CVRA. Instead of making victims parties or intervenors in criminal prosecutions, the CVRA asks courts and prosecutors to vindicate victims' interests. This unusual posture creates substantial conflicts for courts and prosecutors and undermines defendants' rights. To avoid these consequences, this Note argues, courts can interpret the CVRA's substantive rights narrowly. Rather than reading the CVRA as conferring broad rights on crime victims, courts should interpret the statute to simply require institutional courtesy toward crime victims. This interpretation reflects victims' nonparty status and preserves the rights and responsibilities of courts, prosecutors, and defendants.

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INTRODUCTION

In *Marbury v. Madison*[1] Chief Justice Marshall wrote, "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."[2] Two centuries later, in 2004, Congress disrupted that division of power when it passed the Crime Victims' Rights Act (CVRA),[3] forcing courts both to step beyond deciding the rights of individuals and to second-guess executive discretion. With this statute, Congress may have transformed federal criminal prosecutions.

Prior to the CVRA, for example, the prosecution of Dan Rubin for securities fraud would have been unremarkable. In March 2007, federal prosecutors and Rubin's defense counsel negotiated a plea bargain, which the district court accepted.[4] But two of Rubin's victims, Dixie Chris Omni (Omni) and RJP Investment Company (RJP), did not like the plea agreement. Omni and RJP thought that Rubin should pay more restitution and prosecutors should provide more assistance with their civil suit against Rubin.[5] In short, prosecutors wanted to resolve the case, but the victims wanted to recover their losses.

Over the objection of the government and Rubin's defense counsel, Omni and RJP petitioned the district court based on the CVRA to vacate the plea agreement and modify Rubin's restitution order.[6] They also argued that prosecutors violated their statutory right to be treated with respect when the government contended that Omni and RJP filed the petition merely to improve their bargaining position in the civil lawsuit.[7]

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1. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

2. *Id.* at 170.

3. Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, tit. I, 118 Stat. 2260, 2261–65 (2004) (codified as amended at 18 U.S.C. § 3771 (2006) and to be codified at 42 U.S.C. §§ 10603(d)–(e)). This Note refers to the act simply as the Crime Victims' Rights Act.

4. United States v. Rubin, 558 F. Supp. 2d 441, 416 (E.D.N.Y. 2008).

5. *Id.* at 412–13, 416–17.

6. *Id.* at 412–13, 425. Under the CVRA, victims may assert their statutory rights by petitioning the district court. 18 U.S.C. § 3771(d)(3).

7. *Rubin*, 558 F. Supp. 2d at 416–17, 428; *see also* 18 U.S.C. § 3771(a)(8) (granting victims "[t]he right to be treated with fairness and with respect for [their] dignity and privacy").

The district judge chafed at the victims' request to second-guess the government and place their interests ahead of those of the parties. He refused to "prohibit[] the government from raising legitimate arguments . . . simply because the arguments may hurt a victim's feelings."[8] The court also expressed concern that "such a dispute . . . . potentially compromis[es] its ability to be impartial to the government and defendant, the only true parties to the trial."[9]

United States v. Rubin[10] demonstrates the procedural and practical problems that the CVRA creates for participants in the federal criminal justice system. Traditionally, American courts have followed the adversary system of litigation, which grants parties broad autonomy to vindicate their rights and interests before an impartial court. The adversary system has informed the constitutional, procedural, and ethical rights and obligations of the system's three primary participants: courts, prosecutors, and defendants. But because an adversary system relies on the parties to assert their interests before the court, it necessarily excludes outsiders like crime victims.

The victims' rights movement[11] has argued that excluding victims from criminal proceedings is unjust because victims have a unique interest in the outcome of criminal cases and so deserve the opportunity to have those interests represented.[12] But the movement merely restates the point that both legal realists and public interest litigators have noted: the adversary system fails to consider others whose interests litigation may affect. This Note disagrees with the conclusion of victims' rights activists and other scholars that outside interests justify changing the adversary system. Congress and the courts can give third parties intervenor or party status, which allows

8. *Rubin*, 558 F. Supp. 2d at 428.

9. *Id.* The court continued,

> As for actual clashes between victim and government over the best way to convict, punish and seek restitution from a criminal wrongdoer, how can the court presiding over the prosecution of the defendant referee any spat between government and victim about how best to make the accused pay for his, at that point, only charged criminal conduct?

Id. at 429.

10. United States v. Rubin, 558 F. Supp. 2d 441 (E.D.N.Y. 2008).

11. For a brief history of the victims' rights movement, see Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 865–69.

12. *See infra* notes 64–65 and accompanying text.

third parties to adjudicate their rights without disrupting the adversary structure.

The CVRA does not confer party or intervenor status, however; it instead reaffirms prosecutors' responsibility to prosecute federal criminal proceedings. Yet it asks courts and prosecutors to vindicate the interests of victims, who remain nonparties under the statute. This unusual procedure places courts and prosecutors at odds with their constitutional and ethical obligations, and it undermines historic protections for criminal defendants inherent in the adversary system. Courts can and should interpret the CVRA narrowly to avoid these conflicts.

Part I of this Note outlines the cultural values that underlie adversary adjudication. It demonstrates that the adversary system—which privileges judicial independence and party autonomy—frames the federal criminal justice system, and it concludes that the system excludes third parties, including victims, by design. Part II challenges the victims' rights movement's assumption that the justice system should incorporate victims even at the expense of the adversary system. It shows that the movement has overlooked serious scholarly objections to considering third-party interests rather than focusing on the rights of the parties. And when it has crafted procedures to allow third parties to represent their interests, American law has consistently preferred to confer party status on third parties rather than abandon the adversary structure. Part III demonstrates that the CVRA fails to confer party status on victims. In an unprecedented disruption of the adversary structure, the CVRA instead compels courts and prosecutors to act as victims' advocates, a posture that undermines judicial independence, prosecutorial discretion, and defendants' rights. But courts can interpret the CVRA's substantive rights narrowly; by limiting the scope of victims' rights, courts can limit the burden on courts and prosecutors to advocate for victims and avoid many of these improprieties. This Note concludes that courts should interpret the CVRA as requiring institutional courtesy toward crime victims. But until Congress makes victims independent parties in criminal prosecutions, courts and prosecutors should not change their decisions based on the desires of victims.

I. THE AMERICAN ADVERSARY SYSTEM

A. Adversary and Inquisitorial Cultures

Western cultures resolve legal disputes through one of two basic approaches: the adversary model or the inquisitorial model.[13] The models fundamentally differ in who controls the proceedings. In the inquisitorial model, the court actively directs the case.[14] Judges in inquisitorial systems initiate proceedings, collect evidence, and determine how to construct and resolve the legal and factual issues in the case.[15] In contrast, parties in adversary systems manage their own cases. They initiate proceedings, develop the evidence, and choose the best way to argue their position before the court.[16] Judges in adversary systems act primarily as neutral "umpire[s]."[17] Rather than undertaking independent investigations, they look at the evidence the parties bring before the court and rule on the law based on the facts and arguments before them.[18]

These procedural differences reflect cultural assumptions about the purpose of legal systems.[19] In the inquisitorial model, social interests take primacy. These societies tend to view the legal system primarily as a tool to investigate and uncover the truth.[20] Unlike adversary systems, which prize rules of evidence and procedure, inquisitorial systems generally disfavor rules that might obstruct uncovering the truth.[21] For example, inquisitorial courts admit

13. *See* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1183 (2005) (comparing the United States' adversary system with the "dark inquisitorial world of continental Europe"). Although no system is completely inquisitorial or adversarial, legal systems usually emerge from one method or the other. *Id.* at 1187.

14. *Id.* at 1188.

15. *Id.*

16. *Id.*

17. *Id.*

18. Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313, 320–21 & n.23 (1991).

19. *See* Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 280 (2002) (arguing that the United States' "cultural predilections are reflected in four important aspects of civil procedure that are peculiarly American").

20. Felicity Nagorcka, Michael Stanton & Michael Wilson, *Stranded Between Partisanship and the Truth? A Comparative Analysis of the Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 MELB. U. L. REV. 448, 462–63 (2005).

21. *Id.*

evidence even if authorities improperly collected it.[22] Inquisitorial systems focus more on achieving the right result than on strictly enforcing procedures.[23]

In contrast, adversary systems value parties' rights to have their disputes resolved through a fair process monitored by a judge.[24] Although adversary systems assume that the parties' self-interests drive them to uncover the truth for the jury,[25] these cultures ultimately show less desire to achieve the correct result. For example, these legal systems tend to develop firm procedural default rules that outsiders may view as unfairly harsh.[26] But protecting the process—and thereby protecting party autonomy—justifies sacrificing some accuracy in the outcome of the litigation.

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22. *Id.*

23. *See* Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence*, 57 CATH. U. L. REV. 93, 124 n.170 (2007) (noting that under French law the "honor and conscience," C. PR. PÉN. art. 310(1), of judges binds them to discover the truth and that German law allows a court to, "upon its own motion, extend the taking of the evidence to all facts and evidence which are important for the [court's] decision," StPO § 244(2)).

24. Nagorcka et al., *supra* note 20, at 462–63.

25. *Id.* at 462.

26. *Id.* at 462–63. The Supreme Court's 2006 decision in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), illustrates the tension between adversarial and inquisitorial philosophies. One of the defendants in that case, Mario Bustillo, was a Honduran national who was prosecuted in Virginia state court without being afforded his right under the Vienna Convention to consult with the Honduran Consulate. *Id.* at 2676. Bustillo first raised this issue in a habeas corpus petition, however, and lower courts ruled that because he raised the issue on collateral rather than direct review, Bustillo was procedurally barred from litigating the claim. *Id.* at 2676–77, 2682. The International Court of Justice (ICJ) disagreed, holding that the Vienna Convention required American courts to permit defendants to raise this issue even on collateral appeal. *Id.* at 2683.

The Supreme Court rejected the ICJ's interpretation. Writing for the majority, Chief Justice John Roberts discussed at some length the difference between inquisitorial and adversary litigation. *Id.* at 2685–86. He reasoned that the ICJ overlooked the importance of procedural default rules in adversary systems. *Id.* at 2686. The ICJ's interpretation of the Vienna Convention would allow Convention claims to "trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication." *Id.* These rules are so critical to preserving the fairness of adversary litigation that adversary courts enforce them even at the expense of viable legal claims. *See id.* at 2687 ("[I]t is well established that where a defendant fails to raise a *Miranda* claim at trial, procedural default rules may bar him from raising the claim in a subsequent postconviction proceeding."). The Court concluded that Bustillo's claim was procedurally barred. *Id.*

B. The Federal Justice System

American legal culture generally follows the adversary tradition.[27] As one scholar has explained, "[t]he framers, reacting against the King's autocratic judiciary, wanted both to ensure federal judicial independence from the Executive and to vest substantial adjudicatory power in the people."[28] As a result, adversary philosophy has shaped the constitutional, procedural, and ethical structure of the federal criminal justice system.

1. *Federal Courts.* Article III of the U.S. Constitution vests judicial power in the federal courts to resolve the "Cases" and "Controversies" before them.[29] The cases-and-controversies principle lays the foundation for the limited, adversary nature of the federal justice system. As Chief Justice Marshall declared in *Marbury v. Madison*, the courts resolve the rights of individuals and should not intrude on the executive's responsibility to enforce the law.[30] This limitation allows courts to make decisions based on "concrete legal issues, presented in actual cases, not abstractions,"[31] and it grants parties autonomy to vindicate their rights.[32]

The cases-and-controversies principle also preserves the separation of power between the branches of government.[33] The

27. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 382 (1982). The American legal system is not purely adversarial. Courts of equity, for example, are rooted in inquisitorial procedure. Kessler, *supra* note 13, at 1193. But the American legal system "is considered more adversarial than most." Resnik, *supra*, at 382. And criminal cases traditionally have proceeded in adversary common law courts, not courts of equity. Charles L. Barzun, *Politics or Principle? Zechariah Chafee and the Social Interest in Free Speech*, 2007 BYU L. REV. 259, 287–88; *see also* Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1368 (2005) (distinguishing the "inquisitorial model of the courts of equity" from "the adversarial mode of the common law courts").

28. Resnik, *supra* note 27, at 381 (footnote omitted).

29. U.S. CONST. art. III, § 2, cl. 1.

30. *See supra* note 2 and accompanying text.

31. United Pub. Workers v. Mitchell, 330 U.S. 75, 89 (1947) (quoting United States v. Appalachian Elec. Power Co., 311 U.S. 377, 423 (1940)). As Justice Scalia noted, rejecting a doctrine of hypothetical jurisdiction, "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998).

32. *See* Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.").

33. Morrison v. Olson, 487 U.S. 654, 677–78 (1988). For example, the Court has long held that it cannot resolve political questions because those questions implicate the policy judgments

Supreme Court has prohibited judges from acting as policymakers rather than independent interpreters of the law: "executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution."[34] Not only does a limited judiciary protect the policymaking branches,[35] but it also frees the judiciary to focus its attention on allowing the parties to vindicate their rights before an impartial tribunal.

Ideally, the federal judiciary exhibits two key traits of adversary judges: it ensures that the proceedings give both parties a fair opportunity to present their cases, and it remains impartial toward parties.[36] First, judges bear responsibility for preserving a fair forum for litigation. The Constitution, for example, vests significant responsibility for protecting defendants' constitutional rights in the judiciary.[37] Procedurally, judges manage the proceedings and regulate the relationship between the parties.[38] Second, federal judges refrain from acting as advocates.[39] Fundamental to the American ideal of a fair forum for adjudication is the concept of the "judge as an impartial guardian for the rule of law."[40] The federal judiciary thus exhibits the adversary model's emphasis on allowing individual parties the

of the other branches and are beyond courts' Article III jurisdiction. *E.g.*, Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in the judgment) ("I am of the view that the basic question presented by the petitioners in this case is 'political' and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.").

34. *Morrison*, 487 U.S. at 677 (quoting Buckley v. Valeo, 424 U.S. 1, 123 (1976)).

35. Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 230 (1990).

36. *See supra* notes 17–18, 24–26 and accompanying text.

37. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1014–15 (2006).

38. For example, judges regulate discovery, FED. R. CRIM. P. 16(d), and rule on the parties' pretrial motions, FED. R. CRIM. P. 12(b)–(d).

39. Resnik, *supra* note 27, at 382.

40. Bush v. Gore, 531 U.S. 98, 129 (2000) (Stevens, J., dissenting). Federal law requires judges to recuse themselves from a case "in which [their] impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (2006). Federal judges sometimes do actively protect the rights of particularly vulnerable parties, such as pro se litigants. *E.g.*, Abbas v. Dixon, 480 F.3d 636, 639 (2d Cir. 2007). The purpose of these interventions is not for courts to assume advocacy duties; the parties remain responsible for litigating their cases. *See id.* (asking courts to "liberally construe [a pro se litigant's] pleadings" but not asking the court to litigate on the pro se plaintiff's behalf). Courts show more leniency toward technical procedural issues to prevent unfairly excluding nonlawyers. *E.g.*, *id.* Courts act, then, to preserve the fairness of the proceedings—a quintessentially adversary duty.

freedom to vindicate their interests in a fair forum. As a result, though, the federal courts exclude outsiders to the litigation, including victims.[41]

2. *The Parties.* With a limited judiciary, primary responsibility for vindicating legal rights rests with the parties to litigation.[42] With few exceptions,[43] federal courts still assume that "the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."[44]

a. The Prosecution. The responsibility to enforce the United States' laws rests with the executive branch. The Supreme Court has repeatedly protected the executive's constitutional duties to prosecute criminal offenses. The Court has held that because prosecution is a core executive function, statutes may not "impermissibly interfere" with the executive's prosecutorial powers.[45] Under the doctrine of prosecutorial discretion, prosecutors have near-absolute power to determine whether to bring criminal charges,[46] whether to pursue a prosecution, and how to negotiate a plea bargain.[47] Contrary to the suggestion of some victims' rights

41. In France's inquisitorial system, by contrast, the investigating judge may consider outside interests such as victims, animals, minority groups, or the environment and even permit those parties or their representatives to participate in the proceedings. Nagorcka et al., *supra* note 20, at 460–61.

42. *See* Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.").

43. *See infra* Part II.C.

44. *Castro*, 540 U.S. at 386 (Scalia, J., concurring in part and concurring in the judgment).

45. Morrison v. Olson, 487 U.S. 654, 660, 659–60, 695 (1988). In *Morrison*, the Court found that the statute was valid because it did not impermissibly interfere with the executive's prosecutorial power. *Id.*

46. *See id.* at 710–11 (Scalia, J., dissenting) (observing that the executive is responsible for prosecuting criminal offenses, that the other branches have means to check that balance, and that Congress can "impeach the executive who willfully fails to enforce the laws . . . and the courts can dismiss malicious prosecutions" (citation omitted)); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973) ("[F]ederal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made.").

47. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

advocates, including the CVRA's drafters,[48] federal prosecutors, not victims, have carried sole responsibility to prosecute federal offenses since the Judiciary Act of 1789.[49] Federal law continues to vest all prosecutorial responsibilities in United States attorneys.[50]

Federal prosecutors represent the interests of the United States, not the interests of victims or other specific third parties. As the Supreme Court has observed, by representing the United States, federal prosecutors have a responsibility to vindicate the public's interest in justice.[51] This obligation to seek justice, though, is "twofold": prosecutors must ensure "that guilt shall not escape or innocence suffer."[52] As a result, prosecutors have a duty both to the public *and to the defendant* to make sure justice is done. Prosecutors' codes of ethics generally agree that prosecutors are "ministers of justice."[53] Additionally, prosecutors have a duty to remain impartial toward private interests.[54] Thus, federal prosecutors should consider

48. Senator Dianne Feinstein, for example, has repeatedly relied on an inaccurate history of public prosecution in American law to justify expanding victims' rights. Promoting a victims' rights amendment to the Constitution, she argued that "a constitutional amendment will restore rights that existed when the Constitution was written. It is a little known fact that at the time the Constitution was drafted, it was standard practice for victims, not public prosecutors, to prosecute criminal cases." *Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Comm. on the Judiciary*, 108th Cong. 4 (2003) (statement of Sen. Dianne Feinstein). Later, when sponsoring a federal statute recognizing victims' rights, Senator Feinstein argued that "[v]ictims had rights until about the mid-19th century, the 1850s, when the concept of the public prosecutor was developed in our Nation." 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). In fact, "the American system of public prosecution was fairly well established by the time of the American Revolution." Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 371 (1986). And victims never have prosecuted federal criminal cases. *See infra* note 49 and accompanying text.

49. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 700–01 (2004).

50. 28 U.S.C. § 547(1) (2006).

51. The Court has explained,

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935).

52. *Id.*

53. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1999) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

54. Young v. United States *ex rel.* Vuitton et Fils S. A., 481 U.S. 787, 804 (1987). In *Young*, Louis Vuitton, S.A. (Louis Vuitton) settled a lawsuit against the defendants for trademark infringement. *Id.* at 790. Louis Vuitton's civil attorneys convinced the trial court to appoint

the interests of third parties, including victims, but only in the broader context of society's interest in justice. They should not elevate victims' interests over the interests of the public, the community, and the defendant.

b. Defendants. In criminal prosecutions, the defendant is the prosecution's adversary. The Constitution reflects this position: as one scholar notes, "[o]ne of the animating features of the Constitution is its preoccupation with the regulation of the government's criminal powers."[55] The number of amendments in the Bill of Rights devoted to protecting defendants from government authority demonstrates the Framers' concern for ensuring that the adversary process is fair.[56] Defendants have a right to due process of law;[57] notice of charges against them; assistance of counsel; confrontation of witnesses against them; and a fair, speedy, and public trial by a jury drawn from the community.[58]

This framework protects defendants from government conduct, not the acts of private third parties outside the litigation.[59] Given the number of protections it affords to criminal defendants, the Bill of Rights appears to assume that the government is the defendant's adversary in criminal proceedings. It does not anticipate third parties such as crime victims presenting a challenge to the liberty of accused defendants. Victims' advocates therefore rightly observe that the

them to represent the United States in a later prosecution of the defendants for continuing to infringe Louis Vuitton's trademark. *Id.* at 791–92. The Supreme Court held that it was improper to appoint the beneficiary of the court order to prosecute a contempt action claiming a violation of the settlement agreement. *Id.* at 809 (Brennan, J., announcing the judgment of the Court). The Court observed that "[r]egardless of whether the appointment of private counsel in this case resulted in any prosecutorial impropriety . . . that appointment illustrates the *potential* for private interest to influence the discharge of public duty." *Id.* at 805 (majority opinion). This influence was improper because "[t]he prosecutor is appointed solely to pursue the public interest in vindication of the court's authority. A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* at 804.

55. Barkow, *supra* note 37, at 1012.

56. *See id.* at 1016–17 (arguing that the Bill of Rights contains structural protections for defendants in the adversary process).

57. U.S. CONST. amend. V.

58. *Id.* amend. VI.

59. *See* John O. McGinnis & Michael B. Rappaport, Colloquy Essay, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 393 n.44 (2007) ("With the exception of the Thirteenth Amendment, the Constitution does not regulate private conduct at all.").

traditional justice system prevents victims from representing their interests in criminal cases,[60] but this exclusion is by design.

II. MULTIPLE INTERESTS IN THE CRIMINAL JUSTICE SYSTEM

Victims' rights proponents have joined a number of scholars arguing that fairness requires modifying the adversary system to consider interests beside those of the parties. Section B demonstrates that these critics overlook another problem: if litigation considers third-party interests, it loses focus on the rights of the actual parties. Section C argues that American law has resolved this conflict by conferring party-like status on third parties, allowing them to vindicate their interests without undermining the adversary structure.

A. Criminal Justice in Adversary Proceedings

Because it proceeds according to adversary principles, the federal criminal justice system, like all American criminal proceedings, prizes fair process and party autonomy even at the expense of a correct result.[61] But in criminal prosecutions the stakes are particularly high. If the outcome is incorrect, either an innocent person loses that person's freedom, even life, or a guilty person escapes punishment, endangering society and leaving the victim's suffering unanswered.[62] Criminal law is uniquely emotional as a result; ensuring procedural fairness may seem like a minor concern when discussing something as explosive as child rape or executing an innocent person.[63]

Some scholars and advocates have promoted distorting adversary procedures to improve criminal prosecutions. The victims' rights

60. *E.g.*, Cardenas, *supra* note 48, at 372.

61. *See supra* notes 24–26 and accompanying text.

62. Interest groups devoted to reforming the system to achieve more accurate results demonstrate the significance of this issue. For example, the Innocence Project exists both to "free the staggering numbers of innocent people who remain incarcerated and to bring substantive reform to the system responsible for their unjust imprisonment." Innocence Project, Mission Statement, http://www.innocenceproject.org/about/Mission-Statement.php (last visited Oct. 10, 2008). Similarly, victims' rights groups such as the National Organization for Victim Assistance have argued that victims have the right to protection and "reparations." Nat'l Org. for Victim Assistance, Crime Victim & Witness Rights, http://www.trynova.org/about/victimrights.html (last visited Oct. 10, 2008).

63. The tension between process and the high-stakes nature of criminal proceedings probably in part explains the heated disagreement between the International Court of Justice and the Supreme Court in *Sanchez-Llamas v. Oregon*. *See supra* note 26.

movement contends that criminal cases should consider victims' interests in addition to the government's interests. These advocates argue that excluding victims from the justice system, especially in light of their suffering, is fundamentally unjust.[64] At least one victims' rights scholar has called for changing the adversary system to fully vindicate victims' interests.[65] Other scholars, concerned that too many defendants are wrongfully convicted, advocate greater inquisitorial proceedings to protect innocent defendants.[66]

Victims' rights proponents, at least, have enjoyed enormous success persuading Congress and state legislatures to incorporate victims into criminal prosecutions.[67] But pro-victim scholars and legislators have assumed uncritically that the law should remedy the injustice of excluding victims by incorporating them into proceedings. In their concern for victims' suffering, however, victims' rights advocates have not addressed the theoretical and practical implications of their solution. In fact, commentators have long recognized a core conflict between the adversary model and third-party interests.[68] Section B shows that scholars already have raised important objections to undermining the adversary system to help third parties. And Section C demonstrates that American law has

64. *See, e.g.*, 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (arguing, in support of the CVRA, that "[v]ictims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm"); William T. Pizzi, *Victims' Rights: Rethinking Our "Adversary System,"* 1999 UTAH L. REV. 349, 349 (noting that "victims of violent crime have a stake in the trial that is different from that of the general public or even the prosecutor" and calling for greater victim participation in criminal proceedings); Judith Rowland, *Illusions of Justice: Who Represents the Victim?*, 8 ST. JOHN'S J. LEGAL COMMENT. 177, 178 (1992) (observing that "a crime victim has an 'interest' in the criminal justice process" and lamenting that only the state and the defendant have standing to participate in criminal prosecutions).

65. Pizzi, *supra* note 64, at 349.

66. Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547, 550, 551 (2008) (urging "a fundamental restructuring of the adversarial system" to "minimize the number of convictions of innocent persons" and contending that after this change "the justice system would be more focused on achieving a correct result in cases where a criminal defendant knows he is truly innocent and formally pleads innocent").

67. In addition to the CVRA, every state has passed victims' rights legislation, and a majority of states have amended their constitutions to recognize victims' rights as well. Recent Development, *The Victims' Rights Amendment*, 42 HARV. J. ON LEGIS. 525, 526–27 (2005).

68. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 67–71 (5th ed. 2003) (describing the tension between the "private rights" and "public rights" model).

found a different solution, one which incorporates third parties without discarding the adversary system.

B. The Problem of Considering Nonparty Interests in Adversary Litigation

Classical legal scholars had no reason to question excluding victims from criminal proceedings. Adversary criminal proceedings between the government and the prosecution solidified in the nineteenth century,[69] an era that assumed that litigation could be divided into public and private law.[70] As early as the eighteenth century, William Blackstone declared that "[w]rongs are divisible into two sorts or species; *private wrongs*, and *public wrongs*."[71] For Blackstone, the quality of the wrong dictates the appropriate remedy. Because private law protects personal rights, private citizens are responsible for bringing civil suits to vindicate their interests.[72] In contrast, criminal offenses injure public rights, and so the king, as the sovereign, bears responsibility for prosecuting public offenses.[73] This legal philosophy tended to view the law as rigid and rule based rather than as an instrument of public policy.[74] The public-private distinction therefore justified public prosecutions; because criminal law's public nature necessitated a public remedy, the government, not victims, logically prosecuted criminal cases.

Beginning in the early twentieth century, legal realism challenged this assumption.[75] Legal realist theory rejects the public-

69. *See* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1325–26 (2002) ("[P]rivate citizens continued to initiate and litigate criminal prosecutions in New York until the 1840s or 1850s . . . .").

70. *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) ("The emergence of the market as a central legitimating institution brought the public/private distinction into the core of legal discourse during the nineteenth century.").

71. 3 WILLIAM BLACKSTONE, COMMENTARIES *2.

72. *Id.* at *2–3.

73. 4 *id.* at *2.

74. *See* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 31, 44 (1995) (explaining that nineteenth-century legal scholars viewed the law as founded on sharp dichotomies such as public-private that dictate the "essential character" of legal fields).

75. *See* Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005) ("The legal realist movement flourished back in the 1920s and 30s . . . ."); Horwitz, *supra* note 70, at 1426 (tracing the legal realists' assault on the public-private dichotomy to the 1905 Supreme Court opinion *Lochner v. New York*).

private distinction; it teaches that private law affects public interests, and public rules affect private life.[76] For example, public legislation regulating railroads, labor, and agriculture shapes the private contractual relationships of parties.[77] Public interests, such as the public's interest in avoiding nuisances, limit property owners' rights.[78] And even though the family represents one of the most private areas of an individual's life, the family also plays a central role in shaping civil society by raising future generations.[79] As a result, the state, often acting through a welfare agency, routinely intervenes in family life to make sure that families are performing this role to society's standards.[80] By showing the fallacy of the public-private distinction, legal realism undermines a key justification for public rather than private prosecutions.[81] Legal realism agrees with victims' rights advocates: criminal prosecutions affect private as well as public interests.

This brand of legal realism is essentially descriptive. But since the 1960s and 1970s, many legal scholars have used aspects of legal realism prescriptively. Public interest scholarship argues that because litigation affects public interests, lawyers should use it to drive public policy.[82] Rejecting court neutrality, this theory requires courts to act as regulatory agents, supervising complex and ongoing social policy efforts such as reforming prisons and mental hospitals, desegregating

76. James Boyle, *Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORNELL L. REV. 371, 378–79 (1993).

77. Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 202–03 (1937).

78. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 21–26 (1927).

79. *See* Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1356 (1982) ("It has been common forever to speak of the public functions of the family in producing and socializing 'the next generation.'").

80. *Id.*

81. *See id.* at 1357 (arguing that one cannot "take the public/private distinction seriously as a description, as an explanation, or as a justification of anything").

82. *E.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 *passim* (1976). Professor Chayes argues that

> just as the traditional concept reflected and related to a system in which social and economic arrangements were remitted to autonomous private action, so the new model reflects and relates to a regulatory system where these arrangements are the product of positive enactment. In such a system, enforcement and application of law is necessarily implementation of regulatory policy. Litigation inevitably becomes an explicitly political forum and the court a visible arm of the political process.

Id. at 1304.

schools, and improving public housing.[83] The idea that litigation can effect social change for group interests remains popular in American legal culture; for example, the gay community has combated social discrimination by litigating against the military's "don't-ask-don't-tell" policy and for judicial recognition of gay marriage.[84] Victims' rights advocacy, which also emerged in the 1960s and 1970s,[85] mirrors public interest scholarship. Rather than using private litigation to achieve public goals, it argues that public prosecutions should consider private interests.

But public interest litigation has proven difficult to square with the structural and especially the ethical culture of the adversary system.[86] Professor Derrick A. Bell, in his classic treatment of the issue, demonstrates that lawyers litigating school desegregation cases after *Brown v. Board of Education*[87] often failed their ethical obligations to their clients.[88] Adversary attorneys owe their loyalty to best vindicating their clients' rights *and interests*[89]—but when litigating post-*Brown* desegregation cases, attorneys generally considered long-term social policy goals rather than the client's immediate needs.[90] For example, the NAACP's attorneys and donors saw litigation as a vehicle to obtain widespread racial desegregation.[91] But by the 1970s, some clients began to want more immediate concerns addressed instead, such as improving educational quality or minimizing busing to violent white neighborhoods.[92] When the lawyers acted to promote desegregation even at the expense of their clients' interests, Bell

83. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1266–67.

84. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1635–42 (1997).

85. Indeed, some commentators have linked the victims' rights movement to larger social rights' movements of the era. *E.g.*, Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 825 (1995) (book review).

86. *See* Rubenstein, *supra* note 84, at 1626 (observing that group litigation creates conflicts within the group and arguing that "our current procedural and ethical rules too heavily favor individualism alone").

87. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

88. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 472 (1976).

89. MODEL RULES OF PROF'L CONDUCT pmbl., ¶ 2 (1999).

90. Bell, *supra* note 88, at 482–93.

91. *Id.* at 488–93.

92. *Id.* at 482.

argues, they violated their fundamental responsibility to act as adversary advocates.[93]

Professor Bell's article demonstrates that public interest litigation forgets legal realism's other lesson: just as private litigation affects public interests, public litigation affects private interests. The NAACP lawyers Bell critiques had noble intentions, but their ultimate aim—to promote desegregation as educational and social policy—did not always match the interests of their actual clients. Because these lawyers chose to act through the adversary process rather than by lobbying legislators or the executive branch, they placed themselves in an impossible ethical situation. Victims' rights scholars have failed to acknowledge that asking the justice system to vindicate private rather than public interests could create similar ethical problems. As Chief Justice Marshall observed,[94] adversary litigation is designed to vindicate the rights of the parties. It becomes difficult to do so when lawyers and the courts are representing other interests instead.

C. Representing Multiple Interests in Adversary Proceedings

The adversary system thus creates conflict between the rights of litigants and the interests of third parties. Victims' rights proponents and other scholars have proposed ignoring inconvenient aspects of the adversary process. Although this approach is tempting, particularly in light of the consequences of criminal prosecutions, Professor Bell's observations demonstrate that it overlooks important counterarguments. This Section demonstrates that American law has resolved the conflict between litigants and third parties differently than these scholars have proposed. Rather than undermining adversary litigation, American law has created a variety of procedural devices that confer party or quasi-party status on interested third parties or allow them to present their position to the court without litigating the case's merits. These solutions allow third parties to litigate their interests without disrupting two key features of the adversary system: party autonomy and court neutrality.

93. *See id.* at 472 ("[I]t is difficult to provide standards for the attorney and protection for the client where the source of the conflict is the attorney's ideals. . . . 'No servant can serve two masters . . . .'" (quoting *Luke* 16:13 (King James))).

94. *See supra* note 2 and accompanying text.

The amicus curiae device allows outsiders to present legal arguments to appellate courts without having party status. A third party with an interest in an appellate case may ask the court or the parties for permission to file a brief presenting relevant and useful additional arguments to the court.[95] The broadness of the standards for filing an amicus brief is balanced by the narrowness of an amicus curiae's formal power. An amicus curiae only has the right, after permission, to file a brief;[96] it cannot litigate the merits of a legal claim.[97] The court retains total discretion whether and how to consider the amicus brief,[98] and the parties remain responsible for shaping the issues and arguments for appeal.[99] This device allows third parties to share their perspective with the court without requiring the court or the parties to change their behavior or decisions.

Third parties may obtain permission to litigate the merits of a claim related to a civil case by intervening in the proceedings. The Federal Rules of Civil Procedure authorize two kinds of intervention. Parties with a "cognizable legal interest" in the subject of the case have a right to intervene[100] unless one of the parties already "adequately" represents that interest.[101] Permissive intervention allows third parties to adjudicate additional claims they have that share "common questions of law and fact" with the main case.[102]

95. *See* SUP. CT. R. 37 (requiring permission either from the Court or the parties to file an amicus curiae brief and stating that "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court"); FED. R. APP. P. 29(a)–(b) (requiring an amicus curiae to obtain permission either from the court or the parties and to file a motion with the proposed brief stating "the movant's interest" and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case").

96. 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3975.1 (3d ed. 1999).

97. United States v. Michigan, 940 F.2d 143, 165–66 (6th Cir. 1991).

98. *See id.* at 165 ("[P]articipation as an amicus . . . continues to be[] a privilege within the sound discretion of the courts . . . ." (internal quotation marks omitted)).

99. *See* Bano v. Union Carbide Corp., 273 F.3d 120, 127 n.5 (2d Cir. 2001) ("[A]n amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (quoting Resident Council v. U.S. Dep't of Hous. & Urban Dev., 980 F.2d 1043, 1049 (5th Cir. 1993))).

100. Brody *ex rel.* Sugzdinis v. Spang, 957 F.2d 1108, 1116 (3d Cir. 1992); *see also* FED. R. CIV. P. 24(a)(2) (granting third parties a right to intervene if the litigation ultimately would injure the third party's interest in the "property or transaction that is the subject of the action").

101. FED. R. CIV. P. 24(a)(2).

102. *Id.* 24(b)(1)(B); United Keetoowah Band of Cherokee Indians of Okla. v. United States, 78 Fed. Cl. 303, 304, 306 (2007).

Intervenors are treated like the original parties and may litigate the merits of their claims.[103] The intervenor device therefore preserves the adversary structure by treating intervenors as parties, which avoids distorting the role of the original parties or the judge.

Some statutes simply confer party status on outsiders to litigation. Qui tam statutes, for example, allow private citizens to bring civil claims in the government's name.[104] The most commonly litigated qui tam statute is the federal False Claims Act,[105] under which citizens may bring civil fraud claims in the name of the United States.[106] Once a citizen, called a "relator,"[107] brings a qui tam suit, the government may intervene.[108] If the government does not intervene, the relator prosecutes the case on the government's behalf.[109] Even if the government does intervene, the relator remains a party to the action.[110] But the government and the relator litigate their cases separately and then share in the recovery,[111] much like coplaintiffs in any civil proceeding.

Other procedures permit a litigant to stand in the shoes of a third party that, for some reason, cannot vindicate its own interests. The derivative suit allows shareholders to bring claims on behalf of a corporation when the corporation's officers and directors will not.[112] Because only the corporation is a party, not the shareholder as an individual, the basic adversary structure remains. A series of Supreme Court decisions also have relaxed the standing requirement and permitted a litigant to vindicate the rights and interests of a third party that cannot join an action if the litigant shares a relationship with the third party.[113] For example, defendants may raise equal protection claims on behalf of jurors excluded from the defendant's

103. Schneider v. Dumbarton Developers, Inc., 767 F.2d 1007, 1017 (D.C. Cir. 1985).

104. Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 949 (2007).

105. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 (2000).

106. 31 U.S.C. § 3730(b)(1) (2000); *Vt. Agency of Natural Res.*, 529 U.S. at 769.

107. Broderick, *supra* note 104, at 952.

108. 31 U.S.C. § 3730(b)(2).

109. *Id.* § 3730(b)(4)(B).

110. *Id.* § 3730(c)(1).

111. *Id.* §§ 3730(c), (d)(1).

112. DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE § 1:1 (2003).

113. FALLON ET AL., *supra* note 68, at 175–76.

trial through race-based peremptory challenges.[114] This procedure preserves the litigant's autonomy because the litigant chooses whether and how to vindicate the third party's interests. Neither the court nor the party has a duty to litigate on the third party's behalf.

Congress and the courts have developed a variety of methods to permit third parties to represent their interests in Article III litigation. Procedural rules and statutes may allow the third party to act as an amicus curiae, intervene in the case, or simply obtain party status. They also may allow litigants to bring a claim on behalf of a third party. None of these devices imposes a duty on a litigant to represent a third party's interests even if those interests are at odds with the litigant's own. And none requires courts to vindicate the rights of outsiders to the litigation without first conferring party status. These devices therefore preserve party autonomy and judicial independence—two critical traits of the federal justice system that the CVRA ignores.

III. THE CRIME VICTIMS' RIGHTS ACT IN THE FEDERAL JUSTICE SYSTEM

The CVRA provides little guidance to courts and prosecutors incorporating the statute into federal prosecutions; as a result, the statute's impact on the federal justice system is uncertain. This Part examines the statute's text, particularly its enforcement provisions, and concludes that the CVRA really asks for institutional courtesy toward victims, not sweeping changes to federal prosecutions. Section A shows that the statute's vague rights and conflicted legislative history leave room for interpretation. Section B argues that the statute's enforcement provisions fail to confer party or intervenor status on victims, indicating that the CVRA gives victims little real power. Instead, the CVRA requires courts and prosecutors to vindicate victims' interests. This procedural posture forces courts to act as advocates—even against the accused—and forces prosecutors to promote interests that may conflict with the government's own. But Section C demonstrates that many of the CVRA's provisions permit a much narrower interpretation. Because Congress has not rejected the public prosecution model, and because a broad interpretation of the CVRA could present real conflicts for courts

114. Powers v. Ohio, 499 U.S. 400, 415 (1991).

and prosecutors, courts should narrowly interpret the statute to require institutional courtesy rather than sweeping new rights.

A. The Crime Victims' Rights Act: Statutory History and Text

Congress passed the CVRA as a compromise between victims' rights advocates, who had fought for nearly a decade to pass a constitutional victims' rights amendment, and congressional opponents of the proposed amendment.[115] Because Congress rushed to pass the statute, the legislative history supporting the CVRA is sparse, consisting only of two floor statements by the statute's sponsors, Senators Dianne Feinstein and Jon Kyl.[116] These floor statements support multiple interpretations of the CVRA's purpose, reflecting the statute's history as a compromise. On one hand, its drafters took pains to stress that the rights in the CVRA "do not come at the expense of defendant's [*sic*] rights."[117] But they also demanded that courts and prosecutors avoid "whittl[ing] down or marginaliz[ing]" victims' rights and "treat victims of crime with the respect they deserve and . . . afford them due process."[118] Overall the floor statements appear designed to appease both victims' proponents and skeptics of victims' rights; as a result, the statute's legislative history and purpose leave considerable room for interpretation.[119]

The CVRA's ambiguous statutory text exacerbates the confusion that this conflicted legislative history may create. The CVRA developed from a proposed constitutional amendment.[120] When it became clear that Congress would not approve the amendment,

115. *See* 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (discussing the victims' rights amendment's authors' struggles to garner support for a federal constitutional amendment); Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 588–91 (2005) (reciting the history of the failed proposed victims' rights amendment).

116. Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1015–16 (9th Cir. 2006); United States v. Turner, 367 F. Supp. 2d 319, 323 n.3 (E.D.N.Y. 2005) (mem.).

117. 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

118. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

119. *Compare* United States v. Holland, 380 F. Supp. 2d 1264, 1279 (N.D. Ala. 2005) (mem.) (calling the CVRA "the new, mushy, 'feel good statute'"), *with* United States v. Heaton, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006) (mem.) ("Congress plainly intended to give victims broad rights to fair treatment.").

120. *See Turner*, 367 F. Supp. 2d at 323 n.3 (describing the CVRA's origins in a proposed victims' rights amendment).

victims' rights proponents passed the measure as a statute instead.[121] As a result, the CVRA reads more like an amendment than a statute, with sweeping statements of rights and no discussion of how those rights should be implemented. It grants victims eight substantive and procedural rights: the right to be reasonably protected from the accused, the right to be notified of public proceedings, the right not to be excluded from public proceedings, the right to be heard at designated proceedings, the right to proceedings free from unreasonable delay, the right to confer with the prosecution, the right to restitution as permitted by law, and the right to be treated with fairness and respect for their dignity and privacy.[122] Nowhere does the statute state how these rights should affect courts' and prosecutors' decisions during criminal proceedings.

The CVRA also fails to explain another important detail: how courts and prosecutors should recognize victims' rights when prosecutors have not yet brought criminal charges. It defines "victim" as a person who is "directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."[123] Although the statute does not define "offense," its legislative history and plain language appear to confer victim status even if the government has not brought charges.[124]

It is odd that a statute with such broad language and expansive application provides no guidance to the courts and prosecutors who actually apply it to federal prosecutions. The explanation for this omission is probably political: passing the CVRA presented an opportunity to help crime victims, a broadly sympathetic group. In its

121. *Id.*

122. 18 U.S.C. § 3771(a) (2006).

123. *Id.* § 3771(e). For a discussion of the difficulty of determining who is a "victim" within the meaning of the statute, see United States v. Sharp, 463 F. Supp. 2d 556, 561–67 (E.D. Va. 2006) (mem.).

124. *See* 18 U.S.C. § 3771(d)(3) (allowing a victim to seek a writ of mandamus for denial of any statutory rights "if no prosecution is underway, in the district court in the district in which the crime occurred"); 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (claiming to have written "an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged"). The practical difficulties of this interpretation have led the Department of Justice to apply the CVRA only to charged conduct. *See* OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 9 (2005), *available at* http://www.usdoj.gov/olp/final.pdf ("[A] victim is 'a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia' . . . if the offense is charged in federal district court." (quoting 18 U.S.C. § 3771(e)).

haste to pass popular legislation, however, Congress did not bother considering the CVRA's practical implications. As a result, Congress passed a statute that—probably unintentionally—conflicts with the basic structure of the federal criminal justice system.

B. Enforcing the CVRA in an Adversary System

1. *The CVRA's Enforcement Provisions.* Its drafters claimed that the CVRA "mak[es] victims independent participants in the criminal justice process"[125] and gives victims the chance to enforce their participation rights.[126] But the CVRA does not change federal prosecutors' constitutional and statutory responsibilities to enforce federal criminal law. The statute expressly states that it does not infringe prosecutorial discretion.[127] And nowhere does the CVRA suggest that it confers party or even intervenor status on victims.[128] The government and the defendant thus remain the sole parties to criminal prosecutions.

Because victims have no formal status under the CVRA, courts and prosecutors ultimately bear responsibility to vindicate victims' interests. Under the CVRA, trial courts must ensure that victims are afforded their statutory rights.[129] Government officials, including prosecutors, must "make their best efforts to see that crime victims are notified of, and accorded," their rights under the CVRA.[130] Victims and their legal representatives may petition a district court and then an appellate court if they are not being accorded their rights.[131] But the plain language of the statute requires courts and prosecutors to protect victims' rights before the victim files a petition—the victim may petition for enforcement if courts and prosecutors fail their obligations. The CVRA thus turns courts and prosecutors into victims' advocates. In contrast, victims only have indirect power to influence the system. They cannot seek party or

125. Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1013 (9th Cir. 2006).

126. The CVRA is the first enforceable victims' rights statute in the federal system. 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

127. 18 U.S.C. § 3771(d)(6).

128. *See* United States v. Rubin, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008) ("So far as the Court can divine, however, victims in this posture are not accorded formal party status, nor are they even accorded intervenor status as in a civil action.").

129. 18 U.S.C. § 3771(b)(1).

130. *Id.* § 3771(c)(1).

131. *Id.* §§ 3771(d)(1), (3).

intervenor status; only the court, prosecutors, and defendants remain direct participants.

Congress could have made victims substantial participants to criminal proceedings. The CVRA could have made victims coparties with the government, like qui tam plaintiffs, or it could have created an intervenor posture in criminal cases, as it did in civil cases. More radically, Congress could have abandoned the public prosecution system and asked victims to prosecute criminal cases, or it could have made prosecutors representatives of the victim rather than the public, similar to plaintiffs in derivative suits. At best, by giving victims the right "to be heard" on limited subjects, Congress probably made victims little more than amici curiae. Like amici curiae, then, victims remain nonparties to criminal proceedings with no right to litigate the merits of a criminal case.

Victims' proponents might argue that Congress would not draft such a narrow statute. But the CVRA suggests why Congress created an enforcement provision that fundamentally gives victims very little power: perhaps Congress simply was unwilling to abandon the existing public prosecution model. By restricting victim participation and reaffirming prosecutorial discretion, Congress expressed its preference that the executive, not victims, prosecute criminal cases. But as the rest of this Section indicates, placing the burden instead on courts and prosecutors to vindicate victims' rights may upset the basic structure of the federal criminal justice system.

2. *Courts.* Enforcing victims' interests can place courts at odds with the parties. For example, in *In re Dean*,[132] prosecutors were investigating whether to bring criminal charges against BP Products North America (BP) after an explosion at a refinery that BP owned killed fifteen people.[133] The government and the district court agreed that given the publicity surrounding the case and the possibility of prejudicing BP, the government did not need to confer with the victims.[134] Prosecutors argued that communicating with victims would "impair the plea negotiation process."[135] The Court of Appeals for the Fifth Circuit held that prosecutors had to confer with victims,

132. *In re* Dean, 527 F.3d 391 (5th Cir. 2008) (per curiam).

133. *Id.* at 392.

134. *Id.*

135. *Id.* (quoting federal prosecutors).

although it refused to compel the trial court to reject the plea agreement.[136] Under the Fifth Circuit's interpretation, a trial court would have to force victim participation in plea negotiations over the objections of the parties and despite concerns that victim participation would prejudice the defendant. And by the plain terms of the CVRA, the court would have to do so even if the victim did not first object. Thus the CVRA disrupts the most fundamental division of responsibility in adversary litigation: it does not rely on a party to the litigation to vindicate that party's rights (or even to vindicate an outsider's rights on the outsider's behalf); instead, it asks courts to vindicate the rights and interests of a nonparty.

The CVRA also places courts in conflict with prosecutors' statutory and constitutional discretion. The core of the *Rubin* case[137] was a dispute between prosecutors, who wanted to resolve the case, and the victims, who wanted to recover as much of their loss through restitution and civil damages as possible.[138] Because Omni and RJP were not parties, they demanded that the court vindicate their interest in recovery at the expense of the government's right, as a party, to litigate its case. The *Rubin* victims therefore asked the court to infringe an adversary party's autonomy. And because the party was the government exercising an executive function, the *Rubin* victims were fundamentally asking the court to overlook prosecutors' statutory and constitutional responsibilities to prosecute federal crimes. Federal courts, generally reluctant to interfere with prosecutorial discretion, have an obligation under the CVRA to second-guess prosecutors' decisions on behalf of a nonparty with no right to adjudicate the case.

The *Rubin* decision highlighted another problem for courts enforcing victims' rights: victims' interests often conflict with the rights and interests of the accused, placing courts in the uncomfortable position of vindicating a victim's rights while the

136. *Id.* at 395. The appellate court stated that the trial court could decide what weight, if any, to give the victims' absence from negotiations when deciding whether to accept the plea agreement. *Id.* In July 2008, the Supreme Court refused to stay enforcement of the plea agreement. Dean v. U.S. Dist. Court, 128 S. Ct. 2996, 2996 (2008).

137. *See supra* notes 4–9 and accompanying text.

138. United States v. Rubin, 558 F. Supp. 2d 411, 425–26 (E.D.N.Y. 2008) (reporting that Omni and RJP argued that "the government has not provided information with which to pursue restitution in this case and in their civil suit" and that "the government submitted on behalf of victims a restitution claim . . . that significantly undervalues their loss").

accused continues to enjoy the presumption of innocence.[139] This duty clashes with a court's responsibility to protect defendants' rights during criminal proceedings.[140] In *Rubin*, for example, the victims wanted the court to increase restitution over the objection of the prosecution and the defense.[141] Their petition created two problems for the court. First, when asked to vindicate *victims'* rights, the court had to assume that the victims had suffered at the hands of the defendant—an assumption that directly conflicts with the presumption of innocence.[142] Second, the victims wanted the court to step beyond its neutrality, a core aspect of adversary judging, and encourage the prosecution to make the plea agreement harsher for the defendant. As the *Rubin* court aptly summarized, "[i]t is hard to comprehend, in any case, how a court presiding over the prosecution of a defendant could engage in sidebar dispute resolution between a victim and the government regarding the strategic decisions of the government about the very prosecution the Court is to try impartially."[143]

3. *Prosecutors.* Prosecutors have an ethical responsibility to vindicate the public's interest in ensuring just enforcement of the United States' criminal laws.[144] But the CVRA asks prosecutors to make their "best efforts" to enforce victims' rights.[145] Although the statute disclaims any infringement on prosecutorial discretion,[146] it

139. One district court explained the conundrum:

> The CVRA defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." At this stage of the case, however, the defendant continues to enjoy a presumption that he is innocent of the charge that he committed a Federal offense. Strictly speaking, then, I might be constrained to presume that there is no person who meets the definition of "crime victim" in this case. That syllogism—which renders the CVRA inapplicable to this or any other criminal case unless and until the defendant is proved guilty beyond a reasonable doubt—produces an absurd result that I must presume Congress did not intend. Nevertheless, I cannot ignore the possibility that by requiring me to afford rights to "crime victims" in this case, the CVRA may impermissibly infringe upon the presumption of Turner's innocence.

United States v. Turner, 367 F. Supp. 2d 319, 325–26 (E.D.N.Y. 2005) (mem.) (citation omitted) (quoting 18 U.S.C. § 3771(e)(2006)).

140. *See supra* note 58 and accompanying text.

141. *Rubin*, 558 F. Supp. 2d at 412–13.

142. *Turner*, 367 F. Supp. 2d at 325–26.

143. *Rubin*, 558 F. Supp. 2d at 427–28.

144. *See supra* Part I.B.2.a.

145. 18 U.S.C. § 3771(c)(1) (2006).

146. *Id.* § 3771(d)(6).

does give victims the "reasonable right to confer" with the prosecution.[147] The CVRA also allows prosecutors to petition the district and appellate courts for relief if victims are not afforded their rights.[148]

Representing victims' private interests creates an ethical conflict for prosecutors as soon as the victims' interests diverge from those of the public. In *Young v. United States ex rel. Vuitton et Fils S. A.*,[149] the Supreme Court discussed the conflict that prosecutors face when representing private interests during a criminal proceeding:

> A prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client. Conversely, a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges.[150]

Young addressed the appointment of a private attorney whose client had a financial stake in the outcome of the proceedings to prosecute a criminal contempt case.[151] Although the CVRA does not make victims the clients of federal prosecutors, as was the situation in *Young*, it does appear to ask prosecutors to consider victims' interests in a new or more significant light. And as *Rubin* demonstrated, victims may have financial interests—or even simply emotional interests—that drive them to demand harsher treatment of defendants than the prosecutor may consider wise. Had the prosecutors in *Rubin* assisted Omni and RJP with their efforts to recover their financial losses criminally and civilly, the prosecutors would have verged on committing the very improprieties the *Young* Court denounced.

And like the courts, prosecutors' ethical responsibilities include seeking justice for all parties, including the accused.[152] For example, in *Dean*, the trial court granted an ex parte order for the government relieving it of its responsibilities to notify and confer with the victims of the BP explosion because, given the high-profile nature of the case, "any public notification of a potential criminal disposition resulting

147. *Id.* § 3771(a)(5).
148. *Id.* § 3771(d)(1).
149. Young v. United States *ex rel.* Vuitton et Fils S. A., 481 U.S. 787 (1987).
150. *Id.* at 805.
151. For a discussion of the facts in the *Young* case, see *supra* note 54.
152. *See supra* Part I.B.2.a.

from the government's investigation . . . would prejudice BP."[153] The Fifth Circuit rejected the lower court's conclusion that ordering the government to disclose the existence of its investigation would infringe prosecutorial discretion.[154] But the Fifth Circuit did not address the ethical problem prosecutors faced—by acting cautiously to protect BP's rights, the government was fulfilling its duty to the public interest. When prosecutors place the rights of victims, who are not even parties to the litigation, before the rights of defendants, who enjoy substantial constitutional protections, they appear to violate—or at least undermine—their ethical duty to defendants.

Because the CVRA does not infringe or modify prosecutors' statutory and constitutional duties to enforce criminal law, the statute forces prosecutors to vindicate victim's interests while representing the government's interests—even if they conflict. None of the devices discussed in Part II.C asked a party to litigate interests that conflicted with its own goals. Unless the CVRA is nothing more than a reminder that prosecutors should consider victims' interests when deciding how the government should proceed,[155] it is an unprecedented infringement of party autonomy and prosecutorial discretion.

4. *Defendants*. Finally, the CVRA places defendants in the difficult position of combating a nonparty whose interests are generally opposed to their own. For example, in *United States v. Tobin*,[156] the New Hampshire Democratic Party (NHDP) claimed that it was a victim of the defendant's efforts to jam phone lines set up to facilitate NHDP's "get out the vote" campaign.[157] The government and defense jointly moved to continue the trial until December, 2005[158]—after November elections. The NHDP argued that the extension violated its rights under the CVRA and asked the court to

153. *In re* Dean, 527 F.3d 391, 395 (5th Cir. 2008) (per curiam) (alteration in original) (quoting United States v. BP Prods. N. Am. Inc., No. H-07-434, 2008 WL 501321, at *2 (S.D. Tex. Feb. 21, 2008)).

154. *Id.*

155. For a discussion of how prosecutors may consider victims' interests, see *supra* Part I.B.2.a.

156. United States v. Tobin, No. 04-cr-216-01-SM, slip op. (D.N.H. July 22, 2005).

157. *Id.* at 2.

158. *Id.* at 1.

reject the extension.[159] The court observed that it could not "deprive either criminal defendants or the government of a full an [*sic*] adequate opportunity to prepare for trial. The defendant's right to adequate preparation is, of course, of constitutional significance as well."[160] The court prioritized the parties' rights over the victim's desire to proceed to trial prior to election day. But under the CVRA, which grants victims both the right to proceedings free from unreasonable delay[161] and quasi–due process rights,[162] courts could accelerate proceedings to the detriment of the defendant's right to prepare a case.

This posture conflicts with the defendant's position as an adversary to the government, which even the Bill of Rights recognizes as a particularly delicate position.[163] Although prosecutors have an ethical responsibility to defendants, the courts remain primarily responsible for protecting defendants' statutory and constitutional rights during criminal proceedings.[164] And because the CVRA does not make victims parties to the proceedings, courts must step in and represent victims' interests even when they conflict with defendants' interests. But courts are not litigants—they are responsible for ruling on legal questions, including whether the government's conduct has violated the defendant's constitutional rights. Defendants therefore have no way to challenge the court's representation of the victims' interests during the proceedings. The CVRA therefore not only conflicts with courts' responsibilities to protect defendants' rights; it also makes the court, responsible for ensuring fairness to both parties, the adversary of the defendant.

C. Interpreting the CVRA

Congress may have tried to protect prosecutorial discretion by refusing to confer party status on victims, but it created other problems for courts and prosecutors by forcing them to advocate for victims' interests. This Section argues that a careful, narrow reading of the CVRA's rights provisions could avoid many of these conflicts.

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159. *Id.* at 2.
160. *Id.* at 4.
161. 18 U.S.C. § 3771(a)(7) (2006).
162. *See infra* note 168 and accompanying text.
163. *See supra* Part I.B.2.b.
164. *See supra* note 58 and accompanying text.

This Section presents six[165] statutory provisions that could either give the victim a substantial voice in prosecutions or simply ask courts and prosecutors to show courtesy toward victims without changing their decisionmaking processes. Courts should adopt this narrower reading to preserve the public prosecution model that Congress refused to abandon.

First, the provision giving victims the right "to be treated with fairness and with respect for the victim's dignity and privacy" could justify giving victims broad rights to influence many stages of the criminal prosecution.[166] The CVRA's drafters asked courts and prosecutors to read this right expansively.[167] The drafters explained that "[t]he broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational," and they argued that "the right to be treated with fairness" includes "the notion of due process," but they did not explain how they intended the right to operate in practice.[168] As some commentators have already contended, loose language like "fairness" and "respect" could confer sweeping new rights throughout the federal criminal justice system.[169]

But this right also could simply ask courts and prosecutors to show consideration to victims as long as doing so does not come at

165. This Section does not discuss a victim's right to notification of public proceedings, 18 U.S.C. § 3771(a)(2), and not to be excluded from public proceedings, *id.* § 3771(a)(3), because those rights are relatively straightforward and present fewer ethical problems for courts and prosecutors.

166. *Id.* § 3771(a)(8).

167. Senator Kyl argued that "[i]t is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch." 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

168. *Id.* at S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl); *see also id.* (statement of Senator Feinstein) (agreeing with Senator Kyl).

169. For example, Professor Paul Cassell has argued that

> [t]he CVRA requires fundamental changes in the Federal Rules of Criminal Procedure. The CVRA makes crime victims participants in the criminal justice process and commands in sweeping terms that the courts must treat victims "with fairness and with respect for the victim's dignity and privacy." To faithfully implement that directive, it is necessary to assess each of the existing rules against a fairness standard and then make changes and additions where the Rules do not guarantee fair treatment to victims.

Cassell, *supra* note 11, at 872 (emphasis omitted) (footnote omitted) (quoting 18 U.S.C. § 3771(a)(8)).

the expense of the participants' rights and duties.[170] This interpretation would make more sense in light of the CVRA's failure to create anything approaching party status for victims.[171] If Congress wanted to preserve prosecutorial discretion but also incorporate victims into the system,[172] perhaps reading this right as a reminder to courts and prosecutors that they should treat victims thoughtfully best reflects the compromise that led to the statute's enactment.

Another potentially groundbreaking provision grants victims "[t]he right to proceedings free from unreasonable delay,"[173] recognizing that victims have an interest in rapid proceedings independent from prosecutors and the accused. The CVRA's drafters claimed that this provision "does not curtail the government's need for reasonable time to organize and prosecute its case" or "infringe on the defendant's due process right to prepare a defense."[174] Instead, this right was intended to require courts to reject motions to continue proceedings made only for the convenience of the parties that go beyond either party's need to prepare.[175] The statute provides no further guidance explaining when proceedings are unreasonably delayed.

Courts could read this statute strictly and accelerate the case over the objection of the parties, or courts could rely on the drafters' acknowledgement that the parties have a right to fully prepare their cases and rarely, if ever, hasten the proceedings on the victim's behalf.[176] To avoid interfering with the parties' rights to choose how to litigate their cases, courts should follow the latter approach. The CVRA does not make victims parties, and so victims should not have

170. *See, e.g.*, United States v. Rubin, 558 F. Supp. 2d 411, 427–28 (E.D.N.Y. 2008) (refusing to "prohibit[] the government from raising legitimate arguments in support of its opposition to a motion simply because the arguments may hurt a victim's feelings or reputation").

171. *See supra* Part III.B.1.

172. *See supra* Parts III.A–B.

173. 18 U.S.C. § 3771(a)(7). The purpose of this provision was to vindicate the victim's interest in repose. *See* 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) ("It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties or the court.").

174. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

175. *Id.*

176. *See* United States v. Tobin, No. 04-cr-216-01-SM, slip op. at 4 (D.N.H. July 22, 2005) ("Although the [victim's] interest in having this case proceed forthwith is important, of equal importance is the court's duty to ensure that both the defendant and government receive due process and a fair trial.").

a real voice in determining the pace of litigation; nor should courts represent that voice against the government and the accused. One court observed,

> This litigation may be proceeding with less speed than the [victim] would prefer, given its own discrete interests, but it is worthwhile to reflect on the old adage that the wheels of justice grind slowly, but they grind exceedingly fine. The alternative – precipitous spinning of the powerful wheels of justice merely to satisfy popular demand – runs the unacceptable risk of those wheels running over the rights of both the accused and the government, and in the end, the people themselves.[177]

The victim's "reasonable right to confer with the attorney for the Government in the case"[178] also may threaten the government's autonomy. Although the CVRA preserves prosecutorial discretion, this provision has led many victims to ask courts to reject plea agreements or vacate guilty pleas on the ground that the victims did not sufficiently confer with the prosecution regarding the plea.[179] Confronted with this situation, the Fifth Circuit proposed reading the statute to ask prosecutors to converse with victims "before ultimately exercising [their] broad discretion."[180] Although the CVRA's drafters claimed that "[t]his right is intended to be expansive,"[181] the Fifth Circuit's interpretation conforms to the drafters' floor statements on the issue.[182] By asking prosecutors to communicate with victims without necessarily changing their decisionmaking based on the victim's interests, the Fifth Circuit's approach avoids forcing prosecutors to represent conflicting interests and avoids placing courts in the awkward position of second-guessing prosecutors'

177. *Id.*

178. 18 U.S.C. § 3771(a)(5).

179. *E.g.*, *In re* Dean, 527 F.3d 391, 394–95 (5th Cir. 2008) (per curiam).

180. *Id.* at 395. The Fifth Circuit decided that the district court should not have exempted prosecutors from this requirement, but it concluded that the injury to victims was not sufficient to warrant mandamus relief. *Id.*

181. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl); 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

182. Senator Feinstein explained that this right is expansive in the sense that it applies at "any critical stage or disposition of the case." 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). Prosecutors merely "should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions." *Id.* at S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

decisions. This provision should encourage prosecutors to act courteously toward victims while continuing to represent the United States' interests.

Some CVRA provisions ultimately reinforce existing law without creating new rights. "The right to be reasonably protected from the accused"[183] is a particularly ambiguous provision. Although even Senator Kyl recognized that "the government cannot protect the crime victim in all circumstances," he did not explain in what circumstances the right should apply.[184] Victims could demand federal protection based on this provision. The *Rubin* victims argued that because the government investigated, arrested, and placed Rubin on bond while he was defrauding them, Omni and RJP were denied their rights under this provision.[185] But the *Rubin* court found a limiting principle in the statutory text: it concluded that because Rubin had not been "accused" of defrauding Omni and RJP at that time, they had no rights under the CVRA "beyond that of general law to be protected from criminal conduct by Rubin or anyone else."[186]

Even once the defendant is formally charged, however, it is not clear what responsibilities this provision creates. The CVRA's drafters argued it requires protection for victims when courts place defendants on release.[187] Yet existing federal release law already considers victim safety, and so this provision does not appear to contribute new rights.[188] Courts could grant release less often or with harsher terms based on this right, particularly if they considered it with the victim's right to be heard on the issue of release.[189] But the CVRA's plain text does not require them to do so, and forcing a court to change its decision about whether to grant freedom to the accused based on the interests of a nonparty would conflict with the court's

183. 18 U.S.C. § 3771(a)(1).

184. 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

185. United States v. Rubin, 558 F. Supp. 2d 411, 419 (E.D.N.Y. 2008).

186. *Id.* at 420.

187. 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

188. One district court interpreting the CVRA observed as much:

> Regardless of what this right might entail outside the bail context, it appears to add no new substance to the protection of crime victims afforded by the Bail Reform Act, which already allows a court to order reasonable conditions of release or the detention of an accused defendant to "assure . . . the safety of any other person."

United States v. Turner, 367 F. Supp. 2d 319, 332 (E.D.N.Y. 2005) (mem.) (alteration in original) (quoting 18 U.S.C. § 3142(c)(1) (2000)).

189. 18 U.S.C. § 3771(a)(4) (2006).

role as protector of a defendant's rights. The drafters' other statements about this provision counsel a more limited reading. Aside from the release issue, Senator Kyl simply asked courts to reasonably "provide[] accommodations such as a secure waiting area, away from the defendant."[190] Senator Kyl appears to ask courts to be courteous. This reading allows courts to remain impartial, particularly toward the defendant, and it prevents imposing on courts general responsibility to ensure that federal law enforcement and federal prosecutors are providing protection for victims.

Another provision that fundamentally restates existing law is "[t]he right to full and timely restitution as provided in law."[191] The CVRA's drafters endorsed a definition of restitution that includes compensating the victim's family for the victim's lost future income in homicide cases.[192] This provision contributes to criminal proceedings, then, by clarifying existing law.[193] But because the CVRA recognizes the right to restitution "as provided in law,"[194] courts uniformly have concluded that the CVRA does not change victims' access to restitution.[195]

Many of these interpretations appear to give victims no real right to participate in the proceedings, which the CVRA's drafters claimed was the statute's purpose.[196] But one provision could give victims an opportunity to participate without upsetting the role of the court or the rights of the parties. The CVRA gives victims the right to be "reasonably heard at any public proceeding in the district court

190. 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

191. 18 U.S.C. § 3771(a)(6).

192. *See* 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (endorsing two decisions by Judge Cassell, then on the District Court of Utah, that interpreted federal restitution statutes to include lost future income).

193. *See* United States v. Bedonie, 317 F. Supp. 2d 1285, 1302–04 (D. Utah. 2004) (mem.) (interpreting the language and legislative intent of existing federal restitution statutes to authorize lost income restitution in homicide cases).

194. 18 U.S.C. § 3771(a)(6).

195. *E.g.*, *In re* W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 563–64 (2d Cir. 2005) (affirming the establishment of a restitution fund that did not fully compensate all victims because the Mandatory Victim Restitution Act allows courts to limit restitution when the number of victims makes full compensation difficult); United States v. Lay, 456 F. Supp. 2d 869, 871–72, 875 (S.D. Tex. 2006) (mem.) (concluding that the CVRA could not overcome the abatement doctrine, which required vacation of Kenneth Lay's conviction because he could not appeal his conviction after his death).

196. *See supra* notes 125–26 and accompanying text.

involving release, plea, sentencing, or any parole proceeding."[197] Senator Kyl argued that it makes victims "independent participant[s]" and ensures that they may give victim impact statements.[198] Federal statues already permit victim impact evidence during some sentencing proceedings,[199] and the Federal Rules of Criminal Procedure allow victims of violent or sexual crimes to address the court.[200] But the CVRA appears to be the first federal statute to confer a general right on victims of all federal crimes to speak to the court at sentencing,[201] expanding the role of controversial victim impact evidence in federal criminal proceedings.[202]

The CVRA does not explain how much weight, if any, courts should give victims' opinions. Courts could use this provision to justify imposing harsher release terms or sentences. On the other hand, as the Sixth Circuit observed, it is not clear "why the particular desires of [the] victim should affect the legal analysis necessary for sentencing" the defendant.[203] Courts could treat victims essentially like amici curiae, because, like amici curiae, victims have no clear

197. 18 U.S.C. § 3771(a)(4).

198. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

199. *E.g.*, 18 U.S.C. § 2319A(d) (2006) (copyright infringement); 18 U.S.C. § 3593(a) (2006) (capital sentencing).

200. FED. R. CRIM. P. 32(i)(4)(B).

201. Lower courts disagree whether the CVRA gives victims the right to speak or to simply present their perspective in writing. *Compare* United States v. Marcello, 370 F. Supp. 2d 745, 748 (N.D. Ill. 2005) (mem.) ("[T]he statute requires only that a victim be reasonably heard, and . . . Congress's use of that term of art does not require that a trial court accept oral statements in all situations."), *with* Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1016 (9th Cir. 2006) ("The statements of the sponsors of the CVRA and the committee report for the proposed constitutional amendment disclose a clear congressional intent to give crime victims the right to speak at proceedings covered by the CVRA."). The CVRA's drafters, however, intended for victims to have the right to speak. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl); 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

202. Many commentators have criticized victim impact evidence as inflammatory and prejudicial. *E.g.*, Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 395 (1996) ("Victim impact statements evoke . . . a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger." (footnote omitted)); Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 426 (2003) (arguing that victim impact evidence "diverts the jury's attention away from the crime and the defendant and toward the character of the victim and the crime's effect on his family").

203. United States v. Hughes, No. 06-6461, 2008 WL 2604249, at *7 n.7 (6th Cir. June 26, 2008).

statutory right to have their arguments considered. Victims still could have the satisfaction of expressing their feelings without necessarily affecting the court's decisionmaking, avoiding conflicts for the judges and prosecutors who otherwise would have to treat the defendant more harshly. And if Congress has not given victims the right to adjudicate their interest in harsher treatment of defendants, then courts should not use vague language about a right *to be heard* to create it.

Some might object that interpreting the CVRA this narrowly eviscerates the statute. But this reading still requires the federal justice system to incorporate victims; it simply avoids making them independent parties. After the CVRA, victims may express their opinions to prosecutors and, during some proceedings, to the court.[204] The CVRA also makes it more difficult for courts to exclude victims from public court proceedings,[205] and it requires prosecutors to notify victims of those public proceedings in advance.[206] In short, the CVRA allows victims to witness some proceedings, talk to prosecutors, and communicate with the court. These rights still respect victims' unique investment in the proceedings. But narrowly interpreting the CVRA makes sense in light of Congress's refusal to replace the public-prosecution model. Limiting victims' influence over the prosecution matches their lack of formal party status, and it generally avoids many problems that forcing courts and prosecutors to advocate for crime victims creates. If Congress wishes to make victims parties, it may do so. Until then, courts should tread carefully before reading the CVRA too broadly.

CONCLUSION

This Note probes whether some ends justify the means necessary to achieve them. Victims' rights scholars have argued, with considerable political success, that it is worth changing the means of criminal justice—the traditional adversary process between the

204. *See supra* notes 178–82, 196–202 and accompanying text.

205. *See* 18 U.S.C. § 3771(a)(3) (2006) (requiring courts to find, by clear and convincing evidence, that a victim's presence at a public proceeding would "materially alter[]" the victim's testimony before excluding the victim from the courtroom). This provision contrasts with the Federal Rules of Evidence, which generally allow courts total discretion to exclude witnesses from the courtroom. FED. R. EVID. 615.

206. 18 U.S.C. § 3771(a)(2).

government and the defendant—to promote the victim's well-being. Their arguments echo an old debate among legal scholars about the adversary system's effect on third-party interests. It also probes one of the most vexing problems of criminal justice: with so much at stake, why not manipulate procedure to ensure a better outcome for victims, defendants, or the public at large?

But valuing the right result over the right process has consequences. Because American law continues to follow the adversary tradition, promoting essentially inquisitorial values undermines the way American procedure actually operates. The CVRA's potential effect on the federal criminal justice system illustrates this problem. It places courts in the awkward position of second-guessing prosecutorial discretion and vindicating victims' interests against the rights of criminal defendants. Prosecutors also must represent victims in criminal proceedings, undermining prosecutors' traditional role as ministers of justice and forcing them to vindicate interests that may conflict with the government's own. And defendants rely on courts and, to a lesser extent, prosecutors to protect their constitutional rights, a protection that the CVRA may enervate.

American law has developed a number of solutions for the conflict between the adversary process and third-party interests. Some devices, like the amicus curiae devices, allow third parties to present their position without giving third parties power to vindicate their rights vis-à-vis the real parties. Otherwise, American law has either conferred some kind of party or intervenor status on third parties or asked a litigant to stand in the third party's shoes before the court. None of the devices presented in this Note requires the court to vindicate the interests of nonparties or forces litigants to represent interests contrary to their own.

The CVRA does not confer party or intervenor status on crime victims. Despite some pro-victim rhetoric, Congress explicitly preserved the public-prosecution model and claimed that the statute did not affect defendants' rights. In short, even Congress was unwilling to change the fundamental structure of the justice system to promote victims' interests. Both victims' nonparty status and the limited nature of many of the CVRA's substantive rights demonstrate Congress's reluctance to upset the status quo.

This Note proposes a way to interpret the CVRA that remains true to the statute's text and generally avoids disrupting the basic

structure of the federal adversary process. Rather than conferring broad rights on crime victims, courts and others should simply show courtesy and respect toward crime victims. They should allow victims to attend public proceedings and share their thoughts. They should communicate with victims and remember them when release or restitution law requires it. But courts and prosecutors should not change their decisionmaking for victims. By observing this distinction, they can implement the statute that Congress crafted and the justice system demands.

APPEAL,CLOSED

UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA (Western Division − Los Angeles) CRIMINAL DOCKET FOR CASE #: 2:03−cr−00568−JFW All Defendants

Case title: USA v. Leichner
Related Case: 2:07−cv−04128−JFW
Magistrate judge case number: 2:03−mj−00282

Date Filed: 06/12/2003
Date Terminated: 05/23/2005

Assigned to: Judge John F. Walter

Appeals court case number:
10−56087 9th CCA

Defendant (1)

Moshe Leichner
TERMINATED: 03/04/2005

represented by **Peter William Scalisi**
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Pending Counts	Disposition
18:1343, 2 WIRE FRAUD, AIDING AND ABETTING AND CAUSING AN ACT TO BE DONE (1−2)	Committed to the Bureau of Prisions for 240 monhts on counts 1,3 of the Information, 60 months on count 1, 60 months on count 2 &120 monhts on count 3, consecutivvely. Supervised Release for 5 years, 5 years on count 2 &3 years on counts 1 &3, con currently under the terms &conditions of USPO,

	General Order 318 &01−05. Special Assessment of $300. Restitution of $94,796,530.44. Fine of $250,000.
18:1957, 2 MONEY LAUNDERING, AIDING AND ABETTING AND CAUSING AN ACT TO BE DONE (3)	Committed to the Bureau of Prisions for 240 monhts on counts 1,3 of the Information, 60 months on count 1, 60 months on count 2 &120 monhts on count 3, consecutivvely. Supervised Release for 5 years, 5 years on count 2 &3 years on counts 1 &3, con currently under the terms &conditions of USPO, General Order 318 &01−05. Special Assessment of $300. Restitution of $94,796,530.44. Fine of $250,000.
18:981(a)(1)(C), 21:853, 28:2461(c) CRIMINAL FORFEITURE (4)	

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
None	

Highest Offense Level (Terminated)

None

Complaints	**Disposition**
None	

Assigned to: Judge John F. Walter

Defendant (2)

Zvi Leichner
TERMINATED: 05/23/2005

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William L O'Bryan (See above for address)
TERMINATED: 05/23/2005
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Pending Counts	**Disposition**
18:1343: WIRE FRAUD (1s−2s)	Committed on counts 1−3 of the Supersedng Information for 135 months, 60 months on counts 1 and 2, concurrently to each other, and 120 months on count 3, partially consecutively (75 months) and partially concurrently (45 months) to counts 1 and 2. Su pervised Release for 3 years on counts 1−3 concurrently under the terms and conditions uf US Probation office, General Order 318 and 01−05. Special Assessment of $300. Restitution of $94,796,530.44. Fine waived. RESENTENCING: Defendant is committed to the custody of the Bureau of Prisons for One Hundred Thirty Five (135) months. Supervised release for Three (3) years under the terms and conditions of the US Probation Office, General Order 318 &01−05. Fines waived, pay special assessment of $300, restitution in the total amount of $94,796,530.04
18:1957: MONEY LAUNDERING (3s)	Committed on counts 1−3 of the Supersedng Information for 135 months, 60 months on counts 1 and 2, concurrently to each other, and 120 months on count 3, partially consecutively (75 months) and partially concurrently (45 months) to counts 1 and 2. Su pervised Release for 3 years on counts 1−3 concurrently under the terms and conditions uf US Probation office, General Order 318 and 01−05. Special Assessment of $300. Restitution of $94,796,530.44. Fine waived. RESENTENCING: Defendant is committed to the custody of the Bureau of Prisons for One Hundred Thirty Five (135) months. Supervised release for Three (3) years under the terms and conditions of the US Probation Office, General Order 318 &01−05. Fines waived, pay special assessment of $300, restitution in the total amount of $94,796,530.04

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
18:1343, 2 WIRE FRAUD, AIDING AND ABETTING AND CAUSING AN ACT TO BE DONE (1−2)	The Original Information is dismissed.

18:1957, 2 MONEY LAUNDERING, AIDING AND ABETTING AND CAUSING AN ACT TO BE DONE (3)	The Original Information is dismissed.
18:981(a)(1)(C), 21:853, 28:2461(c) CRIMINAL FORFEITURE (4)	The Original Information is dismissed.
18:981 &28:2461: CRIMINAL FORFEITURE AND 18:2: AIDING AND ABETTING AND CAUSING AN ACT TO BE DONE (4s)	The Original Informatin is dismissed.

Highest Offense Level (Terminated)

Felony

Complaints	**Disposition**
None	

Plaintiff

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Date Filed	#	Docket Text
02/07/2003	1	COMPLAINT filed against Moshe Leichner, Zvi Leichner in violation of 18:1343. Approved by Magistrate Judge Margaret A. Nagle. [2:03−m −282] (dmap) (Entered: 02/11/2003)

02/07/2003		BENCH WARRANT issued for Moshe Leichner by Magistrate Judge Margaret A. Nagle. Bail to be fixed at Initial Appearance. [2:03−m −282] (dmap) (Entered: 02/11/2003)
02/07/2003	2	NOTICE OF REQUEST FOR DETENTION filed by USA as to Moshe Leichner . [2:03−m −282] (dmap) (Entered: 02/11/2003)
02/07/2003		BENCH WARRANT issued for Zvi Leichner by Magistrate Judge Margaret A. Nagle. Bail to be set at the Initial Appearance. [2:03−m −282] (dmap) (Entered: 02/11/2003)
02/07/2003	3	NOTICE OF REQUEST FOR DETENTION filed by USA as to Zvi Leichner . [2:03−m −282] (dmap) (Entered: 02/11/2003)
02/10/2003	4	REPORT COMMENCING CRIMINAL ACTION as to Moshe Leichner arrested on 2/8/03. Defendant's date of birth: 12/6/48. [2:03−m −282] (dmap) (Entered: 02/11/2003)
02/10/2003	5	MINUTES OF ARRAIGNMENT ON MAGISTRATE COMPLAINT held before Magistrate Judge Victor B. Kenton as to Moshe Leichner : Defendant arraigned and states true name as charged. First appearance of Moshe Leichner entered. Retained Attorney Willian O'Bryan present. Defendant committed to the custody of the U. S. Marshal. Case is continued to 10:00 a.m. on 2/14/03 for further processing. Tape No.: 03−03 [2:03−m −282] (dmap) (Entered: 02/11/2003)
02/10/2003	6	REPORT COMMENCING CRIMINAL ACTION as to Zvi Leichner arrested on 2/8/03. Defendant's date of birth: 7/27/71. [2:03−m −282] (dmap) (Entered: 02/11/2003)
02/10/2003	7	MINUTES OF ARRAIGNMENT ON MAGISTRATE COMPLAINT held before Magistrate Judge Victor B. Kenton as to Zvi Leichner : Defendant arraigned and states true name as charged. First appearance of Zvi Leichner entered. Retained Attorney Willian O'Bryan present. Court orders Zvi Leichner temporarily detained. Defendant committed to the custody of the U. S. Marshal. Case is continued to 10:00 a.m. on 2/14/03 for further processing. Tape No.: 03−03 [2:03−m −282] (dmap) (Entered: 02/11/2003)
02/10/2003	8	WAIVER OF PRELIMINARY HEARING filed by Moshe Leichner . [2:03−m −282] (dmap) (Entered: 02/18/2003)
02/10/2003	11	NOTICE DIRECTING Defendant To Appear for Preliminary Hearing and for Arraignment on Indictment/Information filed as to Moshe Leichner [2:03−m −282] (dmap) (Entered: 02/18/2003)
02/10/2003	16	WAIVER OF PRELIMINARY HEARING filed by Zvi Leichner [2:03−m −282] (dmap) (Entered: 02/18/2003)
02/10/2003	17	NOTICE DIRECTING Defendant To Appear for Preliminary Hearing and for Arraignment on Indictment/Information filed as to Zvi Leichner. [2:03−m −282] (dmap) (Entered: 02/18/2003)
02/12/2003	9	BENCH WARRANT returned executed as to Moshe Leichner on 2/10/03 [2:03−m −282] (dmap) (Entered: 02/12/2003)
02/12/2003	10	BENCH WARRANT returned executed as to Zvi Leichner on 2/10/03 [2:03−m −282] (dmap) (Entered: 02/12/2003)
02/14/2003	12	MINUTES OF DETENTION HEARING held before Magistrate Judge Victor B. Kenton as to Moshe Leichner : Court orders Moshe Leichner permanently detained. Case continued to 3/10/03 at 8:30 a.m. for PIA. Court ords MDC to allow counsel to meet with defendants jointly. Tape No.: 03−04 [2:03−m −282] (dmap) (Entered: 02/18/2003)
02/14/2003	13	WAIVER OF PRELIMINARY HEARING filed by Moshe Leichner [2:03−m −282] (dmap) (Entered: 02/18/2003)
02/14/2003	14	ORDER filed by Magistrate Judge Victor B. Kenton as to Moshe Leichner : It is orderd counsel Brian A. Newman &Bill O'Brien are to be allowed to visit with their clients Moshe Leichner &Avi Leichner at MDC jointly &with both

		defendants present Court recommends defendants to be placed in the same facility to incorporate visitation jointly for purposes of the case preparation. (cc: all counsel) [2:03−m −282] (dmap) (Entered: 02/18/2003)
02/14/2003	15	ORDER OF DETENTION by Magistrate Judge Victor B. Kenton as to Moshe Leichner (cc: all counsel) [2:03−m −282] (dmap) (Entered: 02/18/2003)
02/14/2003	18	MINUTES OF DETENTION HEARING held before Magistrate Judge Victor B. Kenton as to Zvi Leichner : Court orders Zvi Leichner permanently detained. Post−indictment arraignment set for 8:30 a.m. on 3/10/03. Court orders MDC to allow counsel to meet with both defendants jointly. Tape No.: 03−04 [2:03−m −282] (dmap) (Entered: 02/18/2003)
02/14/2003	19	ORDER OF DETENTION by Magistrate Judge Victor B. Kenton as to Zvi Leichner (cc: all counsel) [2:03−m −282] (dmap) (Entered: 02/18/2003)
02/14/2003	20	ORDER filed by Magistrate Judge Victor B. Kenton as to Zvi Leichner : It is ordered that counsel Brian A. Newman &Bill O'Brien are to be allowed to visit with their clients Moshe Leichner &Zvi Leichner at the MDC jointly &with both defendants present. The Court recommends defendants be placed in the same facility to incorporate visitations jointly for purposes of case preparation. (cc: all counsel) [2:03−m −282] (dmap) (Entered: 02/18/2003)
02/14/2003	21	WAIVER OF PRELIMINARY HEARING filed by Zvi Leichner . [2:03−m −282] (dmap) (Entered: 02/19/2003)
02/28/2003	22	STIPULATION AND ORDER filed by Magistrate Judge Carolyn Turchin as to Moshe Leichner : It is order the period from 3/10/03 through 4/10/03, inclusive, is excludable under 18:3161(h)(8)(A), from the time within which &indictment or information in this action must be filed. [2:03−m −282] (dmap) (Entered: 02/28/2003)
02/28/2003		EXCLUDABLE DELAY FORM as to Moshe Leichner [2:03−m −282] (dmap) (Entered: 02/28/2003)
02/28/2003	23	STIPULATION AND ORDER filed by Magistrate Judge Carolyn Turchin as to Zvi Leichner : It is ordered the period from 3/10/03 through 4/10/03, inclusive, is excludable under 18:3161(h)(8)(A), from the time within which &indictment or information in this action must be filed. [2:03−m −282] (dmap) (Entered: 02/28/2003)
02/28/2003		EXCLUDABLE DELAY FORM as to Zvi Leichner [2:03−m −282] (dmap) (Entered: 02/28/2003)
03/11/2003	25	EX PARTE APPLICATION filed by Moshe Leichner, Zvi Leichner to quash Grand Jury Subpoena [2:03−m −282] (es) (Entered: 03/27/2003)
03/19/2003	26	MEMORANDUM filed by USA as to Moshe Leichner, Zvi Leichner in Opposition to ex parte application motion to quash Grand Jury Subpoena [25−1] [2:03−m −282] (es) (Entered: 03/27/2003)
03/19/2003	27	STIPULATION AND ORDER filed by Magistrate Judge Jeffrey W. Johnson as to Moshe Leichner, Zvi Leichner: Continuing the Hearing on Dfts Ex Parte Application to Quash Grand Jury Subpeona to 3/20/03 @ 2:00pm. [2:03−m −282] (es) (Entered: 03/27/2003)
03/19/2003	28	MINUTES OF IN CHAMBERS Re Ex Parte Application to Quash Grand Jury Subpoena, filed March 11, 2003 held before Magistrate Judge Jeffrey W. Johnson as to Moshe Leichner, Zvi Leichner: The Court gives notice to counsel that the hearing date of March 20, 2003 for the above−entitled application is hereby Vacated. This matter is referred to the Criminal Duty District Judge. C/R: None Appearing [2:03−m −282] (es) Modified on 04/01/2003 (Entered: 03/27/2003)
03/21/2003	24	SUBSTITUTION OF ATTORNEY filed as to Zvi Leichner . Attorney Michael R McDonnell substituting for attorney William L O'Bryan for Zvi Leichner Approved by Magistrate Judge Suzanne H. Segal. [2:03−m −282] (es) (Entered: 03/25/2003)

03/26/2003	29	STIPULATION AND ORDER filed by Judge Terry J. Hatter Jr. as to Zvi Leichner: Extending the Time to file Information or Indictment; Excludable Time Findings [2:03−m −282] (es) Modified on 04/21/2003 (Entered: 03/27/2003)
03/26/2003	30	ORDER filed by Judge Terry J. Hatter Jr. as to Moshe Leichner, Zvi Leichner: DENYING ex parte application motion to quash Grand Jury Subpoena [25−1] (cc: all counsel) [2:03−m −282] (es) (Entered: 04/21/2003)
03/26/2003	31	STIPULATION AND ORDER filed by Judge Terry J. Hatter Jr. as to Moshe Leichner: Extending the Time to File Information or Indictment; Excludable Time Findings [2:03−m −282] (es) (Entered: 04/21/2003)
04/17/2003	32	STIPULATION AND ORDER filed by Magistrate Judge Andrew J. Wistrich as to Moshe Leichner: Extending the Time to File Information/Indictment; Excludable Time Findings [2:03−m −282] (es) (Entered: 04/21/2003)
04/17/2003	33	STIPULATION AND ORDER filed by Magistrate Judge Andrew J. Wistrich as to Zvi Leichner: Extending of Time to File Information or Indictment ; Excludable Time Findings [2:03−m −282] (es) (Entered: 04/21/2003)
05/07/2003	34	STIPULATION AND ORDER filed by Magistrate Judge Andrew J. Wistrich as to Zvi Leichner : extending the time to file information or indictment; excludable time findings [2:03−m −282] (es) (Entered: 05/08/2003)
06/12/2003	35	INFORMATION filed against Moshe Leichner (1) count(s) 1−2, 3, 4, Zvi Leichner (2) count(s) 1−2, 3, 4. Offense occurred in LA. (sb) (Entered: 06/13/2003)
06/12/2003	36	CASE SUMMARY filed by AUSA R Stephen Kramer, attorney for USA, as to Moshe Leichner. Defendant's date of birth: 12/6/48. (sb) Modified on 06/13/2003 (Entered: 06/13/2003)
06/12/2003	37	CASE SUMMARY filed by AUSA R Stephen Kramer, attorney for USA, as to Zvi Leichner. Defendant's date of birth: 8/27/71. (sb) (Entered: 06/13/2003)
06/12/2003	38	MEMORANDUM filed by USA as to Moshe Leichner, Zvi Leichner. This criminal action, being filed on 12/22/98, WAS NOT pending in the U.S. Attorney's Office before 12/22/98, the date on which U.S. District Judge Nora M. Manella began receiving criminal matters. (sb) (Entered: 06/13/2003)
06/12/2003	39	MEMORANDUM filed by USA as to Moshe Leichner, Zvi Leichner. This criminal action, being filed on 6/12/03, WAS NOT pending in the U.S. Attorney's Office before 11/2/92, the date on which U.S. District Judge Lourdes G. Baird began receiving criminal matters. (sb) (Entered: 06/13/2003)
06/12/2003	40	MEMORANDUM filed by USA as to Moshe Leichner, Zvi Leichner seeking authority for an investigative action and being filed on 6/12/03, DOES NOT RELATE TO, a mtr in which Magistrate Judge Patrick J. Walsh was personally involved or on which he was personally consulted while employed in the US Atty's Ofc. (sb) (Entered: 06/13/2003)
06/12/2003	41	MEMORANDUM filed by USA as to Moshe Leichner, Zvi Leichner seeking authority for an investigative action and being filed on 6/12/03, DOES NOT RELATE TO, a mtr pending in the Major Frauds Section of the US Atty's Ofc before 6/30/01, the date on which Magistrate Judge Jennifer T. Lum resigned her appt in that ofc; or was personally involved or on which she was personally consulted while employed in the US Atty's Ofc. (sb) (Entered: 06/13/2003)
06/12/2003	42	MEMORANDUM filed by USA as to Moshe Leichner, Zvi Leichner seeking authority for an investigative action and being filed on 6/12/03, DOES NOT RELATE TO, a mtr pending in the Organized Crime Section of the US Atty's Ofc before 9/29/00, the date on which Magistrate Judge Stephen G. Larson resigned his appt in that ofc; or was personally involved or on which he was personally consulted while employed in the US Atty's Ofc. (sb) (Entered: 06/13/2003)
06/12/2003	43	MEMORANDUM filed by USA as to Moshe Leichner, Zvi Leichner seeking authority for an investigative action and being filed on 6/12/03, DOES NOT RELATE TO, a mtr pending in the Narcotic Section of the US Atty's Ofc before April 20, 1999, the date on which Magistrate Judge Jeffrey W. Johnson resigned his appt in that ofc; or was personally involved or on which he was personally

		consulted while employed in the US Atty's Ofc. (sb) (Entered: 06/13/2003)
06/12/2003	44	CONFLICT OF INTEREST CERTIFICATION filed as to Moshe Leichner, Zvi Leichner. (sb) (Entered: 06/13/2003)
06/12/2003	45	WAIVER OF INDICTMENT filed as to Moshe Leichner. (sb) (Entered: 06/13/2003)
06/12/2003	46	WAIVER OF INDICTMENT filed as to Zvi Leichner. (sb) (Entered: 06/13/2003)
06/12/2003	47	PLEA AGREEMENT filed by USA as to Moshe Leichner. (sb) (Entered: 06/13/2003)
06/12/2003	48	PLEA AGREEMENT filed by USA as to Zvi Leichner. (sb) (Entered: 06/13/2003)
06/30/2003	49	STATEMENT OF DEFENDANT'S CONSTITUTIONAL RIGHTS filed as to Moshe Leichner. (sv) (Entered: 07/02/2003)
06/30/2003	50	DESIGNATION AND APPEARANCE of Attorney for Moshe Leichner by George Buehler. (sv) (Entered: 07/02/2003)
06/30/2003	51	DESIGNATION AND APPEARANCE of Attorney for Moshe Leichner by William O'Bryan. (sv) (Entered: 07/02/2003)
06/30/2003	52	STATEMENT OF DEFENDANT'S CONSTITUTIONAL RIGHTS filed as to Zvi Leichner. (sv) (Entered: 07/02/2003)
06/30/2003	53	DESIGNATION AND APPEARANCE of Attorney for Zvi Leichner by Mike McDonnell and Victor Sherman. (sv) (Entered: 07/02/2003)
06/30/2003	54	MINUTES OF POST−INDICTMENT ARRAIGNMENT HEARING held before Magistrate Judge Paul Game Jr. as to Moshe Leichner and Zvi Leichner: Reassigning case to Judge John F. Walter. Plea and trial setting set 10:00 7/7/03 for Moshe Leichner and Zvi Leichner. Tape No.: CS 6/30/03. (sv) (Entered: 07/07/2003)
07/02/2003	55	MINUTES OF PLEA AND TRIAL SETTING HEARING held before Judge John F. Walter as to Zvi Leichner: Continuing guilty plea and sentencing date for 1:30 7/10/03 for Zvi Leichner. C/R: Cheshire. (sv) (Entered: 07/07/2003)
07/02/2003	56	MINUTES OF PLEA AND TRIAL SETTING HEARING held before Judge John F. Walter as to Moshe Leichner: Continuing plea and trial setting for 1:30 7/10/03 for Moshe Leichner, for Zvi Leichner. Tape No.: C/R: Cheshire. (sv) (Entered: 07/07/2003)
07/09/2003	57	MEMORANDUM re procedures for criminal forfeiture of case filed by USA as to Moshe Leichner and Zvi Leichner. (sv) (Entered: 07/10/2003)
07/10/2003	58	MINUTES OF CHANGE OF PLEA HEARING held before Judge John F. Walter as to Moshe Leichner: Defendant moves to change plea to the Information. Plea of guilty entered by Moshe Leichner (1) count(s) 1−2, 3. The Court questions the defendant regarding plea of guilty and finds it knowledgeable and voluntary and orders the plea accepted entered. The Court refers Moshe Leichner to the Probation Office for investigation and report. Sentencing hearing set for 9:00 4/12/04 for Moshe Leichner. C/R: Smith−Wells. (sv) (Entered: 07/14/2003)
07/10/2003	59	MINUTES OF CHANGE OF PLEA HEARING held before Judge John F. Walter as to Zvi Leichner: Defendant moves to change plea to the Information. Plea of guilty entered by Zvi Leichner (2) count(s) 1−2, 3. The Court questions the defendant regarding plea of guilty and finds it knowledgeable and voluntary and orders the plea accepted and entered. The Court refers Zvi Leichner to the Probation Office for investigation and report. Sentencing hearing set for 9:00 4/12/04 for Zvi Leichner. C/R: Smith−Wells. (sv) (Entered: 07/14/2003)
09/17/2003	60	NOTICE OF UNDER SEAL FILING by Zvi Leichner. (sv) (Entered: 09/18/2003)
09/18/2003	61	APPLICATION filed by Zvi Leichner for order to file document under seal. (sv) (Entered: 09/19/2003)

09/18/2003	62	ORDER filed by Judge John F. Walter as to Zvi Leichner: granting document sealed. (cc: all counsel) (sv) (Entered: 09/19/2003)
02/10/2004	64	SUBSTITUTION OF ATTORNEY filed as to Moshe Leichner. Attorney Peter William Scalisi substituting for attorney George Buehler for Moshe Leichner. Approved by Judge John F. Walter. (sv) Modified on 02/12/2004 (Entered: 02/12/2004)
03/03/2004	65	STIPULATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner: Continuing sentence hearing for 9:00 5/24/04 for Moshe Leichner . (sv) (Entered: 03/05/2004)
03/03/2004	66	STIPULATION AND ORDER filed by Judge John F. Walter as to Zvi Leichner: Continuing sentence hearing for 9:00 8/23/04 for Zvi Leichner. (sv) (Entered: 03/05/2004)
03/12/2004	67	NOTICE OF MOTION AND MOTION filed by Moshe Leichner for release on bond pending sentencing and to set conditions of bond. Returnable on: 3/22/04 − 1:30pm. Lodged order. (sv) (Entered: 03/15/2004)
03/15/2004	68	MINUTES REFERAL OF DEFENDANT'S MOTION FOR RELEASE ON BOND PENDING SENTENCING HEARING held before Judge John F. Walter as to Moshe Leichner: This matter is hereby referred to Magistrate Game, or the duty Magistrate if Magistrate Game is unavailable, for review and determination. C/R: Smith−Wells. (sv) (Entered: 03/18/2004)
03/18/2004	69	MINUTES OF MOTION HEARING held before Magistrate Judge Victor B. Kenton as to Moshe Leichner: On 3/12/04, defendant filed a motion for release on bond pending sentencing. The matter was referred to Magistrate Judge Kenton, who makes the following orders: A hearing on said motion set for 1:30 3/26/04; Pending the heaing, defendant will be forthwith transferred to and housed at MDC Unless space is unavailable or if Marshal cannot accomodate this transfer. Within 24 hours of defendant's arrival at MDC, he is to be examined by a physician. The Warden will provide a report to Court as to the results prior to 3/26/04 hearing. Pretrial will provie updated report responding to issues set forth in the motion by 3pm 3/25/04. Government to file it's position with court by 3pm 3/25/04. C/R: None. (sv) (Entered: 03/22/2004)
03/25/2004	70	MEMORANDUM filed by USA as to Moshe Leichner in opposition to motion for release on bond pending sentencing and to set conditions of bond. [67−1] (sv) (Entered: 03/26/2004)
03/25/2004	71	MEMORANDUM filed by Moshe Leichner in opposition to motion for release on bond pending sentencing and to set conditions of bond. [67−1] (vc) (Entered: 03/29/2004)
03/26/2004	72	MINUTES OF MOTION HEARING held before Magistrate Judge Victor B. Kenton as to Moshe Leichner: denying motion for release on bond pending sentencing and to set conditions of bond. [67−1] Tape No.: 04−03. (sv) (Entered: 03/29/2004)
04/22/2004	73	EX PARTE APPLICATION filed by USA as to Moshe Leichner, Zvi Leichner for order of forfeiture and authorization to conduct discovery. Lodged order. (sv) (Entered: 04/23/2004)
04/26/2004	74	ORDER filed by Judge John F. Walter as to Moshe Leichner and Zvi Leichner: granting ex parte application for order of forfeiture and authorization to conduct discovery. [73−1] (cc: all counsel) (sv) (Entered: 04/29/2004)
05/03/2004	75	NOTICE of FORFEITURE filed by USA as to Moshe Leichner and Zvi Leichner. (sv) (Entered: 05/05/2004)
05/12/2004	76	STIPULATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner: Regarding Continuance of Sentencing Hearing. Sentence hearing continued to 9:00am on 8/23/04. (roz) (Entered: 05/13/2004)
05/20/2004	77	Verified Peition claiming interes in forfeited assets filed by Moshe Leichner, Zvi Leichner (ca) (Entered: 05/21/2004)

06/04/2004	78	Petition by Israel Schwarts For Adjudication of Interst Under 21 Section 853(n)(Filed in Conjunction With Petition of Sagi Leichner; Request for Hearing and Opportunity to Conduct Discovery filed as to Moshe Leichner, Zvi Leichner (es) (Entered: 06/07/2004)
06/04/2004	79	Petition by Sagi Leichner For Adjudication of Interes Under 21 Section 853(n)(Filed in Conjunction with Petition of Israel Schwarts); Request for Hearing and Opportunity to Conduct Discovery filed as to Moshe Leichner, Zvi Leichner (es) (Entered: 06/07/2004)
06/04/2004	80	Petition by Vered Leichner For Adjudication of Interest Under 21 Section 853(n); Request For Hearing and Opportunity to Conduct Discovery filed as to Moshe Leichner, Zvi Leichner (es) (Entered: 06/07/2004)
06/08/2004	81	NOTICE OF DISCREPANCY AND ORDER by Judge John F. Walter as to Moshe Leichner Striking Letter Regarding: Notification of Discovery Dispute and Request for Judicial Intervention in United States V. Moshe Leichner, Docket No. CR 03−568−JFW. (roz) (Entered: 06/18/2004)
07/08/2004	82	NOTICE OF MOTION AND MOTION filed by Moshe Leichner to withdraw plea of guilty as to Moshe Leichner. Returnable on: 8/2/04, 9:00 a.m.. (ca) (Entered: 07/09/2004)
07/13/2004	83	AMENDED PROOF OF SERVICE filed by Moshe Leichner of motion to withdraw plea of guilty as to Moshe Leichner [82−1]. (ca) (Entered: 07/15/2004)
07/20/2004	84	Notice of filing of reporter's transcripts of the entry of the plea on July 10, 2003 filed by Moshe Leichner (vc) (Entered: 07/21/2004)
07/22/2004	85	RECEIPT for Transcripts of proceedings held on: 7/10/04 C/R: Nancy Smith−Wells (weap) (Entered: 07/26/2004)
07/22/2004		TRANSCRIPT filed for proceedings held on 7/10/04 as to Moshe Leichner. (weap) (Entered: 07/26/2004)
07/26/2004	86	ORDER AND STIPULATION filed by Judge John F. Walter as to Moshe Leichner : Motion to withdraw plea of guilty as to Moshe Leichner [82−1] is continued to 9:00 a.m., on 8/16/04 (cc: all counsel) (ca) (Entered: 07/26/2004)
08/05/2004	87	OPPOSITION filed by USA as to Moshe Leichner to motion to withdraw plea of guilty as to Moshe Leichner [82−1]. (ca) (Entered: 08/06/2004)
08/09/2004	88	Filing of page nine to opposition to defendant Moshe Leichner's motin to withdraw plea of guilty filed by USA as to Moshe Leichner (ca) (Entered: 08/10/2004)
08/11/2004	89	MINUTES OF IN CHAMBERS HEARING held before Judge John F. Walter as to Moshe Leichner, Zvi Leichner : On June 4, 2004, the Court recieved a Peitin y Sagi Leichner for Adjudication of Interest Under 21 U.S.C. Section 853(n), a Peititon by Vred Leichner for Adjudication of Interest Under 21 U.S.C. Section 853(n), and a petition by Israel Schwarts for Adjudication of Interest Under 21:853(n) (collectively e "Petitions"). The Court hereby sets a hearing ont he Petitions at 9:00 a.m., on 9/13/04. The Government shall file its oppositions to the petitions on or before 8/23/04. Petitioners Sago Leichner, Vered Leichner and Israel Schwarts shall file any replies in support of their Petitions on or before 9/1/04. IT IS SO ORDERED. C/R: None Present (ca) (Entered: 08/13/2004)
08/12/2004	90	DECLARATION of Counsel for Mr. Leichner FILED by Moshe Leichner regarding the status of discovery (ca) (Entered: 08/13/2004)
08/12/2004	91	MINUTES OF ORDER SETTING BRIEFING SCHEDULE AND HEARING ON VERIFIED PETITON OF CHRISTOPHER R. BARCLAY, AS TRUSTEE OF THE SUBSTANTIVELY CONSOLIDATED BANKRUPTCY ESTATES OF MIDLAND EURO EXCHANGE, INC., MIDLAND EURO, INC., MIDLAND GROUP, INC., MOSE LEICHNER, AND ZVI LEICHNER, CLAIMING INTEREST IN FORFEITED ASSETS [filed 5/20/04] HEARING held before Judge John F. Walter as to Moshe Leichner, Zvi Leichner : On May 20, 2004, the Court received a Verified Petition of Christopher R. Barclay, as Trustee of the Substantively Consolidated Bankruptcy Estates of Midland Eruo Exchange, Inc., Midland Euro, Inc., Midland Group,Inc., Moshe Leichner, and Zvi Leichner,

		Claiming Interest in Forfeited Assets (The "Petition"). The Court hereby sets a hearing on the Petiton. Petition hearing set for 9:00 a.m., on 9/13/04 for Moshe Leichner, for Zvi Leichner. The Government shall file its Opposition to the Petition on or before 8/23/04. Petitioner shall file any Reply in support of his Peittion on or before September 1, 2004. IT IS SO ORDERED. C/R: None Present (ca) (Entered: 08/16/2004)
08/16/2004	92	MINUTES OF MOTION HEARING held before Judge John F. Walter as to Moshe Leichner : Denying motion to withdraw plea of guilty as to Moshe Leichner [82−1]. The Court orders counsel to submit a joint statement re: production of documents by Thursday, August 19, 2004. The Court schedules a status conference to discuss any issues re: production of documents. Status hearing set for 9:00 a.m., on 8/23/04 for Moshe Leichner. C/R: Nancy Smith−Wells (ca) (Entered: 08/17/2004)
08/16/2004		PLACED IN FILE − NOT USED: Proposed Order to allow the withdrawal of the plea of guilty to all counts by Moshe Leichner. (ca) (Entered: 08/17/2004)
08/18/2004	93	MINUTES OF ARRAIGNMENT ON FIRST SUPERSEDING INFORMATION, CHANGE OF PLEA AND SETTING OF SENTENCING DATE HEARING held before Judge John F. Walter as to Zvi Leichner : Court continues the change of plea hearing set for 10:30 a.m., on 8/19/04 for Zvi Leichner. C/R: Jennifer Cheshire (ca) (Entered: 08/19/2004)
08/18/2004	94	STIPULATION filed by USA as to Moshe Leichner Re: production and review of discovery materials (ca) (Entered: 08/19/2004)
08/18/2004	95	FIRST SUPERSEDING INFORMATION filed against Zvi Leichner (2) count(s) 1s−2s, 3s, 4s. (ca) (Entered: 08/19/2004)
08/19/2004	96	MINUTES OF ARRAIGNMENT ON FIRST SUPERSEDING INFORMATION, WAIVER OF INDICTMENT, GUILTY PLEA AND SETTING OF SENTENCING DATE HEARING held before Judge John F. Walter as to Zvi Leichner : Supplemental agreement is filed. Waiver of indictment executed by defendant is filed. Plea of guilty entered by Zvi Leichner (2) count(s) 1s−2s, 3s, 4s. The Court questions the defendant regarding plea of guilty and finds it knowledgeable and voluntary and orders the plea accepted and entered. The Court refers Zvi Leichner to the Probation Office for investigation and report. Sentencing hearing set for 9:00 a.m., on 11/1/04 for Zvi Leichner. C/R: Jennifer Cheshire (ca) (Entered: 08/20/2004)
08/19/2004	97	STIPULATION AND ORDER filed by Judge John F. Walter as to Zvi Leichner : Sentence hearing set for 9:00 a.m., on 11/1/04 for Zvi Leichner (ca) (Entered: 08/20/2004)
08/19/2004	98	STIPULATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner : Sentence hearing set for 9:00 a.m., on 11/1/04 for Moshe Leichner (ca) (Entered: 08/20/2004)
08/19/2004	99	SUPPLEMENTAL PLEA AGREEMENT filed by USA as to Zvi Leichner (ca) (Entered: 08/20/2004)
08/19/2004	101	WAIVER OF INDICTMENT filed as to Zvi Leichner. Approved by Judge John F. Walter. (ca) (Entered: 08/24/2004)
08/23/2004	100	STIPULATION AND ORDER TO CONTINUE HEARING ON PEITITONS OF SAGI LEICHNER; VERED LEICHNER; ISRAEL SCHWARTS; AND CHRISTOPHER BARCLAY AS TRUSTEE OF THE BANKRUPTCY ESTATES OF MIDLAND EURO EXCHANGE, INC., MIDLAND EURO, INC., MIDLAND GROUP, INC., MOSHE LEICHNER AND ZVI LEICHNER filed by Judge John F. Walter as to Moshe Leichner, Zvi Leichner : The due date for the government's opposition to the Petitions is continued from 8/23/04 to 9/27/04; The due date for peittioners replies in support of their peittions is ocntinued from 9/1/04 to 10/6/04. Petition hearing set for 9:00 a.m., on 10/18/04 for Moshe Leichner, for Zvi Leichner (ca) (Entered: 08/24/2004)
09/28/2004	102	STIPULATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner, Zvi Leichner : withdrawing Leichner and Schwarts forfeiture peititons

		and transfer forfeited assets to bankruptcy trustee. The petitions for the adjudication of interest in the forfeited assets, filed by the Vered Parties on June 4, 2004 are hereby deemed withdrawn; withdrawing petition [80−1], withdrawing petition [79−1], withdrawing petition [78−1]. The United States shall not seek to forfeit the personal property exempted by Vered Leichner or Moshe Leichner as listed in Exhibit A attached to this Stipulation. This Order dispose of all petitions related to the "Notice of Forfeiture" filed by the government and the hearing presently set for 9:00 a.m. on October 18, 2004 shall be taken of calendar. IT IS SO ORDERED. (ca) (Entered: 09/29/2004)
10/01/2004	103	RECEIPT for Transcripts of proceedings held on: 8/19/04. C/R: Jennifer Cheshire. (sb) (Entered: 10/01/2004)
10/01/2004	104	TRANSCRIPT filed for proceedings held on 8/19/04 as to Zvi Leichner. (sb) (Entered: 10/01/2004)
10/14/2004	106	POSITION RE: SENTENCING filed by USA as to Moshe Leichner (ca) (Entered: 10/18/2004)
10/15/2004	105	STIPULATION AND ORDER filed by Judge John F. Walter as to Zvi Leichner : Sentence hearing set for 9:00 a.m., on 2/28/05 for Zvi Leichner. (ca) (Entered: 10/18/2004)
10/19/2004	107	POSITION REGARDING SENTENCING FACTORS filed by Moshe Leichner (ca) (Entered: 10/20/2004)
10/20/2004	108	NOTICE OF DISCREPANCY AND ORDER by Judge John F. Walter as to Zvi Leichner Document Motion to continue &order ordered filed and processed. (ca) (Entered: 10/21/2004)
10/20/2004	109	NOTICE OF MOTION filed by Moshe Leichner to continue sentencing hearing as to Moshe Leichner Returnable on: 11/1/04, at 9:00 a.m.. (ca) (Entered: 10/21/2004)
10/20/2004	110	ORDER filed by Judge John F. Walter as to Moshe Leichner : Granting motion to continue sentencing hearing as to Moshe Leichner [109−1]. Sentence hearing set for 9:00 a.m., on 2/28/05 for Moshe Leichner (cc: all counsel) (ca) (Entered: 10/21/2004)
02/07/2005	111	MEMORANDUM filed by USA as to Moshe Leichner in opposition to Defendant's Position Regarding Sentencing (dmap) (Entered: 02/14/2005)
02/14/2005	112	STIPULATION AND ORDER filed by Judge John F. Walter as to Zvi Leichner : Sentencing is continued to 9:00 am on 4/4/05. (dmap) (Entered: 02/14/2005)
02/18/2005	113	REPLY by Moshe Leichner to Government's Opposition to Defendant's Position RE: Sentencing [111−1] (dmap) (Entered: 02/22/2005)
02/28/2005	114	MINUTES OF SENTENCING held before Judge John F. Walter as to Moshe Leichner (1) count(s) 1−2, 3. Committed to the Bureau of Prisions for 240 monhts on counts 1,3 of the Information, 60 months on count 1, 60 months on count 2 &120 monhts on count 3, consecutivvely. Supervised Release for 5 years, 5 years on count 2 &3 years on counts 1 &3, concurrently under the terms &conditions of USPO, General Order 318 &01−05. Special Assessment of $300. Restitution of $94,796,530.44. Fine of $250,000. Court advises Moshe Leichner of right to appeal. C/R: Nancy Smith−Wells (dmap) (Entered: 03/04/2005)
02/28/2005	116	NOTICE OF APPEAL to USCA filed by Moshe Leichner from sen minutes [114−3], filed on: 02/28/05 and entered on: 03/04/05. Fee status: Billed, forms given: Transcript Designation and Ordering Form. (cc: Peter Scalisi, Retained Counsel; Assistant U.S. Attorney) (cbr) (Entered: 03/08/2005)
03/04/2005	115	JUDGMENT AND COMMITMENT issued to U.S. Marshal for Moshe Leichner. Approved by Judge John F. Walter. (dmap) (Entered: 03/07/2005)
03/08/2005	117	AMENDED NOTICE OF APPEAL to USCA filed by Moshe Leichner from sen minutes [114−3], filed on: 2/28/05 and entered on: 3/4/05. Fee status: Waived. (cc: Philip Deitch, retained; Assistant United States Attorney) (ghap) (Entered: 03/09/2005)

03/10/2005	118	ORDER FOR TIME SCHEDULE filed as to Moshe Leichner for [116−1]. Transcript designation due: 3/29/05; C/R transcripts due: 4/28/05; Appellant's briefs &excerpts due: 6/7/05; Appellee's reply brief due: 7/7/05; Appellant's reply brief due by: 7/21/05. (cc: all counsel) (ghap) (Entered: 03/10/2005)
03/14/2005	119	MOTION filed by USA as to Zvi Leichner pursuant to USSG 5K1.1 to impose sentencing guidelines; Memorandum of points and authorites; Returnable on: 4/4/05 at 9:00 a.m. (vc) (Entered: 03/15/2005)
03/14/2005	120	Government's Position Re Sentencing filed by USA as to Zvi Leichner (es) (Entered: 03/15/2005)
03/16/2005	121	NOTIFICATION by United States Court of Appeals as to Moshe Leichner, designating USCA Appeal No. 05−50164 assigned to appeal [116−1]. (ghap) (Entered: 03/16/2005)
03/22/2005	122	STIPULATION filed by Zvi Leichner for continuance of sentencing; declaration of Michael R. McDonnel proposed Lodged order (vc) (Entered: 03/22/2005)
03/22/2005	123	ORDER to continue sentencing date filed by Judge John F. Walter as to Zvi Leichner : Sentence hearing is hereby ordered continued from 4/4/05 to 5/9/05 at 9:00 a.m. (cc: all counsel) (vc) (Entered: 03/23/2005)
03/23/2005	124	RECEIPT for Transcripts of proceedings held on: 2/28/05, C/R: Nancy Smith−Wells. (ghap) (Entered: 03/24/2005)
03/23/2005	125	TRANSCRIPT filed for proceedings held on 2/28/05 as to Moshe Leichner. (ghap) (Entered: 03/24/2005)
04/01/2005	126	ORDER filed by Judge John F. Walter as to Moshe Leichner, Zvi Leichner : It is ordered that the Prelininary Order of Forfeiture entered on 4/26/04 is amended to allow the interests of the United States in the Specific Property be transferred to Christopher R. Barclay. (cc: all counsel) (dmap) (Entered: 04/04/2005)
04/04/2005	127	NOTICE OF MOTION filed by USA as to Moshe Leichner for order Compelling Defendant to Execute Consents for Release of Foreign Bank Records Returnable on: 5/2/05 at 9:00 am.. (dmap) (Entered: 04/05/2005)
04/11/2005	128	ORDER from USCA, received in District Court 04/13/05 Motion of Peter Scalisi to withdraw as appellant retained counsel is denied without prejudice to renewal within 21 days after the filing date of this order. (05−50164) (cbr) (Entered: 04/15/2005)
04/15/2005	129	APPLICATION AND ORDER for Writ of Habeas Corpus Ad Testificandum ordered by Judge John F. Walter and issued to Warden, MDC for production of Moshe Leichner, to testify on 5/2/05 at 9:00 a.m., as to Moshe Leichner. Writ issued. (ca) (Entered: 04/22/2005)
04/19/2005		RECEIVED fee from Moshe Leichner [117−1] re [117−1] in amount of $ 255.00 (Receipt # 22949) (ghap) (Entered: 04/19/2005)
04/21/2005	130	STIPULATION AND ORDER filed by Judge John F. Walter as to Zvi Leichner : Sentencing is continued to 9:00 am on 5/23/05. (dmap) (Entered: 04/22/2005)
04/22/2005	134	RESPONSE filed by Moshe Leichner to motion for order Compelling Defendant to Execute Consents for Release of Foreign Bank Records. [127−1] (sv) (Entered: 04/29/2005)
04/25/2005	133	EX PARTE APPLICATION filed by Zvi Leichner for an order sealing documents . Lodged order. (vdr) (Entered: 04/29/2005)
04/25/2005	135	NOTICE OF UNDER SEAL FILING by Zvi Leichner (sv) (Entered: 05/02/2005)
04/26/2005	131	ORDER filed by Judge John F. Walter as to Zvi Leichner : It is ordered that the document sought to be filed under seal and the defendnat's ex parte application fro sealed filing shall both be filed under seal. (cc: all counsel) (dmap) (Entered: 04/27/2005)
04/27/2005	142	PROCESS RECIEPT AND RETURN executed as to Moshe Leichner, Zvi Leichner on 4/19/05 (dmap) (Entered: 05/12/2005)

04/29/2005	139	NOTICE OF MOTION filed by USA as to Moshe Leichner and motion for order compelling defendant to execute consents for release of foreign bnak records (dmap) (Entered: 05/05/2005)
05/02/2005	136	MINUTES OF HEARING held before Judge John F. Walter as to Moshe Leichner : The Court denyies the motion for order Compelling Defendant to Execute Consents for Release of Foreign Bank Records [127−1]. C/R: Nancy Smith−Wells (dmap) (Entered: 05/03/2005)
05/02/2005	137	ORDER filed by Judge John F. Walter as to Moshe Leichner, Zvi Leichner : It is ordered that the motion for order Compelling Defendant to Execute Consents for Release of Foreign Bank Records [127−1] is DENIED. (cc: all counsel) (dmap) (Entered: 05/03/2005)
05/02/2005	138	EX PARTE APPLICATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner. It is orderdd the defendant Ex Parte Application to Continue Hearing on Motion to Compel Execution of Consents is DENIED. (dmap) (Entered: 05/03/2005)
05/04/2005	140	NOTICE OF MOTION filed by USA as to Moshe Leichner &motion for reconsideration of order Denying Motion to Compeling Defendant to Execute Consents for Release of Foreign Bank Records (dmap) (Entered: 05/11/2005)
05/10/2005	141	RESPONSE filed by USA as to Zvi Leichner to defendant's Position regarding sentencing [106−1] (dmap) (Entered: 05/12/2005)
05/17/2005	143	POSITION RE: SENTENCING FACTORS filed by Zvi Leichner (dmap) (Entered: 05/19/2005)
05/23/2005	144	MINUTES OF SENTENCING held before Judge John F. Walter as to Zvi Leichner (2) count(s) 1s−2s, 3s. Committed on counts 1−3 of the Supersedng Information for 135 months, 60 months on counts 1 and 2, concurrently to each other, and 120 months on count 3, partially consecutively (75 months) and partially concurrently (45 months) to counts 1 and 2. Supervised Release for 3 years on counts 1−3 concurrently under the terms and conditions uf US Probation office, General Order 318 and 01−05. Special Assessment of $300. Restitution of $94,796,530.44. Fine waived. Court advises Zvi Leichner of right to appeal. Dismissing count(s) as to Zvi Leichner (2) count(s) 1−2, 3, 4s, 4. The Original Informatin is dismissed. C/R: Nancy Smith−Wells (dmap) (Entered: 05/26/2005)
05/25/2005	145	JUDGMENT AND COMMITMENT issued to U.S. Marshal for Zvi Leichner. Approved by Judge John F. Walter. (dmap) (Entered: 05/26/2005)
06/15/2005	155	WAIVER OF DEFENDANT'S PRESENCE filed by Moshe Leichner. (vc) (Entered: 07/20/2005)
06/20/2005	146	MINUTES OF HEARING held before Judge John F. Walter as to Moshe Leichner : It is ordered that the Court grants the Govenment's Motion for Reconsideration of Order Denying Motion Compelling Defendant to Execute Consents for Release of Foreign Bank Records. The Court grants the Government's Motion for Order Denying Motion Compelling Defendant to Execute Consents for Releae of Foreign Bank Records. C/R: Nancy Smith−Wells (dmap) (Entered: 06/21/2005)
06/21/2005	147	ORDER filed by Judge John F. Walter as to Moshe Leichner : It is ordered that defendant execute twenty originals of the form of bank record consent attached to the motion. The documents shall be executed before a notary public. Defendant shall execute the documents and deliber them to the United States not later than 7/5/05. (cc: all counsel) (dmap) (Entered: 06/22/2005)
06/30/2005	148	NOTICE OF APPEAL to USCA filed by Moshe Leichner from minutes [146−2], filed on: 6/20/05 and entered on: 6/21/05. Fee status: Billed, Forms Given: Transcript Designation and Ordering Form. (cc: Philip Deitch, retained counsel; Brent Whittlesey, Assistant United States Attorney) (ghap) (Entered: 06/30/2005)
07/05/2005	149	ORDER FOR TIME SCHEDULE filed as to Moshe Leichner for [148−1]. Transcript designation due: 07/21/05; C/R transcripts due: 08/22/05; Appellant's briefs &excerpts due: 09/29/05; Appellee's reply brief due: 10/31/05; Appellant's reply brief due by: 11/14/05. (cc: all counsel) (cbr) (Entered: 07/05/2005)

07/07/2005	150	RECEIPT for Transcripts of proceedings held on: 05/23/05, C/R: Nancy Smith−Wells. (cbr) (Entered: 07/08/2005)
07/07/2005	151	TRANSCRIPT filed for proceedings held on 05/23/05 as to Zvi Leichner. (cbr) (Entered: 07/08/2005)
07/11/2005	152	EX PARTE APPLICATION filed by Moshe Leichner for order to show cause re: criminal contempt Lodged Order (dmap) (Entered: 07/13/2005)
07/13/2005	153	ORDER filed by Judge John F. Walter as to Moshe Leichner : granting ex parte application for order to show cause re: criminal contempt [152−1]. Motions hearing set for 1:30 pm on 8/8/05. Motions due by 7/25/05. Reply to response not later than 8/1/05. (cc: all counsel) (dmap) (Entered: 07/14/2005)
07/15/2005	159	PROOF OF SERVICE OF ORDER TO SHOW CAUSE RE: CRIMNAL CONTEMPT filed by Moshe Leichner of (dmap) (Entered: 09/13/2005)
07/18/2005	154	NOTIFICATION by United States Court of Appeals as to Moshe Leichner, designating USCA Appeal No. 05−50516 assigned to appeal [148−1]. (cbr) (Entered: 07/18/2005)
07/22/2005	156	PROOF OF SERVICE filed as to Moshe Leichner, Zvi Leichner. Order to Show Cause Re: Criminal Contempt (dmap) (Entered: 07/25/2005)
08/02/2005		PLACED IN FILE − NOT USED: EX PARTE APPLICATION TO CONTINUE CRININAL CONTEMPT HEARING; MOTION TO CONDUCT HEARING BY VIDEO CONFERENCING; (Proposed) Order by Moshe Leichner (dmap) (Entered: 08/04/2005)
08/03/2005	157	STIPULATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner : Motions Hearing is set for 1:30 pm on 10/3/05. Motions may be filed on or before 9/12/05, and any reply by 9/19/05. (dmap) (Entered: 08/04/2005)
08/08/2005	158	ORDER from USCA in re: W. Patrict Kenna, received in District Court 08/10/05 This petition for writ of mandamus raises issues that warrant a response. Accordingly, within 14 days after the filing date of this order, the district court shall file a response. (05−73467) (cbr) (Entered: 08/15/2005)
08/26/2005		RECEIVED fee from Moshe Leichner re Appeal to Circuit Court [148−1] in amount of $ 255.00 (Receipt # 77480) (cbr) (Entered: 09/07/2005)
09/08/2005	160	ORDER from USCA, received in District Court 09/13/05 Appellant's motion for an extension of time until 09/29/05 to file the opening brief is appeal no. 05−50164 is also construed as motion for relief from default. So construed, the motion is granted. Court ordered appellant to pay the docketing fees for appeal no. 05−50516. Appellant's retained counsel, Philip Deitch shall have one final opportunity ot prosecute appeal no. 05−50516. Within 14 days after the date of this order, counsel Deitch shall pay the docketing and filing fees of $255. to District Court. (05−50164, 05−50516) (cbr) (Entered: 09/20/2005)
09/23/2005	166	MEMORANDUM filed by USA as to Moshe Leichner in opposition to Motion for Styof Enforcement of Judgment (dmap) (Entered: 09/29/2005)
09/23/2005	167	MEMORANDUM filed by USA as to Moshe Leichner in opposition to Ex Parte Application for Order either Appointing Counsel of Directing former Counsel to Represent Defendant (dmap) (Entered: 09/29/2005)
09/26/2005	161	EX PARTE APPLICATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner It is ordered defendants application for appointment of counsel or compelling former counsel to represent the defendant is set for hearing on 10/3/05 at 1:30 pm.. It is further ordered that the defendant application to permit the late filing of his opposition to the contempt proceeding is granted. (dmap) (Entered: 09/27/2005)
09/26/2005	162	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A STAY OF PROCEEDINGS filed by Moshe Leichner (dmap) (Entered: 09/28/2005)

09/26/2005	163	MOTION filed by Moshe Leichner to stay Execution of Judgement Pursuant to Rule 38(c) and Reply in Re: Contempt and Order to Show Cause (dmap) (Entered: 09/28/2005)
09/28/2005	164	RECEIPT for Transcripts of proceedings held on: 8/16/04. C/R: Nancy Smith−Wells. (sb) (Entered: 09/29/2005)
09/28/2005	165	TRANSCRIPT filed for proceedings held on 8/16/04 as to Moshe Leichner. (sb) (Entered: 09/29/2005)
10/03/2005	168	MINUTES OF HEARING held before Judge John F. Walter as to Moshe Leichner : It is ordered the motion stay Execution of Judgement Pursuant to Rule 38(c) and Reply in Re: Contempt and Order to Show Cause is denied [163−1] Order to Show Cause Re: Criminal Contempt is continued to 9:00 am on 11/7/05. C/R: Nancy Smith−Wells (dmap) (Entered: 10/05/2005)
10/03/2005	169	ORDER from USCA received in the district court 10/5/05, appellant's motion to consolidate appeal numbers 05−50164 and 05−50516 and for a 30 day extension of time to file the consolidated opening brief is granted. Appeal numbers 05−50164 and 05−50516 are hereby consolidated. The briefing schedule is set. (05−50164, 05−50516) (ghap) (Entered: 10/07/2005)
10/11/2005	170	APPLICATION AND ORDER For Writ of Habeas Corpus Ad Prosequendum for production of defendant for hearing on 11/7/05 as to Moshe Leichner. Ordered by Judge John F. Walter. Writ issued. (seal) (Entered: 10/17/2005)
10/24/2005	171	TRIAL MEMORANDUM filed by USA as to Moshe Leichner (dmap) (Entered: 10/25/2005)
10/28/2005	172	GOVERNMENT'S PROPOSED JURY INSTRUCTIONS filed by USA as to Moshe Leichner (Unannotated Set). (es) (Entered: 11/01/2005)
10/28/2005	173	GOVERNMENT'S PROPOSED JURY INSTRUCTIONS filed by USA as to Moshe Leichner (Annotated Set). (es) (Entered: 11/01/2005)
11/02/2005	174	EX PARTE APPLICATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner For An Order Re Housing at MDCLA (es) (Entered: 11/03/2005)
11/03/2005	175	EX PARTE APPLICATION AND ORDER filed by Judge John F. Walter Case is continued for trial set for 9:00 am on 1/24/06. (dmap) (Entered: 11/04/2005)
11/03/2005	176	MINUTES OF IN CHAMBERS HEARING held before Judge John F. Walter as to Moshe Leichner : Case is contineud for trial set for 9:00 am on 1/24/06. C/R: Nancy Smith−Wells (dmap) (Entered: 11/04/2005)
01/09/2006	177	MINUTES OF (IN CHAMBERS): FINAL STATUS CONFERENCE HEARING held before Judge John F. Walter as to Moshe Leichner: The Court will conduct a Final Status Conference in connection with the Order to Show Cause regarding: Criminal Contempt on 1/20/06 at 9:00am. C/R: Nancy Smith−Wells (roz) (Entered: 01/10/2006)
01/18/2006	178	RECORD ON APPEAL FORWARDED TO USCA 1 through 4 volumes original clerks file, 5 volumes C/R transcripts. (05−73467) (ghap) (Entered: 01/18/2006)
01/18/2006	179	RECORD ON APPEAL FORWARDED TO USCA 2 sealed documents 63 and 132. (05−73467) (ghap) (Entered: 01/18/2006)
01/20/2006	180	MINUTES OF HEARING held before Judge John F. Walter as to Moshe Leichner : Case is continued for status conference 9:00 am on 1/24/06. C/R: Nancy Smith−Wells (dmap) (Entered: 01/20/2006)
01/20/2006	181	WAIVER OF TRIAL BY JURY and WAIVER OF SPECIAL FINDINGS OF FACT (F.R.Cr.P. RULE 23 (a) AND (c) filed by Moshe Leichner. Approved by Judge John F. Walter (dmap) (Entered: 01/23/2006)
01/23/2006	182	TRIAL MEMORANDUM filed by Moshe Leichner (dmap) (Entered: 01/24/2006)
01/23/2006	183	MOTION filed by Moshe Leichner for reconsideration to stay execution of judgement pursuant to rule 38(e) and reply in re: contempt and order to show cause . Returnable on 1/24/06 at 9:00 am.. (dmap) Modified on 02/21/2006 (Entered:

		01/24/2006)
01/23/2006	184	GOVERNMENT'S MEMORANDUM REGARDING PROSECTION OF CRIMINAL CONTEMPT BY ODER TO SHOW CAUSE filed by USA as to Moshe Leichner (dmap) Modified on 02/02/2006 (Entered: 01/24/2006)
01/24/2006	185	MINUTES OF HEARING held before Judge John F. Walter as to Moshe Leichner : The Cout sets the briefing schedule: Government's opening brief due 2/7/06, Defendants opposition brief due 2/21/06, Government's reply brief due 2/24/06. The Court defers its ruling on he defendant's Motion for reconsideration to Stay filed on 1/23/06. Government's counsel shall file a Brief in opposition to the pending Motion for Reconsideration to Stay by 2/7/06. C/R: Leslie King (dmap) (Entered: 01/25/2006)
01/27/2006	188	RESPONSE to Court's inquiry re response to mandamus petition filed by USA as to Zvi Leichner (sm) (Entered: 02/08/2006)
01/31/2006	186	APPLICATION filed by Zvi Leichner of Non−Resident Attorney to appear in a specific case . Lodged Order (roz) (Entered: 02/07/2006)
01/31/2006	187	ORDER filed by Judge John F. Walter as to Zvi Leichner: granting application of Non−Resident Attorney to appear in a specific case [186−1]. (cc: all counsel) (roz) (Entered: 02/07/2006)
01/31/2006	189	CRIME VICTIM W PATRICK KENA'S NOTICE OF MOTION AND MOTION filed by Zvi Leichner to reopen sentence as authorized by Court of Appeals; Memorandum of points and authorities in support thereof; proposed order Returnable on: 2/27/06 at 9:00 a.m. Lodged Order (sm) (Entered: 02/08/2006)
01/31/2006	190	MEMORANDUM filed by Zvi Leichner in support of motion to reopen sentence as authorized by Court of Appeals; [189−1] (sm) (Entered: 02/08/2006)
02/03/2006	191	Government's memorandum regarding waiver of privilege against self incrimination filed by USA as to Moshe Leichner (vc) (Entered: 02/09/2006)
02/10/2006	192	RECEIPT for Transcripts of proceedings held on: 7/10/03. C/R: Nancy Smith−Wells. (sb) (Entered: 02/13/2006)
02/10/2006	193	TRANSCRIPT filed for proceedings held on 7/10/03 as to Moshe Leichner. (sb) (Entered: 02/13/2006)
02/15/2006	195	OPPOSITION filed by Zvi Leichner to motion of W. Patrick Kenna to reopen sentencing [189−1]. (ca) (Entered: 02/27/2006)
02/16/2006	194	RESPONSE to crime victime W. Patrick Kenna's filed by USA as to Zvi Leichner to motion to reopen sentence as authorized by Court of Appeal [189−1]. (ca) (Entered: 02/27/2006)
02/24/2006	197	MEMORANDUM filed by Moshe Leichner in opposition in re governments psotion on waiver of fifth amendment privilege. (am) (Entered: 02/28/2006)
02/27/2006	196	EX PARTE APPLICATION AND ORDER TO PERMIT LATE FILING OF RESPONSE TO GOVERNMENTS MEMORANDUM RE WAIVER OF 5th AMENDMENT PREIVILEGE TO RESCHEDULE DATE OF REPLY BRIEF; DECLARATION AND ORDER filed by Judge John F. Walter as to Moshe Leichner. It is ordered that the defendants Fifth amendment memorandum, filed on 2/24/06 may be late filed on that date. The government may file its reply on or before 3/1/06. (vc) (Entered: 02/28/2006)
02/27/2006	198	MINUTES OF CRIME VICTIM W. PATRICK KENNA'S MOTION TO REOPEN SENTENCE. AS AUTHORIZED BY COURT OF APPEALS (1/31/06) HEARING held before Judge John F. Walter as to Zvi Leichner : Defendant Zui Leichner is not present. The Court continues that matter to 2:30 p.m. and orders the Marshals to produce the defendant at that time. motions hearing set for 2:30 2/27/06 for Zvi Leichner C/R: Smith−Wells (vc) (Entered: 02/28/2006)
02/27/2006	199	MINUTES OF MOTION HEARING held before Judge John F. Walter as to Zvi Leichner: granting motion to reopen sentence as authorized by Court of Appeals. [189−1] The court vacates sentence imposed on 5/23/05. Sentence hearing set for

		9:00 3/27/06 with the following briefing schedule: (1) Defense sentencing papers due 3/17/06; (2) Government's sentencing papers due 3/22/06. Defendant to remain at MDC pending sentencing by the court. C/R: Smith−Wells. (sv) (Entered: 03/01/2006)
02/27/2006		PLACED IN FILE − NOT USED: proposded order granting crime victim W. Patrick Kenna's motion to reopen sentence, as authorized by court of appeals as to Zvi Leichner (ab) (Entered: 03/01/2006)
02/27/2006		***Procedural Interval start as to Zvi Leichner moving counts to P5 (es) (Entered: 09/05/2006)
03/02/2006	200	MINUTES (IN CHAMBERS) held before Judge John F. Walter as to Moshe Leichner : VACATING Order directing defendnt to execute foreign bank record [147−1], [147−2]; ORDER DISCHARGING Order to Show Cause Re Ciminal Contempt [153−1], [153−2]. VACATING [174−1] Order Re Housing of defendant at Metropolitan Detention Center. C/R: No Court Reporter (ca) (Entered: 03/06/2006)
03/07/2006	202	AMENDED JUDGMENT/ORDER from USCA in Re: W. Patrick Kenna, received in District Court on 8/10/05. Petition for Writ of Mandanus to the US Dictrict Court for the Central District of California. The Court has GRANTED the petiton for Writ of Mandamus filed by petitioner. Now, therefore, you are directed to take such actions as is consistent with the opinion of the Court filed 1/20/06. (05−73467) (dmap) Modified on 03/13/2006 (Entered: 03/13/2006)
03/08/2006	201	STIPULATION filed by Zvi Leichner for continuance of sentencing as to Zvi Leichner. Lodged order. (sv) (Entered: 03/10/2006)
03/10/2006		PLACED IN FILE − NOT USED: [PROPOSED] ORDER TO CONTINUE RE−SENTENCING DATE by Zvi Leichner. (roz) (Entered: 03/13/2006)
03/10/2006	203	MINUTES OF (IN CHAMBERS): CONDITIONAL ORDER GRANTING STIPULATION TO CONTINUE SENTENCING [FILED 3/8/06] HEARING held before Judge John F. Walter as to Zvi Leichner: On 3/8/06, the Government and Defendant Zvi Leichner filed a Stipulation to continue the sentencing of Defendant, currently scheduled for 3/27/06, to 4/10/06 at 9:00am or 4/24/06 at 9:00am. Upon review of the Stipulaiton, the Court hereby grants the Stipulation to continue the sentencing to 4/24/06 at 9:00am on the condition that counsel for the Government personally notify counsel for crime victim Patrick Kenna of the new sentencing date. Mr. Kramer shall then file with the Court, no later than 3/20/06, a declaration that he has conferred with Mr. Kennas counsel and that the 4/24/06 sentencing date is acceptable to both Mr. Kenna and his counsel. In the event Mr. Kenna or his counsel are unaviable for the sentencing on 4/24/06, Mr. Kramer, counsel for Defendant and counsel for Mr. Kenna shall meet and confer and stipulate to a mutually acceptabl edate for the sentencing of Defendant. Such stipulation shall be filed with the Court no later than 3/27/06. granting stipulation for continuance of sentencing as to Zvi Leichner [201−1] Sentence hearing set for 4/24/06 at 9:00am. C/R: No Court Reporter (roz) (Entered: 03/14/2006)
03/15/2006	208	RECORD on Appeal returned from 9th CCA 1 thru 4 volumes original clerks file, 5 volumes C/R transcripts, and 2 sealed documents. (cbr) (Entered: 03/22/2006)
03/17/2006	204	NOTICE OF UNDER SEAL FILING by Zvi Leichner (es) Modified on 03/21/2006 (Entered: 03/21/2006)
03/17/2006	205	SEALED DOCUMENT−EX PARTE APPLICATION for an order sealing docments ; Declaration of Michael R McDonnell (es) Modified on 03/21/2006 (Entered: 03/21/2006)
03/17/2006	206	SEALED DOCUMENT−Defendant's Position Paper At His Re−Sentencing (es) (Entered: 03/21/2006)
03/17/2006	207	ORDER Sealing Document filed by Judge John F. Walter as to Zvi Leichner : (cc: all counsel) (es) (Entered: 03/21/2006)
03/23/2006	209	STIPULATION AND ORDER filed by Judge John F. Walter as to Zvi Leichner: Sentence hearing continued to 5/1/06 at 9:00am. (roz) (Entered: 03/24/2006)

03/23/2006	210	Renewed Motion filed by USA as to Zvi Leichner Pursuant to USSG 5K1.1 to Impose Sentence Below Sentencing Guidelines (es) (Entered: 03/28/2006)
03/23/2006	211	RESPONSE filed by USA as to Zvi Leichner to Defendant's Position Regarding Re−Sentencing [206−1] . (es) (Entered: 03/28/2006)
04/04/2006	212	NOTICE OF DOCUMENT DISCREPANCIES AND ORDER ORDERING Ex Parte Application: Amicus Curiae Christopher Lemoine Seeks Permission of the Court to File Amicus Brief Regarding submitted by Defendant Moshe Leichner, received on 3/13/06 to be filed and processed. (es) (Entered: 04/14/2006)
04/04/2006	213	EX PARTE APPLICATION Amicus Curiae Christopher Lemoine Seeks Permission of the Court to File Amicus Brief regarding (CVRA) 18 U.S.C. 3771 filed by Christopher Lemoine. (jp,) (Entered: 04/24/2006)
04/04/2006	214	AMICUS BRIEF Filed by Amicus Curiae Christopher Lemoine(ab,) (Entered: 04/24/2006)
04/25/2006	215	CRIME VICTIM'S EX PARTE APPLICATION for Disclosure of Presentence Report. Filed by Crime Victim and Moving Party W. Patrick Kenna. Lodged Order. (jp,) (Entered: 04/25/2006)
04/25/2006	218	MOTION of Amicus Curiae, The National Crime Victim Law Institute for Leave to Participate as Amicus Curiae in support of Victim's Motion for Disclosure of Presentence Report. (jp,) (Entered: 05/01/2006)
04/26/2006	216	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter: Court denies ex parte application for disclosure of presentence report 215 without prejudice. Mr. Kenna shall file his motion for disclosure of defendant's presentence report by 5/15/06 and shall set the matter for hearong on 6/19/06, 9AM. Court grants motion of Amicus Curiae for leave to participate as amicus curaie in support of victim's motion for disclosure of presentence report. 213 The government is ordered to file a response to Mr. Kenna's motion and NCVLI's Brief in support of Mr. Kenna's motion by 5/30/06. Defendant shall also file any opposition to Mr. Kenna's motion by 5/30/06. Mr. Kenna shall file any reply in support of his brief by 6/12/06. On court's own motion, it continues Sentencing for 6/26/2006 09:00 AM before Judge John F. Walter. Probation Office shall prepare an addendum to defendant's presentence report to be provided to the court by 6/12/06. Counsel for government shall personally contact via telephone counsel for defendant, Mr. Kenna and NCVLI to advise them that the court has continued sentencing. Government shall also serve via facsimile, a copy of this order on counsel for Mr. Kenna and NCVLI by noon 4/28/06. Motion set for hearing on 6/19/2006 at 09:00 AM before Judge John F. Walter. Court Reporter: None. (sv) (Entered: 04/27/2006)
04/26/2006		PLACED IN FILE − NOT USED re [Proposed] Order Granting Crime Victim's Ex Parte Application for Disclosure of Presentence Report. Lodged 4/25/2006. (jp,) (Entered: 05/01/2006)
04/26/2006	219	BRIEF OF AMICUS CURIAE filed by National Crime victim Law Institute in suport of Victim Motion for Disclosure of Presentence Report. (jp,) (Entered: 05/01/2006)
04/26/2006	221	NOTICE OF DOCUMENT DISCREPANCIES AND ORDER by Judge John F. Walter ORDERING motion of amicus curiae submitted by Defendant Moshe Leichner, Zvi Leichner, received on 4/25/06 to be filed and processed; filed date to be the date the document was stamped Received but not Filed with the Clerk. (mrgo,) (Entered: 05/04/2006)
04/27/2006	217	DECLARATION of PEGEEN D. RHYNE Regarding Notification of Court's Order Dated April 26, 2006 216 filed by Plaintiff USA as to Defendant Zvi Leichner. (jp,) (Entered: 05/01/2006)
04/27/2006	220	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter: Order re sentencing Letters: The attached copies of sentencing letter submitted on behalf of Zvi Leichner shall be deemed filed as of this date and maintained in the original case file. (am,) (Entered: 05/01/2006)

05/05/2006	222	NOTICE OF MOTION AND MOTION for Order Compelling defendant Moshe Leichner to Execute Consents for Release of Foreign Bank Records; Memorandum of Points and Authorities. Filed by Plaintiff USA as to Defendant Moshe Leichner. Motion set for hearing on 6/26/2006 at 09:00 AM before Judge John F. Walter. Lodged Order. (jp,) (Entered: 05/09/2006)
05/09/2006	223	NOTICE OF MOTION AND MOTION for Disclosure of presentence report Filed by Crime Victim and Moving Party W. Patrick Kenna Motion set for hearing on 6/19/2006 at 09:00 AM before Judge John F. Walter. Lodged Proposed Order. (am,) Modified on 5/15/2006 (am,). (Entered: 05/15/2006)
05/09/2006	224	MEMORANDUM in Support of MOTION for Disclosureof presentence report 223 filed by Crime Victim and Moving Party W. Patrick Kenna(am,) (Entered: 05/15/2006)
05/11/2006	225	APPLICATION AND ORDER for Writ of Habeas Corpus Ad Testificandum for Moshe Leichner to testify on 6/26/2006 at 9:00 AM. before Judge John F. Walter, by Judge John F. Walter as to Defendant Moshe Leichner. Writ Issued. (jp,) (Entered: 05/24/2006)
05/12/2006		Writ of Habeas Corpus ad Testificandum Issued as to Moshe Leichner for June 26, 2006 at 09:00 AM in case. (jp,) (Entered: 05/26/2006)
05/25/2006	227	OPPOSITION to MOTION for Disclosure 223 filed by Defendant Zvi Leichner. (vc,) (Entered: 06/06/2006)
05/30/2006	226	RESPONSE TO VICTIM PATRICK KENNA MOTION FOR Disclosure 223 OF PRESENTENCE REPORT filed by Plaintiff USA as to Defendant Zvi Leichner. (vc,) (Entered: 06/06/2006)
05/31/2006	228	ORDER of USCA filed as to Moshe Leichner re Notice of Appeal to USCA − Final Judgment, 116 , Notice of Appeal to USCA − Final Judgment, 148 , CCA #05−50164 and 05−50516. Order received in this district on 6/5/06. Appellant request a 10 day extension to file his petition for rehearing. Counsel requests that he be given until 6/9/06 to file a petition for rehearing. Government counsel has indicated that he has no opposition to this request. (dmap,) (Entered: 06/07/2006)
06/12/2006	229	Victim's Reply in Support of Crime Victim's Motion for Disclosure of Presentence Report 215 filed by Defendant Zvi Leichner. (es) (Entered: 06/17/2006)
06/15/2006	230	RESPONSE to Victim Reply in Support of Crime Victim MOTION for Disclosure of presentence report 223 filed by Defendant Zvi Leichner. (jp,) (Entered: 06/21/2006)
06/16/2006	232	EX PARTE APPLICATION for Order Directing Counsel to Appear; Declaration of Moshe Leichner filed by Defendant Moshe Leichner. Lodged Order. (jp,) (Entered: 06/26/2006)
06/16/2006	233	MEMORANDUM OF POINTS AND AUTHORITIES in Support of EX PARTE APPLICATION for Order Directing Counsel to Appear 232 filed by Defendant Moshe Leichner. (jp,) (Entered: 06/26/2006)
06/19/2006	231	MINUTES OF Motion Hearing held before Judge John F. Walter as to Defendant Zvi Leichner. ORDER CONTINUING SENTENCING HEARING. The Court hears oral argument on Mr. Kenna MOTION for Disclosure of presentence report 223 . For the reasons set forth on the record, the Court DENIES Mr. Kenna Motion for Disclosure of Presentence Report. At the request of Mr. Kenna, and with the consent of Defendant, the Court hereby CONTINUES Defendant Zvi Leichner Sentencing Hearing, currently on the calendar for 6/26/2006 at 09:00 AM., ti 7/17/2006 at 09:00 AM. Court Reporter: Leslie King. (jp,) (Entered: 06/21/2006)
06/23/2006	234	STIPULATION AND ORDER by Judge John F. Walter that the hearing on the motion of Plaintiff USA for Order Compelling defendant Moshe Leichner to Execute Consents for Release of Foreign Bank Records is CONTINUED to 7/24/2006 at 09:00 AM. (jp,) (Entered: 06/26/2006)
06/23/2006	238	ORDER of USCA filed as to Moshe Leichner re Notice of Appeal to USCA − Final Judgment 116 , Notice of Appeal to USCA − Final Judgment 148 , CCA #05−50164, 05−50516. Order received in this district on 06/26/06. Appellants

		motion for extension of time to file a petition for rehearing until 07/05/06 is granted. (cbr,) (Entered: 07/10/2006)
06/29/2006	235	RECEIPT OF REPORTERS TRANSCRIPT of proceedings as to Defendant Zvi Leichner for the following dates: 06/19/06; Court Reporter: Leslie A. King (lr,) (Entered: 07/07/2006)
06/29/2006	236	TRANSCRIPT filed as to Zvi Leichner for dates of 6/19/06 before Judge John F. Walter, Court Reporter: Leslie A. King. (lr,) (Entered: 07/07/2006)
07/03/2006	237	ORDER of USCA filed in re: W. Patrick Kenna, CCA #06−73352. Order received in this district on 07/06/06. We have received this petition for a writ of mandamsu pursuant to the Crime Victims Rights Act, The government shall file a response on or before 10 am Pacific Time, Tuesday 07/04/06. The district court may also file a response if it so desires. Petitioner may file a reply on or before 1 pm Pacifit Time, Tuesday 07/04/06. (cbr,) (Entered: 07/10/2006)
07/06/2006	239	ORDER of USCA filed as to Moshe Leichner re Notice of Appeal to USCA − Final Judgment, 148 , CCA #06−73352. Order received in this district on 7/11/06. Because we have issued our opinion in this case, all remaining motions are denied as moot. (lr,) (Entered: 07/25/2006)
07/17/2006	251	MINUTES OF RESENTENCING Hearing held before Judge John F. Walter as to Defendant Zvi Leichner. Counts 1s−2s, 3s Defendant is committed to the custody of the Bureau of Prisons for One Hundred Thirty Five (135) months. This term consists of Sixty (60) months on each of Counts 1 and 2, to run concurrently to each other, and One Hundred Twenty (120) months on Count 3, to be served partially consecutively (75 months) and partially concurrently (45 months) to Counts 1 and 2. Supervised release for Three (3) years under the terms and conditions of the US Probation Office, General Order 318 &01−05. Fines waived, pay special assessment of $300, restitution in the total amount of $94,796,530.04. Defendant advised of right of appeal. Court Reporter: Nancy Smith−Wells. (es) (Entered: 09/05/2006)
07/17/2006	252	JUDGMENT AND COMMITMENT by Judge John F. Walter as to Defendant Zvi Leichner (2), Count(s) 1s−2s, 3s, Defendant is committed to the custody of the Bureau of Prisons for One Hundred Thirty Five (135) months. Supervised release for Three (3) years under the terms and conditions of the US Probation Office, General Order 318 &01−05. Fines waived, pay special assessment of $300, restitution in the total amount of $94,796,530.04 Signed by Judge John F. Walter. (es) (Entered: 09/05/2006)
07/18/2006	240	ORDER of USCA filed as to Moshe Leichner; re Notice of Appeal to USCA − Final Judgment, 148 ; CCA #05−50164, 05−50516. Order received in this district on 7/20/06. Appellant's petition for rehearing received on 7/07/06, is ordered filed. The panel voted unanimously to deny the petition for panel rehearing. The petition for panel rehearing is hereby denied. (lr,) Modified on 7/25/2006 (lr,). (Entered: 07/25/2006)
07/18/2006	243	Notice of EX PARTE APPLICATION for Order substituting counsel; requiring detailed billing statement; release of balance of retainer and return of property Filed by Defendant Moshe Leichner Ex Parte Application set for hearing on 7/24/2006 at 09:00 AM before Judge John F. Walter. (es) (Entered: 07/27/2006)
07/24/2006	241	MINUTES OF Motion Hearing held before Judge John F. Walter as to Defendant Moshe Leichner. The case is called and counsel make their appearance. The Court confers with counsel and counsel argue. The Court Grants the government's Motion to Compel defendant Moshe Leichner to Execute Consents for Release of Foreign Bank Records 222 . The Court signs order requiring defendant to execute the consents for release of foreign bank records on or before 8/7/06. Court Reporter: Victoria Valine. (es) (Entered: 07/26/2006)
07/25/2006	242	ORDER Compelling defendant Moshe Leichner to Execute Consents for Release of Foreign Bank Records 222 by Judge John F. Walter as to Defendant Moshe Leichner (es) (Entered: 07/27/2006)

07/26/2006	246	MANDATE of the 9th CCA filed as to Defendant Moshe Leichner re Notice of Appeal to USCA − Final Judgment, 116 , Notice of Appeal to USCA − Final Judgment, 148 , CCA #05−50164; 05−50516.The appeal is Affirmed. Mandate received in this district on 7/28/06. (es,) (Entered: 08/09/2006)
07/28/2006	244	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter : On 7/24/06, the Court held a hearing on the Government's Motion for an Order Compelling Defendant Moshe Leichner to Execute Consents for Release of Foreign Bank Records. Defendant's counsel of record, failed to appear at the hearing. Accordingly, the Court hereby orders Mr Scalisi to show cause, in writing, no later than 8/7/06, why sanctions should not be imposed against him for failure to appear at the 7/24/06 hearing. No oral argument on this matter will be heard unless otherwise ordered by the Court. The Order will stand submitted upon the filing of the response to the Order to Show Cause. Court Reporter: not reported. (es) (Entered: 07/31/2006)
08/01/2006	247	DENIED ORDER Directing Counsel to Appear by Judge John F. Walter as to Defendant Moshe Leichner (es) (Entered: 08/14/2006)
08/01/2006	248	DENIED ORDER Substituting Counsel' Requiring A Detailed Billing Statement; Refund of Balance of Retainer; and Return of Property by Judge John F. Walter as to Defendant Moshe Leichner (es) (Entered: 08/14/2006)
08/07/2006	245	Written Response of Counsel Re Order to Show Cause filed by Defendant Moshe Leichner (es) (Entered: 08/09/2006)
08/07/2006	249	Written Response of Counsel Re Order to Show Cause filed by Defendant Moshe Leichner (es) (Entered: 08/14/2006)
08/14/2006	250	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter : The Court ordered Mr Scalisi to show cause, in writing, no later than 8/7/06, why sanctions should not be imposed against him for failure to appear at the July 24, 2006 hearing. On 8/7/06, Mr Schalisi filed a response to the Order to Show Cause. The court hereby sets a hearing for 9/11/06 @ 9:00am. Mr Scalisi is directed to either 1) appear at the hearing, or 2) file a motion to withdraw as counsel of record no later than 9/5/06. IT IS SO ORDEREDCourt Reporter: No Court Reporter. (es) (Entered: 08/15/2006)
09/05/2006	253	NOTICE OF MOTION AND MOTION to Withdraw as Attorney by Peter Scalisi. Filed by Defendant Moshe Leichner; Lodged Order (es) (Entered: 09/07/2006)
09/11/2006	254	ORDER by Judge John F. Walter as to Defendant Moshe Leichner, Relieving Counsel Peter Scalisi as Attorney of Record 253 as to Moshe Leichner. (es) (Entered: 09/12/2006)
09/11/2006	255	MINUTES OF Motion Hearing held before Judge John F. Walter as to Defendant Moshe Leichner. Case called, and counsel make their appearance. Court hears oral argument, and for the reasons stated on the record, Mr Scalisi Motion to withdraw as counsel for Defendant Moshe Leichner is Granted. Order to show cause why attorney Peter Scalisi should not be sanctioned for failure to appear at the July 24, 2006 hearing is discharged 253 Court Reporter: Victoria Valine. (es) (Entered: 09/12/2006)
09/20/2006	256	EX PARTE APPLICATION for Order to Show Cause re Criminal Contempt; Filed by Plaintiff USA as to Defendant Moshe Leichner. Lodged Order. (mb,) (Entered: 09/25/2006)
09/25/2006		ORDER to Show Cause Re Criminal Contempt by Judge John F. Walter as to Defendant Moshe Leichner 256 (es) (Entered: 09/26/2006)
09/25/2006	257	ORDER by Judge John F. Walter as to Defendant Moshe Leichner to Show Cause Re Criminal Contempt (es) (Entered: 09/26/2006)
09/25/2006	258	SUPPLEMENT to EX PARTE APPLICATION for Order to Show Cause Re Criminal Contempt 256 filed by Plaintiff USA as to Defendant Moshe Leichner (es) (Entered: 09/27/2006)

10/23/2006	259	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter : Case called, and counsel make their appearance. Defense counsel is not present. For the reasons stated on the record, the Court continues the hearing to 10/24/06 @ 8:30AM. The hearing will be held in Courtroom 890 in the Roybal Federal Building. Court Reporter: Victoria Valine. (es,) (Entered: 10/24/2006)
10/23/2006	260	MINUTES OF IN CHAMBERS ORDER Discharging Order to Show Cause Re Criminal Contempt and Vacating Hearing by Judge John F. Walter: Based on the foregoing, the 9/25/06 Order to show Cause is hereby Discharged. The further hearing on the Order to show Cause, currently on calendar for 10/24/06 @ 8:30am, is Vacated. Court Reporter: No Court Reporter. (es,) (Entered: 10/24/2006)
10/23/2006	261	MEMORANDUM REGARDING SERVICE OF ORDER TO SHOW CAUSE filed by Plaintiff USA as to Defendant Moshe Leichner (ew) (Entered: 10/25/2006)
01/26/2007	262	EX PARTE APPLICATION for Appointment of Counsel Filed by Defendant Moshe Leichner (Attachments: # 1 Proposed Order # 2 # 3 Proposed Order) (Deitch, Philip) (Entered: 01/26/2007)
02/01/2007	263	NOTICE of Under Seal Filing filed by Defendant Moshe Leichner (Deitch, Philip) (Entered: 02/01/2007)
02/02/2007	264	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter : DENIES EX PARTE APPLICATION for Appointment of Counsel 262 Court Reporter: No Court Reporter. (pj,) (Entered: 02/12/2007)
02/02/2007	265	SEALDED DOCUMENT − APPLICATION For Order Permitting Filing of Supplemental Filing Under Seal (lm,) (Entered: 02/26/2007)
02/02/2007	266	SEALED DOCUMENT−ORDER PERMITTING FILING OF SUPPLEMENTAL FILING UNDER SEAL. (ab,) (Entered: 03/01/2007)
02/02/2007	267	*NVPV* SUPPLEMENTAL FILING OF FINANCILA AFFIDAVIT BY DEFENDNAT MOSHE LEICHNER IN SUPPORT OF HIS APPLICATION FOR APPOINTMENT OF CONSE FOR POST CONVICTION PROCEEDINGS. (ab,) Additional attachment(s) added on 3/1/2007 (ab,). Modified on 8/3/2007 (ab,). (Entered: 03/01/2007)
05/18/2007	268	PROCESS RECEIPT AND RETURN (USM−285) (es,) (Entered: 05/22/2007)
06/25/2007	270	REQUEST for Hearing as to Status Conference to Set Schedules Filed by Defendant Moshe Leichner (es) (Entered: 06/29/2007)
06/29/2007	269	MOTION to Vacate, SetAside, Correct Sentence pursuant to 28:2255 (Civil Case 07−04128.) Filed by Defendant Moshe Leichner (Attachments: # 1 CV−17)(es) Civil case 2:07−cv−04128 opened. (Entered: 06/29/2007)
07/16/2007	278	ORDER by Judge John F. Walter as to Defendant Moshe Leichner, re REQUEST for Hearing as to Status Conference to Set Schedules 270 ; Status Conference set for 7/17/2007 10:00 AM to consider the issues raied in petitioner's request for status conference before Judge John F. Walter. (ab) (Entered: 07/23/2007)
07/17/2007	271	MINUTES OF REQUEST TO SET SCHEDULE [fld 6/25/07] RE: DEFENDANT/PETITIONER'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. § 2255 [fld 6/25/07] held before Judge John F. Walter as to Defendant Moshe Leichner, re REQUEST for Hearing as to Status Conference to Set Schedules 270 . Court provides counsel with a copy of an annonymous letter received by the Court as to Moshe Leichner. Court and counsel discuss the content of the letter. For the reasons stated on the record, the Court orders the Governments response to Petioners Motion to Vacate, Set Aside or Correct Sentence to be filed on or before September 17, 2007. Court Reporter: Victoria Valine. (ca) (Entered: 07/18/2007)
07/17/2007	277	MINUTES OF REQUEST TO SET SCHEDULE (FILED 6/25/07) RE: DEFENDANT/PETITIONER MOTIONT TO VACATE, SET ASIDE OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. 2255 (FILED 6/25/07) Motion Hearing held before Judge John F. Walter as to Defendant Moshe Leichner, re MOTION to Vacate, SetAside, Correct

		Sentence pursuant to 28:2255 (Civil Case 07−04128.) 269 ; for reasons stated on the record, the Court orders the Government response to petitioner's motion to vacate, set aside or correct sentence to be filed on or before 9−17−07. Court Reporter: Victoria Valine. (ab) (Entered: 07/23/2007)
07/19/2007	272	PROPOSED ORDER ON RENEWED APPLICATION BY DEFENDANT MOSHE LEICHNER FOR APPOINTMENT OF COUNSEL; FOR APPOINTMENT OF PARALEGAL AND FOR ORDER FOR HIM TO REMAIN AT MDC PENDING POST CONVICTION PROCEEDINGS by Judge John F. Walter as to Defendant Moshe Leichner, re EX PARTE APPLICATION for Appointment of Counsel 262 DENIED. (ab) (Entered: 07/19/2007)
07/19/2007	273	EX PARTE APPLICATION for Order for Order declaring partial waiver of attorney client privilege Filed by Plaintiff USA as to Defendant Moshe Leichner (Attachments: # 1 Proposed Order)(Fettig, Derik) (Entered: 07/19/2007)
07/19/2007	274	EX PARTE APPLICATION for Order for unsealing financial affidavit Filed by Plaintiff USA as to Defendant Moshe Leichner (Attachments: # 1 Proposed Order)(Fettig, Derik) (Entered: 07/19/2007)
07/20/2007	275	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents. The following deficiency was found pfoof of service missing for non−electronically served parties: RE EX PARTE APPLICATION for Order for Order declaring partial waiver of attorney client privilege 273 (ab) (Entered: 07/20/2007)
07/20/2007	276	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents. The following deficiency was found proof of service of non−electronically served parties: RE EX PARTE APPLICATION for Order for unsealing financial affidavit 274 (ab) (Entered: 07/20/2007)
07/24/2007	279	ORDER by Judge John F. Walter as to Defendant Moshe Leichner, re declaring partial waiver of attorney client privilege and compelling disclosure of certain attorney−client communications 273 . (es) (Entered: 07/24/2007)
07/27/2007	280	RESPONSE filed by Plaintiff USA as to Defendant Moshe Leichner *statement of confinement status and opposition to application for reconsideration of orders* (Fettig, Derik) (Entered: 07/27/2007)
08/01/2007	281	ORDER DENIED by Judge John F. Walter as to Defendant Moshe Leichner; COURT DID NOT CONSIDER THE ANONYMOUS LETTER IN ITS RULING. (ab) (Entered: 08/02/2007)
08/02/2007	282	NOTICE of Proposed Order Returning Petitioner to Custody of the Federal Bureau of Prisons filed by Plaintiff USA as to Defendant Moshe Leichner, Re: Response (Non−Motion) 280 (Fettig, Derik) (Entered: 08/02/2007)
08/02/2007	283	ORDER by Judge John F. Walter as to Defendant Moshe Leichner, Granting EX PARTE APPLICATION for Order Unsealing Financial Affidavit of Petitioner Moshe Leichner in Support of Petitioner's Application for Appointment of Counsel 274 . (es) (Entered: 08/03/2007)
08/03/2007	284	ORDER Returning Petitioner Mosh Leichner to the Custody of the Federal Bureau of Prisons by Judge John F. Walter as to Defendant Moshe Leichner, (es) (Entered: 08/03/2007)
08/09/2007	285	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter : NOTICE TO COUNSEL OF UNDER SEAL FILING COURT Counsel are hereby notified that the court has filed an anonymous letter dated 7/31/07 and received by the court on 8/8/07 under seal; the court clerk shall provide a copy of the letter to counsel. (ab) (Entered: 08/10/2007)
08/10/2007	286	SEALED DOCUMENT−LETTER DATED JULY 31, 2007 FILED UNDER SEAL. (ab) (Entered: 08/23/2007)
09/14/2007	287	OPPOSITION to MOTION to Vacate, SetAside, Correct Sentence pursuant to 28:2255 (Civil Case 07−04128.) 269 filed by Plaintiff USA as to Defendant Moshe Leichner. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Declaration of George Buehler# 6 Declaration of Peter Scalisi)(Fettig,

		Derik) (Entered: 09/14/2007)
09/20/2007	288	EX PARTE APPLICATION for Extension of Time to File defendants reply to government opposition to petition. Filed by Defendant Moshe Leichner (Attachments: # 1)(Deitch, Philip) (Entered: 09/20/2007)
09/24/2007	289	ORDER by Judge John F. Walter as to Defendant Moshe Leichner, Granting EX PARTE APPLICATION for Extension of Time to File defendants reply to government opposition to petition; IT IS ORDERED that the petitioner may have to and including 10/4/07 to file his traverse to the government's opposition to his petition under 28:2255 288 (es) (Entered: 09/24/2007)
10/04/2007	291	UNOPPOSED APPLICATION for Further Extension for of Date for Filing of Traverse [Reply Brief] to Government's Return [Answer] to Petition. Filed by Defendant Moshe Leichner. Lodged Proposed Order. (jp) (Entered: 10/09/2007)
10/05/2007	290	DUPLICATE ORIGINAL ORDER by Judge John F. Walter as to Defendant Moshe Leichner, re EX PARTE APPLICATION for Extension of Time to File defendants reply to government opposition to petition. 288 ; GOOD CAUSE SHOWN fromthe unopposed application of petitioner,it is ordered that the Petitioner may have to and including October 15, 2007 to file his response tothe Government's opposition to his petition for writ of habeas corpus filed by petitioner. (ab) (Entered: 10/05/2007)
10/17/2007	293	ORDER by Judge John F. Walter as to Defendant Moshe Leichner, GRANTING UNOPPOSED APPLICATION. Petitioner may have and including 10/18/2007 to file his response to the government's opposition to his petition for writ of habeas corpus. (jp) (Entered: 10/22/2007)
10/18/2007	292	REPLY opposition MOTION to Vacate, SetAside, Correct Sentence pursuant to 28:2255 (Civil Case 07−04128.) 269 filed by Defendant moshe leichner. (Deitch, Philip) (Entered: 10/18/2007)
10/18/2007	294	REPLY MEMORANDUM to the answer submitted by the rspondent and REQUEST for Evidentiary Hearing filed by Defendant Moshe Leichner. (jp) (Entered: 10/22/2007)
10/19/2007	295	PETITIONER'S EXHIBITS in support of MOTION to Vacate, SetAside, Correct Sentence pursuant to 28:2255 (Civil Case 07−04128.) 269 filed by Defendant Moshe Leichner. (jp) (Entered: 10/23/2007)
10/25/2007	296	PETITIONER'S AMENDED REPLY MEMORANDUM AND REQUEST for Evidentiary Hearing 294 filed by Defendant Moshe Leichner. (jp) (Entered: 11/03/2007)
10/25/2007	297	PETITIONER'S AMENDED EXHIBITS in support of PETITION under 28 USC 2255 (Civil Case 07−04128.) 269 filed by Defendant Moshe Leicher. (jp) (Entered: 11/03/2007)
10/25/2007	298	EXHIBITS in support of PETITION Under 28 USC 2255 (Civil Case 07−04128.) 269 filed by Defendant Moshe Leichner. (Attachments Main document Exhibits Pages 1−34: # 1 Exhibit A 1.2 Pages 35−59 #(2) Exhibit A 1.3 Pages 60−84# 3 Exhibit A 1.4 Pages 85−109 #(4) Exhibit A 1.5 Pages 110−159 #(5) Exhibit A 1.6 Pages 160−184 #(6) Exhibit A 1−7 Pages 185−209 #(7) Exhibit A 1.8 Pages 210−234 #(8) Exhibit A 1.9 Pages 235−259 #(9) Exhibit A 1.10 Pages 260−284 #(10) Exhibit A 1.11 Pages 285−298 &Proof of Services) (jp) (Entered: 11/03/2007)
10/25/2007	300	ERRATA SHEET RE: PETITIONER'S REPLY MEMORANDUM AND REQUEST for Evidentiary Hearing 294 filed by Defendant Moshe Leichner. (jp) (Entered: 11/03/2007)
11/01/2007	299	ORDER by Judge John F. Walter DENYING Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255 (Civil Case 07−04128.) 269 . (jp) (Entered: 11/03/2007)
11/01/2007	301	JUDGMENT by Judge John F. Walter as to Defendant Moshe Leichner, Pursuant to this Courts November 1, 2007 Order denying MOTION to Vacate, SetAside,

		Correct Sentence pursuant to 28:2255 (Civil Case 07−04128) 269 . IT IS NOW, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED, that the above−captioned action is dismissed with prejudice. (jp) (Entered: 11/06/2007)
11/30/2007	302	NOTICE OF APPEAL to Appellate Court filed by Defendant Moshe Leichner re Miscellaneous Order, 301 Filed on: 11/1/07; Entered on: 11/6/07; Certificate of Appealability Pending. cc: Philip Deitch (car) (Entered: 12/08/2007)
11/30/2007	303	NOTIFICATION OF APPEAL NOTIFICATION form issued regarding Notice of Appeal to USCA − Final Judgment 302 as to Defendant Moshe Leichner. (car) (Entered: 12/08/2007)
11/30/2007	305	NOTICE of Civil Appeal Docketing Statement filed by Defendant Moshe Leichner, Re: Notice of Appeal to USCA − Final Judgment 302 (dmap) (Entered: 12/18/2007)
12/10/2007	304	APPLICATION FOR ISSUANCE OF Certificate of Appealability to USDC by Petitioner Moshe Leichner (car) (Entered: 12/12/2007)
12/20/2007	306	ORDER by Judge John F. Walter as to Defendant Moshe Leichner denying Petitioner's Application for Issuance of Certificate of Appealability re: Petition for Certificate of Appealability 304 (dmap) (Entered: 12/26/2007)
12/26/2007	307	CERTIFICATE OF RECORD Transmitted to USCA as to Defendant Moshe Leichner, re Petition for Certificate of Appealability 304 (dmap) (Entered: 12/26/2007)
12/26/2007		Transmission of Notice of Appeal and Docket Sheet as to Moshe Leichner to US Court of Appeals re Petition for Certificate of Appealability 304 (dmap) (Entered: 12/26/2007)
11/14/2008	308	ORDER of USCA filed as to Moshe Leichner re Notice of Appeal to USCA − Final Judgment 302 , CCA #08−55132. Order received in this district on 11/14/08. The request for certificate of appealability is denied. (cbr) (Entered: 11/17/2008)
09/02/2009	309	MOTION Seeking Relief from a Final Judgment Pursuant to Rule 60(b). Filed by Defendant Moshe Leichner. (jp) (Entered: 09/04/2009)
09/08/2009	310	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter as to Defendant Moshe Leichner : Government's Response to Motion due by 9/28/2009; Defendant's reply due 10/13/09. (se) (Entered: 09/08/2009)
09/23/2009	311	MOTION to Appoint Counsel to Assist Petitioner with the Rule 60(b) Proceedings and Renewed Request for Evidentiary Hearing Filed by Defendant Moshe Leichner. (se) (Entered: 09/24/2009)
09/28/2009	312	OPPOSITION to MOTION for Order for Seeking Relief from a Final Judgment Pursuant to Rule 60(b) 309 filed by Plaintiff USA as to Defendant MOSHE LEICHNER. (Attachments: # 1 EXHIBIT A, # 2 EXHIBIT B, # 3 EXHIBIT C, # 4 EXHIBIT D, # 5 MOSHE LEICHNER PROOF OF SERVICE)(Fettig, Derik) (Entered: 09/28/2009)
09/30/2009	313	MINUTES (IN CHAMBERS) by Judge John F. Walter: ORDER DENYING 309 Motion for Order for Seeking Relief from a Final Judgment Pursuant to Rule 60(b) as to Moshe Leichner (1); ORDER DENYING AS MOOT 311 Motion to Request Appointment of Counsel to Assist Petitioner with the Rule 60(b) Proceedings and Renewed Request for Evidentiary Hearing as to Moshe Leichner (1). Because Defendant has not requested or been granted permission by the Ninth Circuit to file a successive motion under 28 USC 2255, this Court lacks jurisdiction over Defendant's motion. (See attached Minute Order for further information). (jp) (Entered: 10/01/2009)
10/19/2009	314	MOTION TO REQUEST for Extension or Enlargment of Time to Resonse to the Government's Opposition to Defendant's Moshe Leichner's Motion Pursuant to FRCP 60(b); Memorandum of Points and Authorities; Exhibits. Filed by Defendant Moshe Leichner. (jp) (Entered: 10/22/2009)

06/16/2010	315	NOTICE OF APPEAL to Appellate Court filed by Defendant Moshe Leichner re Order on Motion, 313 Filed on: 9/30/09; Entered on: 10/1/09; cc: Moshe Leichner, Attorney Philip Deitch. (car) Modified on 6/16/2010 (car). (Entered: 06/16/2010)
07/08/2010	316	NOTIFICATION by Circuit Court of Appellate Docket Number 10−56087 as to Defendant Moshe Leichner, 9th CCA regarding Notice of Appeal to USCA − Final Judgment 315 . (dmap) (Entered: 07/08/2010)
07/20/2010	317	Order by Judge John F. Walter The Certificate of Appealability is DENIED for the following reason(s). There has been no substantial showing of the denial of a constitutional right. Notice of Appeal to USCA − Final Judgment 315 as to Defendant Moshe Leichner. (lr) (Entered: 07/21/2010)
01/26/2012	318	ORDER of USCA filed as to Defendant Moshe Leichner re Notice of Appeal to USCA 315 CCA #10−56087. The request for a certificate of appealability is denied. Order received in this district on 1/26/2012. (dmap) (Entered: 01/27/2012)

Rights and Procedures Under the Crime Victims' Rights Act and New Federal Rules of Criminal Procedure

Amy Baron-Evans[1]
April 30, 2009

On December 1, 2008, new Federal Rules of Criminal Procedure said to incorporate or implement provisions of the Crime Victims Rights Act, 18 U.S.C. § 3771 ("CVRA") went into effect. The Appendix contains the two new rules (Rules 1(b)(11) and 60), and the amendments to existing rules (Rules 12.1, 17(c), 18 and 32) in redline and strikeout.

Part I of this paper provides the briefest overview of the CVRA's eight rights and enforcement provisions, and the new rules. Part II explains the rulemaking background behind these rules, including the political forces at work and the Committee's intent in promulgating the rules. Part III explains that the CVRA left the adversary system and defendants' constitutional rights intact, that defendants' constitutional rights trump victims' statutory rights, and that victims are not parties. Part IV explains that rules of procedure must be interpreted to avoid conflict with the Constitution and the Rules Enabling Act if possible, and are invalid if no such limiting construction is possible. Part V covers each of the eight CVRA rights in detail, including courts' interpretations of those rights, changes to the rules associated with some of the CVRA rights (Rule 32(c)(1)(B) & (i)(4)(B) and new Rule 60(a)), and related rights of defendants. Part VI covers special procedures, not contained in the CVRA, which were created solely by amendments to the rules (Rules 12.1(b), 17(c)(3), 18 and 32(d)(2)(B)), and ways to avoid problematic applications of those amendments. Part VII sets forth general procedures for the conduct of proceedings in which a victim or alleged victim is involved, based on the procedural provisions of the CVRA, new Rules 1(b)(11) and 60(b), and the procedural rights of defendants that must be observed in criminal proceedings. Finally, Part VIII provides suggestions on how defense counsel can help clients make amends with victims in ways that are beneficial to both.

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[1] Thanks to Denise Barrett, Jennifer Coffin, and Rachelle Barbour for their contributions to this paper.

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I. Overview of CVRA and New Rules

The CVRA, enacted on October 30, 2004, lists the following eight "rights."

(1) "to be reasonably protected from the accused"
(2) "to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused"
(3) "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) "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"

(6) "to full and timely restitution as provided in law"
(7) "to proceedings free from unreasonable delay"
(8) "to be treated with fairness and with respect for the victim's dignity and privacy"

18 U.S.C. § 3771(a). Certain limitations on these rights and the CVRA's procedural provisions are scattered throughout subsections (b)(1), (c), (d) and (e). Notably, the CVRA allows a victim or alleged victim to file a petition for mandamus in the court of appeals if he or she asserted a "right" by motion in the district court and the judge denied the "relief sought," no matter how unreasonable. The court of appeals must decide the petition within 72 hours. 18 U.S.C. § 3771(d)(3). The CVRA also allows a "motion to re-open" a plea or sentence if a victim asserted a "right to be heard" before or during a public proceeding involving a plea or sentencing, that right was denied, a petition for mandamus was filed within 10 days, and the petition was granted. 18 U.S.C. § 3771(d)(5).

Effective December 1, 2008, the following rules changes went into effect:

- Rule 1(b)(11) incorporates the statutory definition of "victim."
- Rule 12.1(b) appears to alter the right to reciprocal discovery alibi cases.
- Rule 17(c)(3) requires a court order for a subpoena for documents containing "personal or confidential" information, permits *ex parte* applications, and permits notice and an opportunity to challenge the application as unreasonable or oppressive only if to do so would not prematurely disclose defense strategy, would not result in the loss or destruction of evidence, and no other "exceptional circumstances" exist that would interfere with a constitutional and orderly adversary procedure.
- Rule 18 requires the court to consider the convenience of spectator victims in setting the place of trial within the district.
- Rule 32 inserts the "right to be reasonably heard" at sentencing, removes the requirement that victim impact information be "verified" and "stated in a nonargumentative style," and requires a pre-sentence investigation if the law "permits" restitution.
- Rule 60(a) restates the procedural rights set forth in § 3771(a)(2), (3) and (4).
- Rule 60(b), entitled "Enforcement and Limitations," restates some of the procedural provisions of the CVRA, and leaves it to the courts and the parties to ensure an orderly adversary procedure.

Rules that create, or appear to create, rights beyond the plain terms of the CVRA may invite mandamus petitions that would not otherwise be filed. Such rules fail in their overall purpose "to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[2] More importantly, if the result of such rules is to abridge a substantive right of the defendant, or to change a substantive outcome for the defendant, the rule is both unconstitutional and violates the Rules Enabling Act.

[2] 28 U.S.C. § 331.

II. Rulemaking Background

The impetus for these amendments came from then Judge Cassell, a well-known victim rights advocate who was then Chair of the Criminal Law Committee of the Judicial Conference.[3] In March 2005, Judge Cassell submitted, in his personal capacity, twenty-five proposed rules changes that would have done through the rules what Congress did not do in the CVRA, *i.e.*, replace the adversary system with a three-party/two-against-one system.[4] In April 2005, the Criminal Rules Advisory Committee ("Committee") appointed a CVRA Subcommittee ("Subcommittee"). The Committee initially questioned whether any amendments should be made, since the CVRA "is self-executing" and rules "cannot alter or add force to those statutory provisions," but concluded that "carefully drafted rule amendments to implement the specific rights set out in the Act would be appropriate and helpful."[5] The Subcommittee determined to take a "conservative" approach and "not create rights beyond those provided by the Act,"[6] and not to use "general language" stating that victims have a right "to be treated with fairness" as a "springboard for a variety of rights not otherwise provided for in the CVRA."[7] From the beginning and through the end of the process, the Committee stated that it did not intend to and did not upset the careful balance of the CVRA, abridge defendants' rights, or enlarge or create new victim rights, and in particular that it did not create any procedures based on the CVRA's right to be treated fairly and with respect.[8]

The Judicial Conference has strived to make the rulemaking process "the most thoroughly open, deliberative, and exacting process in the nation for developing substantively

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[3] Judge Cassell has since left the bench to litigate on behalf of victims and to teach about victim rights.

[4] Criminal Rules Docket (Historical) at 33, http://www.uscourts.gov/rules/2008-Criminal-Suggestions-Docket-Historical.pdf.

[5] *See* Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 23 (September 2007), http://www.uscourts.gov/rules/Reports/ST09-2007.pdf.

[6] Advisory Committee on Rules Minutes at 13, October 24 & 25, 2005, http://www.uscourts.gov/rules/Minutes/CR10-2005-min.pdf.

[7] *See* Memorandum to Criminal Rules Advisory Committee from CVRA Subcommittee at 1-2 (Sept. 19, 2005), included in http://www.uscourts.gov/rules/Agenda%20Books/CR2005-10.pdf.

[8] *See* Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 20, 22 (September 2007), http://www.uscourts.gov/rules/Reports/ST09-2007.pdf; Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 6, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf; Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 2 (Aug. 1, 2006), http://www.uscourts.gov/rules/Excerpt_CRReport1205_Revised_01-06.pdf; Report of the Advisory Committee on Criminal Rules to the Standing Committee on Rules of Practice and procedure, December 8, 2005, http://www.uscourts.gov/rules/Reports/CR12-2005.pdf.

neutral rules."[9] The Committee published for comment initial versions of two new rules (Rule 1(b)(11) & 60) and amendments to four existing rules (Rules 12.1(b), 17(c)(3), 18 & 32) in August 2006, and held a public hearing on these proposals in January 2007.[10] The Federal Defenders and NACDL strenuously opposed most of these proposals and offered alternative language for others.[11] By then, Judge Cassell had proposed nearly thirty rule changes.[12] Senator Kyl, the primary sponsor of both a failed victim rights constitutional amendment and the CVRA, followed up with a letter indicating that legislation would follow if the Committee did not implement his and Judge Cassell's interpretation of the CVRA through the rules.[13] Representatives Poe and Costa, co-chairs of the Congressional Victims' Rights Caucus, also wrote, stating, in what was either a Freudian slip or a typographical error, that the CVRA gave victims the right "to be reasonably protected from the rights of accused."[14]

The Committee took note of the letters from these congressmen, especially Senator Kyl's, while also noting the substantial "criticism that the proposed rules went too far, tipping the adversarial balance and depriving the defense of critical rights."[15] "The package of amendments

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[9]Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 Am. U. L. Rev. 1655, 1656 (1995) (internal quotation marks omitted), quoting Committee on Long Range Planning, Judicial Conference of the U.S., Proposed Long Range Plan for the Federal Courts recommendation 30, at 54 (2d prtg. 1995).

[10] Criminal Rules Docket (Historical) at 33, http://www.uscourts.gov/rules/2008-Criminal-Suggestions-Docket-Historical.pdf.

[11] Federal Defenders' Testimony and Comments on Federal Rules of Criminal Procedure Published for Comment in August 2006, http://www.uscourts.gov/rules/CR%20Comments%202006/06-CR-003.pdf; Comments of NACDL Concerning Proposed Amendments to Federal Rules of Criminal Procedure Published for Comment in August 2006, http://www.uscourts.gov/rules/CR%20Comments%202006/06-CR-010.pdf; Transcript of Public Hearing, January 26, 2007, http://www.uscourts.gov/rules/CR_Hearing_012607.pdf.

[12] Paul G. Cassell, *Treating Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure* (draft of January 16, 2007), submitted as written testimony, http://www.uscourts.gov/rules/CR%20Comments%202006/06-CR-002.pdf.

[13] Letter from Senator Jon Kyl to the Honorable David Levi, Chairman, Committee on Rules of Practice and Procedure, February 16, 2007, http://www.uscourts.gov/rules/CR%20Comments%202006/06-CR-026.pdf. Attached to the letter were Senator Kyl's floor statements.

[14] *See* Letter from Representatives Poe and Costa to Rules Committee, February 8, 2007, http://www.uscourts.gov/rules/CR%20Comments%202006/06-CR-027.pdf.

[15] *See* Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 2, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf. *See also* Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 22 (September 2007), http://www.uscourts.gov/rules/Reports/ST09-2007.pdf.

was revised to account for some of the concerns raised during the public comment."[16] Not satisfied that the Committee had gone far enough, Senator Kyl introduced Judge Cassell's proposals as direct amendments to the rules in S. 1749, the Crime Victims' Rights Rules Act of 2007. The bill had no cosponsors and died in committee.

III. Constitutional Background

A. The CVRA Keeps The Two-Party Adversary System and Defendants' Constitutional Rights Intact. Congressional Floor Statements to the Contrary Cannot Alter the Statute Congress Voted Into Law or the Constitutional Framework.

The Framers created a two-party adversary system, with a public prosecutor, a criminal defendant and a neutral judge. The Framers did not intend that the rights of the accused would be degraded by or subordinated to competing rights of victims. Nor did they envision that prosecutors would gain an advantage over the accused in the name of victims, or that judges' impartiality would be compromised by an obligation to enforce victim rights against the accused.

Congress enacted the CVRA after a victim rights constitutional amendment failed.[17] The proposed constitutional amendment would have given victims rights at least equal to defendants' constitutional rights. It stated that "victims' rights 'shall not be denied . . . and may be restricted only as provided in this article."[18] The fundamental objection to the victim rights constitutional amendment was that it would have replaced the two-party adversary system the Framers created with a three-party system in which criminal defendants would face both the public prosecutor and one or more private prosecutors with rights equal to or greater than the rights of the accused. The opposition argued that the "colonies shifted to a system of public prosecutions because they viewed the system of private prosecutions as 'inefficient, elitist, and sometimes vindictive,'" and that "the Framers believed victims and defendants alike were best protected by the system of public prosecutions that was then, and remains, the American standard for achieving justice."[19] Further, they argued, "we have historically and proudly eschewed private criminal prosecutions based on our common sense of democracy,"[20] and "[n]ever before in the history of the Republic have we passed a constitutional amendment to guarantee rights to a politically popular group of citizens at the expense of a powerless minority," or "to guarantee rights that intrude so technically into such a wide area of law, and with such serious implications for the Bill of Rights."[21]

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[16] See Advisory Committee on Criminal Rules Minutes at 8, October 1-2, 2007, http://www.uscourts.gov/rules/Minutes/CR10-2007-min.pdf.

[17] 150 Cong. Rec. at S4262 (Apr. 22, 2004) ("It is clear to me that passage of a Constitutional amendment is impossible at this time.") (statement of Sen. Feinstein).

[19] *See* S. Rep. No. 108-191 at 68-69 (2003) (minority views).

[20] *Id.* at 70.

[21] *Id.* at 56.

In passing the CVRA instead of the constitutional amendment, Congress intended to preserve the system the Framers created -- with a public prosecutor charged with acting in the public interest, a criminal defendant with the full panoply of constitutional rights, and a neutral judge. *See United States v. Turner*, 367 F.Supp.2d 319, 333 n.13 (E.D.N.Y. 2005) (The "CVRA strikes a different balance [than the failed constitutional amendment], and it is fair to assume that it does so to accommodate the concerns of those legislators [who opposed the amendment]. . . . In particular, it lacks the language that prohibits all exceptions and most restrictions on victims' rights, and it includes in several places the term 'reasonable' as a limitation on those rights."). As Senator Durbin explained:

> By enacting legislation rather than amending the Constitution, our approach today also addresses my concerns regarding the rights of the accused. The premise of criminal justice in America is innocence until proven guilty, and our Constitution therefore guarantees certain protections to the accused. . . . Although these protections for the accused sometimes are painful for us to give, they are absolutely critical to our criminal justice system. When the victim and the accused walk into the courtroom, both are innocent in the eyes of the law, but when the trial begins, it is the defendant's life and liberty that are at stake.[22]

Thus, it remains that only the defendant has constitutional rights in criminal proceedings. Victims and alleged victims do not have constitutional rights. Nor are they parties. Under the CVRA, victims "are not accorded formal party status, nor are they even accorded intervenor status as in a civil action. Rather, the CVRA appears to simply accord them standing to vindicate their rights as victims under the CVRA and to do so in the judicial context of the pending criminal prosecution of the conduct of the accused that allegedly victimized them." *United States v. Rubin*, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008). A court cannot "compromise[e] its ability to be impartial to the government and defendant, the only true parties." *Id.* at 428. *See also United States v. Hunter*, 548 F.3d 1308, 1311 (10th Cir. 2008) (victim has no right to appeal a defendant's sentence because a victim is not a party).

Beware of victim advocates citing to the floor statements of Senator Kyl, the primary sponsor of the failed constitutional amendment and of the CVRA, for interpretations of the CVRA that differ from what Congress intended. For example, Senator Kyl stated that the right to be treated with "fairness" and with "respect for dignity" is synonymous with a right to "due process."[23] "Floor statements from two Senators [who sponsored the bill] cannot amend the clear and unambiguous language of a statute." *Barnhart* v. *Sigmon Coal Co., Inc*. 534 U.S. 438, 457 (2002). Floor statements may "open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President," *Regan v. Wald*, 468 U.S. 222, 237 (1984), and this may be particularly true of a bill's

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[22] *See* 150 Cong. Rec. S4275 (April 22, 2004) (statement of Sen. Durbin).

[23] *See* 150 Cong. Rec. S10911 (Oct. 9, 2004) (statement of Sen. Kyl); 150 Cong. Rec. S4260-01, S4264 (April 22, 2004) (statement of Senator Kyl).

sponsor disappointed in some respect with the final bill. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 n.10 (2006). "The *only* reliable indication of *that* intent-the only thing we know for sure can be attributed to *all* of them-is the words of the bill that they voted to make law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390-91 (2000) (Scalia, J., concurring) (emphasis in original). The plain statutory language controls. *See Crandon v. United States*, 494 U.S. 152, 160 (1997); *Whitfield v. United States*, 543 U.S. 209, 215 (2005); *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 130-36 (2002); *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Further, relying on floor statements to expand upon the text would violate the constitutional requirements for enactment, bicameralism and presentment. U.S. Const. art. I, § 7; *INS v. Chadha*, 462 U.S. 919, 945 (1983).

B. Defendants' Constitutional Rights Trump Victims' Statutory Rights.

Because a defendants' constitutional rights always trump a victim's statutory rights, *see, e.g., Davis v. Alaska*, 415 U.S. 308, 319 (1974) ("the right of confrontation is paramount to the State's policy of protecting a juvenile offender"), no provision of the CVRA or a related rule may infringe on any right of the defendant.

Defendants have a number of constitutional rights. Among them are the rights to an impartial judge, *In re Murchison*, 349 U.S. 133 (1955); to be presumed innocent, and to be found guilty only based on proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970); the right to confront adverse witnesses, *Coy v. Iowa*, 487 U.S. 1012 (1988); the right to cross-examine adverse witnesses, *Crawford v.* Washington, 541 U.S. 36 (2004); the right to compulsory process, *Taylor v. Illinois*, 484 U.S. 400 (1988), *Washington v. Texas*, 388 U.S. 14, 19 (1967); the right to present a complete defense, *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986); the right to effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984); the right to obtain favorable evidence that is relevant to guilt or punishment, *Kyles v. Whitley*, 514 U.S. 419 (1995); the right to an impartial jury, *United States v. Gaudin*, 515 U.S. 506 (1995); and the right to notice and opportunity to challenge any information that may be used to deprive the defendant of life, liberty or property in sentencing. *See Rita v. United States*, 127 S. Ct. 2456, 2465 (2007); *Burns v. United States*, 501 U.S. 129, 137-38 (1991); *Gardner v. Florida*, 430 U.S. 349, 351, 358 (1977); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

The right to an impartial judge is one that the CVRA and some of the rules can implicate to an unusual degree. *See In re Murchison*, 349 U.S. 133, 136 (1955) (a "fair trial in a fair tribunal is a basic requirement of due process"); *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927) ("Every procedure which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law."). The threat of a disruptive mandamus action may place pressure on judges to favor victims' rights over defendants' rights. Indeed, according to Senator Kyl, the mandamus provision was intended to "encourage[] courts to broadly defend the victims' rights." *See also* 150 Cong. Rec. S10910, S10912 (Oct. 9, 2004). But judges cannot act as a victim's advocate and the defendant's adversary. Judges must protect defendants' rights. *See* Erin C. Blondel, *Victims' Rights in an Adversary System*, 58 Duke L. J. 237, 261, 265, 269-

70 (2008). Judges must avoid any reading of a rule that places them in the conflicted position of "defending" victims' statutory interests against defendants' constitutional rights. *See United States v. Rubin*, 558 F. Supp.2d 411, 428 (E.D.N.Y. 2008) (this is "precisely the kind of dispute a court should not involve itself in since it cannot do so without potentially compromising its ability to be impartial to . . . the only true parties.").

IV. The Rules Must Be Interpreted to Avoid Abridging Defendants' Rights or Enlarging Victims' Rights; If No Such Interpretation is Possible, the Rule is Invalid.

When construing the rules, consider the avoidance canon, constitutional limits on rulemaking, and the Rules Enabling Act. Both the Constitution and the Rules Enabling Act prohibit the Rules Committee from promulgating rules that abridge defendants' constitutional or statutory rights or that enlarge victims' statutory rights, and prevent the courts from interpreting the rules in such a manner.

How is it possible for a rule to run afoul of the Constitution or the Rules Enabling Act when the Supreme Court approved it? The Court ordinarily depends on adversary testing of concrete disputes to sharpen its understanding of difficult questions.[24] It approves the rules in the abstract without adversary testing. The Court may not be aware of problematic applications of a rule, or it may not feel the need to disapprove a rule unless the lower courts interpret it in a way that violates the Constitution or the Rules Enabling Act. For example, the Rules Committee received extensive public comment opposing Rules 12.1(b), 17(c)(3) and 18 because they posed problems under the Constitution or the Rules Enabling Act, but the Committee's report to the Supreme Court regarding controversial rules made no mention of those rules.[25] According to other Committee reports, the Committee did not intend that any of the amendments would transgress the bounds of the Constitution or the Rules Enabling Act. *See* Part II, *supra*; Part IV.D, *infra*.

A. Avoidance Canon

Like any law, a rule of procedure must be interpreted, if possible, to avoid violating the Constitution. *See Martinez v. Clark*, 534 U.S. 371, 381 (2005); *Jones v. United States*, 526 U.S. 227, 239-40 (1999). Similarly, a rule must be interpreted to avoid violating the Rules Enabling Act. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 845-48 (1999); *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503-04 (2001).

The Rules Committee's expressed understanding in promulgating a rule can aid in a limiting construction. For example, in interpreting a civil procedure rule that might have violated both the Constitution (the Seventh Amendment and the Due Process Clause) and the Rules Enabling Act, the Supreme Court adopted a limiting construction, stating that "this

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[24] *See Federal Election Comm. v. Akins*, 524 U.S. 11, 20-21 (1998); *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 382-83 (1980).

[25] *See* Proposed Rule Amendments of Significant Interest, http://www.uscourts.gov/rules/supct0108/Controversial_report_Sup_Ct_2007.pdf.

limiting construction finds support in the Advisory Committee's expressions of understanding, minimizes potential conflict with the Rules Enabling Act, and avoids serious constitutional concerns." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999).

If no limiting construction is possible to save the rule from violating the Constitution or the Rules Enabling Act, the rule is invalid, *Holmes v. South* Carolina, 547 U.S. 319 (2006), and the prior rule or practice applies, assuming it is valid. *Ortiz*, 527 U.S. at 845.

B. The Constitution

A rule that abridges a weighty interest of the accused, and that does not serve a legitimate procedural purpose or is arbitrary or disproportionate to its purpose, is invalid. For example, in *Holmes v. South* Carolina, 547 U.S. 319 (2006), the Supreme Court struck down a state evidence rule that prohibited the accused from introducing evidence of a third party's guilt if the prosecution introduced forensic evidence that, if believed, strongly supported a guilty verdict. The right to "present a complete defense . . . is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id*. at 324-25 (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998) and *Rock v. Arkansas*, 483 U.S. 44, 58 (1987)). The Court observed that the Constitution "prohibits the exclusion of defense evidence under rules that serve no legitimate purpose . . . in the criminal trial process . . . or that are disproportionate to the ends that they are asserted to promote." *Id*. at 327. The Court found that the rule was arbitrary in that it did not rationally serve any procedural purpose. *Id*. at 331.

In *United States v. Scheffer*, 523 U.S. 303 (1998), the Court upheld a military rule of evidence that flatly excluded polygraph evidence. The Court found that the rule served three "legitimate interests in the criminal trial process": reliability, preservation of the jury's function in determining credibility, and avoiding litigation over issues other than the guilt or innocence of the accused. *Id*. at 309-15. The Court found that the rule did not affect a significant interest of the accused because it did not exclude any evidence or testimony about the facts of the case, but only bolstered the defendant's credibility. *Id*. at 317.

In *Wardius v. Oregon*, 412 U.S. 470 (1973), the Court struck down a notice of alibi rule that did not guarantee reciprocal discovery to the defendant. While the state's "interest in protecting itself against an eleventh-hour defense is both obvious and legitimate," *id*. at 471 n.1, "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." *Id*. at 475.

C. The Rules Enabling Act

The Supreme Court has no jurisdiction to promulgate rules except through a delegation of congressional power. Congress, not the Supreme Court, has the power to regulate practice and procedure in the federal courts. It "may exercise that power by delegating to [the courts] authority to make rules not inconsistent with the statutes or Constitution of the United States."

Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941). Congress, through the Rules Enabling Act, has delegated to the Supreme Court, acting on recommendations from the Judicial Conference,[26] "the power to prescribe general rules of practice and procedure." 28 U.S.C. § 2072(a). "Such rules shall not abridge, enlarge or modify any substantive right." *Id*., § 2072(b); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 845-48 (1999); *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503-04 (2001).

In sum, there are two requirements: (1) every rule must be procedural; and (2) if a rule is procedural, it also must not abridge, enlarge or modify any substantive right. If possible, a rule must be interpreted to avoid violating these jurisdictional limitations. *Semtek*, 531 U.S. at 503-04; *Ortiz*, 527 U.S. at 845. If a limiting construction is not possible, the rule is invalid.

1. A rule's purpose must be to regulate procedure without regard to substantive interests.

The Rules Enabling Act is "restricted in its operation to matters of pleading and court practice and procedure." *Sibbach.*, 312 U.S. at 10. The test is whether it "really regulates procedure, -- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id*. at 13. The purpose of the rule must be "procedural," *i.e.*, "concerned only with the most sensible way to manage a litigation process," "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes." John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 724, 726 & nn. 170 (1974). The purpose of a "procedural rule" must be "to achieve accuracy, efficiency, and fair play in litigation, without regard to the substantive interests of the parties," *Sims v. Great Am. Life Ins. Co*., 469 F.3d 870, 882 (10th Cir. 2006), much less the substantive interests of persons who are not parties.

Under these authorities, a rule with the stated purpose of advancing a substantive interest of an alleged victim, such as the amendments to Rules 12.1 (reciprocal discovery of alibi) and 17 (restricting issuance of subpoenas), *see* Part VI.A & B, *infra*, is not "procedural." If possible, these rules must be interpreted as procedural only, *i.e.*, concerned only with the most sensible way to manage a two-party adversary litigation process without regard to an alleged victim's substantive interests. If such a construction is not possible, the amendment cannot be applied.

2. A rule shall not abridge, enlarge or modify any substantive right.

A "substantive right [is] a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process." Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. at 725. A substantive reason is "concerned with something other than the way litigation is to be managed." *Id*. at 728. A substantive reason is one that "characteristically and reasonably affect[s] . . . conduct" or "states of mind" beyond the litigation in the courtroom; an example of the latter is a statute of limitations, which fosters "the feeling of release, the assurance that the ordeal has passed." *Id*. at 725-26.

[26] 28 U.S.C. §331.

The rules implementing the CVRA implicate two sets of "substantive rights": statutory rights of victims under the CVRA, which may not be "enlarged," and constitutional and statutory rights of defendants, which may not be "abridged." Even "procedurally neutral rules may affect substantive rights" and "may give a practical advantage to one type of litigant over another."[27] The government does not have constitutional rights, and should not be given a practical advantage over defendants through rules created for victims.

Many of the rights contained in the CVRA are substantive because they are not concerned with the way litigation is managed but with affecting conduct and feelings outside the litigation in the courtroom. The purpose of the right to be "reasonably protected from the accused" is to affect conduct outside the courtroom.[28] The right to be treated with "respect for the victim's dignity and privacy" is aimed at improving victims' state of mind outside the litigation by preventing the "secondary traumatization" that victims sometimes experience "at the hands of the criminal justice system."[29] The amendments to Rules 12.1(b) and 17(c)(3), which are said to "implement" these statutory rights, cannot be interpreted to "enlarge" them.

Nor may any rule be interpreted in a way that abridges a defendant's constitutional rights, whether procedural or substantive. Defendants have a substantive constitutional right to life, liberty and property.[30] *See* U.S. Const. Amend. V. Defendants also have many procedural constitutional rights, including the right to due process of law, the right to effective assistance of counsel, the right to confront and cross-examine witnesses, and the right to compulsory process. *See* U.S. Const. Amend. V, VI. According to a seminal article on the legislative history and interpretation of the Rules Enabling Act, Congress's concern that the rules not be used to abridge, enlarge or modify any substantive right extends to these procedural constitutional rights. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1169 (1982).

Although it does not appear that the Supreme Court has interpreted a criminal rule under the Rules Enabling Act, it has interpreted a civil rule to avoid conflict with the Act. In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the district court had read Fed. R. Civ. P. 23(b)(1)(B) as allowing it to certify a mandatory settlement-only class under a "limited funds" rationale, which meant that all members of the class would receive a *pro rata* share of the settlement fund, and that absent members, who were by definition unidentifiable at the time the class was certified, had no ability to consent or right to abstain. The Court rejected this interpretation to avoid conflict with the Rules Enabling Act, because it may have abridged the rights of absent class members to pursue individual tort claims at law. *Id*. at 845. Instead, the Court interpreted the rule in a manner that would keep it "close to the practice preceding its adoption." *Id*. The Court also applied the doctrine of constitutional avoidance, finding that the lower court's interpretation

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[27] Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 Am. U. L. Rev. 1655, 1683 (1995).

[28] *See* 150 Cong. Rec. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[29] *See* 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[30] Other substantive rights include the right to trial by jury, U.S. Const. Art. III, § 1, U.S. Const. Amend. VI; the right not to be subject to *ex post facto* laws, U.S. Const. Art. I, § 10; and the right against unreasonable searches and seizures, U.S. Const. Amend. IV.

of the rule would violate the absent class members' Seventh Amendment jury trial rights and their due process rights to notice and an opportunity to be heard. *Id*. at 845-48.

D. The Criminal Rules Advisory Committee's Intent and Understanding was that the Rules Comply with the Constitution and the Rules Enabling Act.

The Committee repeatedly recognized that "the CVRA reflects a careful Congressional balance between the rights of defendants, the discretion afforded the prosecution, and the new rights afforded to victims," and stated that "[g]iven that careful balance," it "sought to incorporate, but not go beyond, the rights created by statute."[31] It stated that it (1) "proposed rule amendments to implement the specific rights recognized in the Act," and (2) "did not propose . . . amendments . . . to provide specific rights in particular proceedings, not expressly stated in the Act but based on the Act's general right that crime victims be treated fairly and with respect."[32] It said that rules in the latter category "would have inserted into the criminal procedural rules substantive rights that are not specifically recognized in the Act – in effect creating new victims' rights not expressly provided for in the Act," and thus "could create new substantive rights."[33]

To the extent any of the rules appears to violate the Constitution and/or breach the limits of the Rules Enabling Act, they must be read otherwise if possible. The Committee's "expressions of understanding" are relevant to that interpretation. *See Ortiz*, 527 U.S. at 842.

V. The Eight "Rights," Associated Rules, and Related Constitutional Requirements

All eight of the CVRA "rights" are discussed in this Part. Not all of them resulted in an amendment to the rules. Changes to Rules 32 and 60 associated with one of the eight "rights" are described in this Part. Three of the "rights" (notice, (a)(2); not to be excluded, (a)(3); and to be reasonably heard, (a)(4)) can fairly be characterized as procedural and were incorporated into new Rule 60(a)(1)-(3) nearly verbatim. One of the "rights" (restitution as provided in law, (a)(6)) is "implemented" by Rule 32(c)(1)(B). Two of the "rights" (to be "reasonably protected from the accused," (a)(1), and to be treated "with fairness and with respect for the victim's dignity and privacy," (a)(8)) are clearly not procedural but are said to be "implemented" by the amendments to Rules 12.1(b) and 17(c)(3). Rules 12.1(b) and 17(c)(3), as well as Rule 18 and Rule 32(d)(2)(B) which do not cite to any section of the CVRA, are addressed in Part VI.

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[31] *See* Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 6, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf; Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 2 (Aug. 1, 2006), http://www.uscourts.gov/rules/Excerpt_CRReport1205_Revised_01-06.pdf; Report of the Advisory Committee on Criminal Rules to the Standing Committee on Rules of Practice and procedure, December 8, 2005, http://www.uscourts.gov/rules/Reports/CR12-2005.pdf.

[32] *See* Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 22 (September 2007), http://www.uscourts.gov/rules/Reports/ST09-2007.pdf.

[33] *Id.* 20.

A. "Reasonably Protected from the Accused," § 3771(a)(1)

While this provision is broadly worded, it should not be construed as a "wellhead of boundless authority to fashion protection for victims in the guise of 'protecting them from the accused.'" *United States v. Rubin*, 558 F. Supp. 2d 411, 419-21 (E.D.N.Y. 2008). For example, it does not add to or change the bases upon which a defendant may be released or detained under 18 U.S.C. § 3142. *See United States v. Turner*, 367 F.Supp.2d 319, 332 (E.D.N.Y. 2005), *United States v. Rubin*, 558 F. Supp. 2d 411, 420 (E.D.N.Y. 2008). The Bail Reform Act limits the possibility of detention to persons charged with or previously convicted of particularly serious crimes. *See* 18 U.S.C. § 3142(e) and (f). The Supreme Court upheld the preventive detention provisions of the Bail Reform Act against a facial substantive due process challenge because, under "these narrow circumstances" -- where detention may be sought only for "individuals who have been arrested for a specific category of extremely serious offenses," and may be imposed only when the government "proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community" -- the government's interest in preventing future crime is "compelling." *United States v. Salerno*, 481 U.S. 739, 750-51 (1987). Nothing in the CVRA alters the limited circumstances under which the court may detain a defendant.

The right to be "reasonably protected from the accused" also does not permit a victim to dictate a defendant's financial affairs or restrict travel. *United States v. Rubin*, 558 F. Supp. 2d 411, 420 (E.D.N.Y. 2008). In *Rubin*, the court found that the government had not violated this provision of the CVRA when it chose not to freeze assets of the defendant or prevent him from engaging in securities activities. The right to be "reasonably protected" also was not violated when the court permitted the defendant to visit sick relatives in Israel after his arrest. *Id.*

Nor does § 3771(a)(1) permit the government to withhold the identity of victims. *United States v. Vaughn*, slip op., 2008 WL 4615030 *2 n.1 (E.D. Cal. Oct. 17, 2008). "[A] defendant has the right to test the government's evidence, and only the most unpracticed lawyers would be satisfied with their preparation if they had no opportunity to meet the government's star witness(es) until the day of testimony. Why even bother with cross-examination if one cannot prepare for it?" *Id*. at * 3. Thus, where the government argued that the defendant may retaliate because he had used coercion and threats in the course of the offense, the court ordered disclosure of the names, addresses, email addresses, and telephone numbers of government witnesses under a protective order precluding dissemination to the defendant or anyone other than the defense team. *Id*. at *2.

Section 3771(a)(1) is one of the stated bases for the amendment to Rule 12.1(b) notice of alibi, which is discussed in Part VI.A, *infra*.

B. "Reasonable, Accurate and Timely Notice of Any Public Court Proceeding . . . Involving the Crime," § 3771(a)(2), (c)(1); Rule 60(a)(1)

Incorporating § 3771(a)(2) and (c)(1), new Rule 60(a)(1) states: "The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime."

The duty to give a victim notice is appropriately assigned to the government, rather than the judge, because the government already has notification duties under 42 U.S.C. § 10607(b) & (c)(3)(A)-(D), and, importantly, the judge should not be involved in notifying "victims" at any point in time before the defendant has been convicted and while he is still presumed innocent. Otherwise, the judge's actions might interfere with the presumption of innocence. *See United States v. Turner*, 367 F. Supp.2d 319, 326 (E.D.N.Y. 2005).

The CVRA applies only in "public" court proceedings and has no effect on the court's authority to close or seal court proceedings. *See* 150 Cong. Rec. S10910 (Oct. 9, 2004); *United States v. L.M.*, 425 F.Supp.2d 948, 951-52 (N.D. Iowa 2006). A court may close proceedings if the defendant's right to a fair trial, the need to protect the safety of any person, or the need to protect sensitive information so requires. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564, 581 (1980); *Estes v. Texas*, 381 U.S. 532 (1965); 28 C.F.R. § 50.9. Victims are not entitled to notice of matters handled without court appearance or that arise without prior notice at a status conference. *United States v. Rubin*, 558 F. Supp. 2d 411, 423 (E.D.N.Y. 2008).

"Notice of release otherwise required pursuant to [the CVRA] shall not be given if such notice may endanger the safety of any person," including the defendant. § 3771(c)(3).

C. "Not to be Excluded from any Such Public Court Proceeding" Unless the Court Determines by "Clear and Convincing Evidence" that the Victim's Testimony "Would be Materially Altered," § 3771(a)(3), (b)(1); Rule 60(a)(2)

Incorporating § 3771(a)(3) and (b)(1) fairly closely, Rule 60(a)(2) states:

> The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

1. No Right to Attend, but a Qualified Right Not to be Excluded

While victims are generally allowed to attend public court proceedings, they have no "right" to attend. Thus, neither the courts nor the government have an affirmative duty to ensure that they are present. *See* 150 Cong. Rec. S10910 (Oct. 9, 2004); *United States v. Turner*, 367

F.Supp.2d 319, 332 (E.D.N.Y. 2005); *United States v. Rubin*, 558 F. Supp. 2d 411, 423-24 (E.D.N.Y. 2008).

Victims have a right "not to be excluded from" a public court proceeding involving the crime, "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." § 3771(a)(3).

2. Violation of Due Process

The right not to be excluded is a significant incursion on defendants' right to a fair and reliable trial. Fed. R. Evid. 615 lessens the risk of a witness presenting tainted testimony by requiring the court upon request to order witness sequestration. "The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion." Fed. R. Evid. 615, 1972 advisory committee note. Sequestration has been used since biblical times and "is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice." *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 628-29 (4th Cir. 1996).

Fed. R. Evid. 615, however, contains an exception for "a person authorized by statute to be present," and the CVRA allows (but does not require) victims to be present. This exception to the sequestration rule was promulgated in response to an earlier statute, 18 U.S.C. § 3510, stating that victims may not be excluded from *trial* on the basis that they may make a victim impact statement at *sentencing*. *See* Fed. R. Evid. 615, 1998 advisory committee note. Unlike § 3510, § 3771(a)(3), permits tainted *factual* testimony *at trial*, unless the defendant can prove in advance that the testimony will be materially altered by the victim-witness's attendance. As judges have reported, proving in advance by clear and convincing evidence that a witness's testimony will be altered is difficult if not impossible to do. *See* United States Government Accountability Office, *Crime Victims' Rights Act* at 87 (Dec. 2008), http://www.gao.gov/new.items/d0954.pdf.

Section 3771(a)(3) and Rule 60(a)(1) should be challenged as a violation of the Due Process Clause because they provide inadequate protection against false testimony.

3. Full Discovery and Development of the Facts

Because the defendant bears the nearly impossibly burden of proving by clear and convincing evidence that a victim-witness's testimony would be materially altered if the witness were allowed to remain in the courtroom,[34] the defendant should be entitled to obtain all information relevant to the question and an evidentiary hearing. The government and the probation department should be required to produce all statements and criminal records of the victim, all statements of other witnesses expected to testify on the same subject matter, and all

[34] *See, e.g., United States v. Edwards*, 526 F.3d 747, 758 & n.28 (11th Cir. 2008) (upholding denial of exclusion where defendant "does not argue that he provided the district court with clear and convincing evidence of the likelihood that the victim-witnesses would materially alter their testimony if they were not sequestered," and "conceded [that such evidence was] not discernible from the record.").

other evidence or information in their possession or control that bears on whether the victim's testimony would be materially altered. To help prove that a witness's testimony would be materially altered, you may want to apply for Rule 17(c) subpoenas for information such as psychiatric history, tax records, employment records, benefit applications and other documents that may bear on a victim-witness's credibility and character for truthfulness. Your use of these records should not be constrained by Federal Rule of Evidence 608(b) (generally prohibiting extrinsic evidence to prove specific instances of a witness's character for truthfulness), because the court is not bound by rules of evidence in deciding preliminary questions. Fed. R. Evid. 104 (a).

To avoid premature disclosure of defense strategy, consider making an ex parte proffer of your evidence and seek a preliminary ruling on whether you have proffered sufficient evidence to go forward with a hearing. Otherwise, you risk the government and the witness being prepared to meet your impeachment at trial. Whether to pursue a pretrial hearing in an effort to exclude a victim-witness from the courtroom is a strategic decision that must be made on a case- by-case basis. It may be advantageous, however, to skip the usually futile exercise of trying to prove in advance that the testimony would be materially altered so as not to alert the witness. On the other hand, going through the process may provide useful discovery information.

4. Alternatives to Prevent Fabrication and Tailoring

The second sentence of Rule 60(a)(2) is based on § 3771(b)(1), which provides that "[b]efore 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." Since subsection (a)(3) states that there is a right "not to be excluded" unless the court determines that the testimony would be materially altered, subsection (b)(1) appears to mean that the court should consider alternatives to complete exclusion only after having found that the testimony would be materially altered. *See In re Mikhel*, 453 F.3d 1137, 1139 (9th Cir. 2006). The court can order that the victim testify before any other witnesses or that she be excluded during testimony on the same subject matter. Even absent a finding that the testimony would be materially altered, the government may cooperate in keeping the witness out of the courtroom during other testimony to avoid damaging cross-examination and jury instructions.

5. Cross-Examination and Jury Instruction

If the court permits an alleged victim to remain in the courtroom and hear other testimony, you can cross-examine the victim-witness on how his or her testimony differed from prior statements and was tailored to fit the other testimony.

You can also seek a jury instruction explaining that she was not subject to sequestration like other witnesses, that the purpose of the sequestration rule is "as a means of discouraging and exposing fabrication, inaccuracy, and collusion," Fed. R. Evid. 615, 1972 advisory committee note, and that it is "natural and irresistible for a jury, in evaluating the relative credibility of a [witness] . . . to have in mind and weigh in the balance the fact that he heard the testimony of all those who preceded him." *Portuondo v. Agard*, 529 U.S. 61, 67-68 (2000).

6. Reason for Any Decision Must Be Clearly Stated on the Record

Rule 60(a)(2) states that "[t]he reasons for any exclusion must be clearly stated on the record." This comes from § 3771(b)(1), which is designed to make a record for a mandamus petition. Of course, reasons for allowing a victim to remain should also be clearly stated on the record so that an adequate record exists for appeal by the defendant.

D. "Reasonably Heard At Any Public Proceeding Involving Release, Plea, Sentencing," § 3771(a)(4); Rule 32(i)(4)(B); Rule 60(a)(3)

Section 3771(a)(4) provides a right to be "reasonably heard" at public proceedings involving release, plea or sentencing, which is not necessarily a right to "speak."

Rule 60(a)(3) states: "The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime." The committee note states that it "incorporates 18 U.S.C. § 3771(a)(4)."

Rule 32(i)(4)(B) sates: "Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard." The committee note, however, indicates that this is a right to "speak" absent "unusual circumstances," as discussed below.

If the "right to be heard" is asserted at a public proceeding involving plea or sentencing, is denied, and is followed by a successful mandamus petition, this triggers a right to move to "re-open" a plea or sentencing. 18 U.S.C. § 3771(d)(5). Thus, to avoid abridging defendants' constitutional rights and to avoid a substantive effect on the outcome, the right to be reasonably heard, and any rule adopted to implement it, must be interpreted as narrowly as possible.

1. In general

"Reasonably heard" is a legal term of art meaning to bring one's position to the attention of the court, in person or in writing, as the court deems reasonable under the circumstances.[35] When Congress uses a legal term of art, it is presumed to intend its traditional meaning.[36] Congress apparently chose deliberately to enact a right to be "reasonably heard," rather than a right to "speak." A principal objection to the failed constitutional amendment was that it would have created an absolute right to be heard and would have prohibited judges from responding flexibly if, for example, there were multiple victims, the victim was involved in the criminal activity, the victim provoked the crime, or the victim's statement would violate the defendant's right to due process. *See* S. Rep. No. 108-191 at 76, 85, 106-107 & n.133 (Nov. 7, 2003)

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[35] *See, e.g., O'Connor v. Pierson*, 426 F.3d 187, 198 (2d Cir. 2005); *Fernandez v. Leonard*, 963 F.3d 459, 463 (1st Cir. 1992); *Commodities Futures Trading Com. V. Premex, Inc.*, 655 F.2d 779, 783 n.2 (7th Cir. 1981); USSG. § 6A1.3, backg'd. comment.

[36] *Morissette v. United States*, 342 U.S. 246, 263 (1952).

(minority views). The CVRA does not include the language from the failed constitutional amendment that would have prohibited judges from restricting the right to be heard,[37] and added the modifier "reasonably." Thus, Congress intended for the courts to have the flexibility to permit victims to be "reasonably heard," under the circumstances, in a manner that does not infringe on the rights of the defendant or the orderly administration of justice.[38]

As of this writing, only one published district court decision squarely addresses an actual dispute about the meaning of the statutory right to be "reasonably heard." In *United States v. Marcello*, 370 F.Supp.2d 745 (N.D. Ill. 2005), involving a bail hearing, the court concluded that the "statute clearly and unambiguously . . . does not mandate oral presentation of the victim's statement." *Id*. at 748. According to the court, the statute gives victims a right to be "reasonably heard," the "ordinary legal and statutory meaning [of which] typically includes consideration of the papers alone." *Id*. The "statute, which contains both a reasonableness requirement and a legal term of art (the opportunity to be 'heard'), does not require the admission of oral statements in every situation, particularly one in which the victim's proposed statement was not material to the decision at hand." *Id*. at 745. The court noted that a victim's oral impact statement may be relevant at sentencing, but also noted that even the defendant's right to allocute at sentencing is not absolute, and may be denied in certain situations, or limited in duration and content. *Id.* at 750 & n.10, citing *United States v. Mack*, 200 F.3d 653 (9th Cir. 2000); *Ashe v. North Carolina*, 586 F.2d 334, 336-37 (4th Cir. 1978) ("need not be heard on irrelevancies or repetitions"). Because the statutory language was clear, the court declined to look to the statements of the floor sponsors indicating that victims always have a right to speak directly to the court if they choose. *Id*. at 748-49.

Another district court decision addresses the right to be "reasonably heard," but it issued in a case where the defense made no objection to the victim speaking at sentencing and against the backdrop of pending litigation in the Ninth Circuit, which makes it appear as if the opinion were written to effect that litigation rather than resolve a disputed controversy. In *United States v. Degenhardt*, 405 F. Supp.2d 1341 (D. Utah 2005), the Honorable Paul J. Cassell found that the right to be "reasonably heard" was ambiguous as to whether it required oral statements in all cases, and thus turned to the statements of the floor sponsors and concluded that "the CVRA gives victims the right to speak directly to the judge at sentencing." *Id*. at 1345-46, 1349. The *Degenhardt* opinion issued twelve days after the defendant's sentencing (where no objection was made to the victim speaking), while a petition for mandamus was pending in the Ninth Circuit in *Kenna v. United States District Court*, No. 05-73467. In the opinion, Judge Cassell expressly commented on that pending litigation, stating, "the court cannot agree with another district court's conclusion that in-court victim allocution at one defendant's sentencing eliminates the need to allow victim allocution when a co-defendant is sentenced." *See* 405 F. Supp.2d at 1348 n. 42. The day after Judge Cassell's opinion issued, the Crime Victim Legal Assistance Project

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[37] It stated that the right to be heard "shall not be denied . . . and may be restricted only as provided in this article." S.J. Res. 1, § 1 (108th Cong.).

[38] The "CVRA strikes a different balance, and it is fair to assume that it does so to accommodate the concerns of such legislators. . . . In particular, it lacks the language that prohibits all exceptions and most restrictions on victims' rights, and it includes in several places the term 'reasonable' as a limitation on those rights." *United States v. Turner*, 367 F.Supp.2d 319, 333 n.13 (E.D.N.Y. 2005).

submitted it to the Ninth Circuit under Fed. R. App. P. 28(j). *See* December 22, 2005, Letter of Steve Twist to Clerk, Ninth Circuit Court of Appeals, docketed December 23, 2005, *Kenna v. United States District Court*, No. 05-73467. Against this background, *Degenhardt* should be viewed as an advisory opinion and taken with a large grain of salt.

Thus far, the Ninth Circuit is the only court of appeals to have addressed the meaning of the right "to be reasonably heard" at a sentencing hearing. In *Kenna v. United States District Court*, 435 F.3d 1011 (9th Cir. 2006), involving father and son defendants, the victims had submitted written impact statements and spoken in court at the more culpable father's sentencing hearing. The judge declined one victim's request to speak again at the son's hearing. On appeal, two members of the panel stated that victims "now have an indefeasible right to speak." *Id*. at 1016. In reaching this conclusion, they appear to have misconstrued what the victim wished to speak about. Although he wished to speak about further financial "impacts" since the father's sentencing, *id*. at 1013, the panel said, puzzlingly, that a request to "present evidence . . . is not at issue here." *Id.* at 1014 n.2. Instead, the panel thought that the content of this speech would be the "effects of a crime," "victims' feelings," "broken families and lost jobs," and "to look this defendant in the eye and let him know the suffering his misconduct has caused." *Id*.

The opinion acknowledged that the district court "may place reasonable constraints on the duration and content of victims' speech, such as avoiding undue delay, repetition or the use of profanity," and presumably relevance. *Id*. at 1014. Further, § 3771(d)(2)'s procedure for cases involving multiple victims "may well be appropriate in a case like this one, where there are many victims." *Id*. at 1014 n.1. One judge wrote separately to state that he doubted that a "victim has an absolute right to speak at sentencing, no matter what the circumstances," and that the "statutory standard of 'reasonably heard' may permit a district court to impose reasonable limitations on oral statements." *Id*. at 1018-19 (Friedman, J., dubitante).

Kenna, which was decided without briefing by the defendant or the government, is somewhat confused. Its more extreme statements – that victims must always be allowed to "speak" -- are based on a misapplication of the rules of statutory construction and reliance on *Degenhardt*. *Kenna*, 435 F.3d at 1015. In concluding that the phrase "reasonably heard" was ambiguous, it gave weight to the dictionary definition of "hear" as "to perceive (sound) by the ear," *id*. at 1014, contrary to two rules of statutory construction. *See Buckhannon Bd. And Home Care, Inc. v. West Virginia Dept. of Health and Human Services*, 532 U.S. 598, 615 (2001) (Scalia and Thomas, JJ., concurring) (meaning of a legal term of art is followed over a dictionary definition); *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990) ("where a phrase in a statute appears to have become a term of art . . . any attempt to break down the term into its constituent words is not apt to illuminate its meaning."). Further, the court said, Congress' use of the word "public" made "the right to be 'heard' at a 'public proceeding' . . . synonymous with 'speak.'" *Kenna*, 435 F.3d at 1015. But the purpose of the word "public" was to limit the right to be "reasonably heard" to public, as opposed to closed, proceedings.[39]

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[39] *See* 150 Cong. Rec. S10910 (Oct. 9, 2004); 150 Cong. Rec. S4268 (April 22, 2004).

Once having found the statute "ambiguous," the court, as in *Degenhardt*, turned to the floor statements of the bill's sponsors stating that the meaning of the right to be "reasonably heard" was that "'[o]nly if it is not practical for the victim to speak in person or if the victim wishes to be heard by the court in a different fashion should this provision mean anything other than an in-person right to be heard.'" *Kenna*, 435 F.3d at 1015, quoting 150 Cong. Rec. S4268 (April 22, 2004) (statements of Sen. Kyl and Sen. Feinstein); 150 Cong. Rec. S10911 (Oct. 9, 2004) (statement of Sen. Kyl). The court's reliance on the floor statements was misplaced. As the Supreme Court has said:

> Floor statements from two Senators [who sponsored the bill] cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.

Barnhart v. *Sigmon Coal Co., Inc*. 534 U.S. 438, 457 (2002). Floor statements, in fact, may "open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President," *Regan v. Wald*, 468 U.S. 222, 237 (1984), and this may be particularly true of a bill's sponsor disappointed in some respect with the final bill. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 n.10 (2006). The court even relied on the legislative history of the constitutional amendment, to the effect that victims "always have the power to determine the form of the statement," *Kenna*, 435 F.3d at 1016, which failed for that reason, among others.

The court believed it appropriate to follow these floor statements because other legislators did not register disagreement. *Kenna*, 435 F.3d at 1015-16 (citing *A Man for All Seasons*). Such congressional silence, however, is irrelevant for reasons well-stated by Justice Scalia:

> Of course this observation, even if true, makes no difference unless one indulges the fantasy that Senate floor speeches are attended (like the Philippics of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes' practice sessions on the beach) alone into a vast emptiness. Whether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator.

Hamdan, 126 S. Ct. at 2815-16 (Scalia, J., dissenting). *See also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390-91 (2000) ("the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor) . . . [are not] a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us. The *only* reliable indication of *that* intent-the only thing we know for sure can be attributed to *all* of them-is the words of the bill that they voted to make law.") (Scalia, J., concurring) (emphasis in original).

Victims, like any other witness, are not free to "speak" without notice, limitation or challenge. Even a defendant's right to allocute at sentencing is not absolute, and may be denied in certain situations, or limited as to duration and content. *Marcello*, 370 F.Supp.2d at 750 &

n.10. When a defendant wishes to testify to facts, he is placed under oath, subjected to cross-examination, and limited to matters that are relevant and material and about which he is competent to testify. *Id*. at 750. The defendant may be precluded from testifying at all if he fails to comply with rules requiring notice. *Michigan v. Lucas*, 500 U.S. 145, 152-53 (1991); *Taylor v. Illinois*, 484 U.S. 400, 417 (1988); *Williams v. Florida*, 399 U.S. 78, 81-82 (1970). Nor do defendants have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the rules of evidence, *Taylor*, 484 U.S. at 410, nor may they "testify[] *falsely*." *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (emphasis in original). They also have no right to introduce inadmissible hearsay, *Chambers v. Mississippi*, 410 U.S. 484 (1973), or evidence that is otherwise unreliable. *United States v. Scheffer*, 523 U.S. 303, 309 (1998). Victims cannot be afforded greater rights than defendants, whose liberty is at stake.

2. Public Proceeding Involving Release or Plea

Rule 60(a)(3) does not suggest that victims must be allowed to "speak" at a proceeding involving release or plea. They might be able to offer relevant factual testimony. *United States v. Marcello*, 370 F.Supp.2d 745, 745 (N.D. Ill. 2005) (excluding testimony of murder victim's son at bail hearing where oral statement was "not material to the decision at hand"). The right to be reasonably heard "does not empower victims to [have] veto power over any prosecutorial decision, strategy or tactic regarding bail, release, plea, sentencing or parole." *United States v. Rubin*, 558 F. Supp. 2d 411, 424 (E.D.N.Y. 2008)

As with any other witness, the defendant should have prompt access to any statement of the victim and a fair opportunity to prepare for and respond at the hearing. Victims and alleged victims should be placed under oath and subject to cross-examination. They are not entitled to offer testimony that is false, unreliable, irrelevant, prejudicial, incompetent, privileged, or otherwise inadmissible under the rules of evidence. If the right to be heard is to be "reasonable," the court must have the authority to hear the victim in writing, to control the timing, duration and tenor of any oral statement, and to impose any reasonable restriction necessary to ensure a fair proceeding and a decision based only on considerations that are relevant to the question before the court.

3. Public Proceeding Involving Sentencing

Under new Rule 32(i)(4)(B), "[b]efore imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard." The committee note states that "the judge must speak to any victim present in the courtroom at sentencing," and "[a]bsent unusual circumstances, any victim who is present should be allowed a reasonable opportunity to speak directly to the judge." *See* Fed. R. Crim. P. 32, 2008 advisory committee note. This rule raises a number of issues about the scope of the victim's "right to be heard" and the defendant's right to notice and an opportunity to challenge or otherwise address victim statements at sentencing.

a. Victims have no right to "speak" in all instances.

As explained in the Committee's report to the Supreme Court regarding controversial rules, the Committee declined to amend the rule to provide victims with the right to "speak to the court in all instances" because that would have "go[ne] beyond the language of the CVRA." [40] The language in the committee note was intended merely to "recognize[] current courts' practices," not to require it in every instance.[41]

You may wish to oppose a particular victim or all victims speaking and being spoken to. The statute itself (and Rule 60(b)(3)) provides for the court to "fashion a reasonable procedure . . . that does not unduly complicate or prolong the proceedings" when the number of victims makes it "impracticable to accord all of the victims the rights described in" subsection (a). 18 U.S.C. § 3771(d)(2). The judge may appoint one or a few spokespersons, or require all of the victims to be heard in writing. There may be other "unusual circumstances," *e.g.*, the victim(s) may be particularly untrustworthy, contentious or disruptive. It may be clear that they intend to make statements or arguments that threaten the defendant's right to a dispassionate and reasoned sentencing decision, or that would require a response that the court, or the victim, may not wish to occur in open court.

The purpose of a sentencing hearing is to sentence the defendant – the only person whose constitutional right to liberty is at stake – in accordance with 18 U.S.C. § 3553(a). This purpose should not be eclipsed by a series of individual conversations with victims, irrelevant disputes, or emotional displays. *See United States v. Korson*, 243 Fed. Appx. 141, 149 (6th Cir. Aug. 8, 2007) (upward departure based on victim statements would be a problem if judge "was influenced by the emotional nature" of the statements, but judge's explanation for upward departure was "well-reasoned and dispassionate").

b. The defendant has the right to notice and full opportunity to challenge victim status, victim impact statements, and victim testimony.

A person who merely shows up at sentencing claiming to be a "victim" should not automatically be allowed to "speak." The court must determine in advance whether the person even is a "victim" as defined by the CVRA, which can be a complex question requiring briefing and hearings. *See* Part VII.A, *infra*. Further, the defendant must be given prior notice, discovery of prior and proposed statements, and a fair opportunity to challenge the information through contrary information or cross-examination.

To guard against an unfair process, the Federal Defenders and NACDL asked the Rules Committee to adopt the following procedure:

> At or before any public proceeding in the district court concerning release, plea, or sentencing, the court shall adopt appropriate procedures which afford any

[40] *See* Proposed Rule Amendments of Interest, http://www.uscourts.gov/rules/supct0108/Controversial_report_Sup_Ct_2007.pdf.

[41] *Id.*

> victim the right to be reasonably heard. Such procedures must afford the parties notice, including prompt disclosure of any statement of the victim in the possession of the court, the Probation Officer or either party, and a fair opportunity to respond.

The Committee did not adopt this proposal, apparently because victim impact statements are included in presentence reports and because issues with fair notice could be addressed in the future if problems arose.[42] Meanwhile, defense counsel must insist on notice and a fair opportunity to challenge any statement by a victim or the right of a person claiming to be a victim to be heard at all, and seek a continuance if necessary to fully litigate the issues. If not, you will be appealing under a plain error standard.[43]

The right to notice and an opportunity to be heard is rooted in the Due Process Clause.[44] This right is protected through various provisions of Rule 32 and Rule 26.2, which require notice in the presentence report; the opportunity to investigate, object and present contrary evidence and argument to the Probation Officer; the opportunity to file a sentencing memorandum and argue orally to the court; the opportunity for a hearing; the right to obtain witness' statements, to have witnesses placed under oath and to question witnesses at any such hearing; and the right to have the court resolve any disputed matter. *See* Rule 32(e)(2), (f), (g), (h), (i); Fed. R. Crim. P. 26.2(a)-(d), (f). These protections apply to information about victim impact and restitution, *see United States v. Rakes*, 510 F.3d 1280, 1285-86 & n.3 (10th Cir. 2007); Fed. R. Crim. P. 32(d)(2)(B), (D); 18 U.S.C. § 3664(a), (b), (e), just as they apply to information provided by the government or any other witness.

In *United States v. Endsley*, slip op., 2009 WL 385864 (D. Kan. Feb. 17, 2009), the government made the astonishing argument that "the victim has a right to make a statement about how he feels the crime impacted him," but "the defendant has no parallel right to counter the information provided by the victim, especially not with extrinsic evidence." *Id*. at *1. The judge easily rejected this argument, holding that the defendant had a right to full adversary testing of sentencing issues, to be sentenced based on accurate information, and thus, "to challenge the government's [and the victim's] argument that the crime here had 'life-altering implications for the young victim.'" *Id*. at *2 & n.1. While the CVRA requires that a victim be treated "with fairness and with respect for [his] dignity and privacy," this did not "impinge[] on a

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[42] Advisory Committee on Criminal Rules, Minutes at 9, April 16-17, 2007, http://www.uscourts.gov/rules/Minutes/CR04-2007-min.pdf.

[43] *See United States v. Eberhard*, 525 F.3d 175, 178 (2d Cir. 2008) (where the defendant "neither objected to the victim statements nor requested additional time to prepare a more thorough response," it was "not plain error for the district court to impose sentence immediately thereafter"); *United States v. Korson*, 243 Fed. Appx. 141, 151 (6th Cir. Aug. 8, 2007) (no plain error in lack of notice that victims would speak at sentencing where no objection, no request for continuance, PSR contained some description of victim impact, and defendant did not claim on appeal that oral statements were false or show how he could have rebutted them).

[44] *See Burns v. United States*, 501 U.S. 129, 137-38 (1991); *Gardner v. Florida*, 430 U.S. 349, 351, 358 (1977); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

defendant's right to refute by argument and relevant information any matter offered for the court's consideration at sentencing," and the "the court will evaluate the victim impact statements against the same standards of reliability and reasonableness applied to all matters introduced at sentencing hearings." *Id*. at *2.

If a victim impact statement is offered in support of a "departure" or "variance," counsel is entitled to notice of it. The Supreme Court recently held that the requirement of Rule 32(h) that the court give the parties reasonable notice that it is contemplating a "departure" on a ground not identified for "departure" in the presentence report or in a party's prehearing submission does not apply to the court's contemplation of a "variance." *Irizarry v. United States*, 128 S. Ct. 2198 (2008). However, *Irizarry* still requires that the parties receive advance notice of all information relevant to sentencing, that all sentencing information be subjected to thorough adversarial testing, and that continuances should be requested and granted if any information comes as a surprise. *Id.* at 2203-04 & n.2. *See also Rita v. United States*, 127 S. Ct. 2456, 2465 (2007) (district court subjects "the defendant's sentence to thorough adversarial testing contemplated by federal sentencing procedure"); *Gall v. United States*, 128 S. Ct. 586, 597 (2007) (basing a sentence on clearly erroneous facts would be "procedural error"); *United States v. Warr*, 530 F.3d 1152, 1162-63 & n.8 (9th Cir. 2008). For further discussion, *see* Amy Baron-Evans, *After Irizarry*: (1) Notice of All Facts Must Still Be Given in the PSR, (2) Object and Seek a Continuance if Any Unnoticed Facts Arise, (3) Argue that the Reason is a "Departure" (August 11, 2008).[45]

c. Special issues with victim impact letters used by the government in child pornography cases

In child pornography cases, the government often submits written victim impact statements from "known victims" depicted in the images for inclusion in the presentence report. The Department of Justice apparently has a stock of such letters for use at sentencing. While Fed. R. Crim. P. 32(d)(2)(B) requires that the report contain "information that assesses any financial, social, psychological, and medical impact on any victim," it does not appear that any individual Probation Officer has assessed the accuracy or relevance of these letters. Defense counsel should not accept unquestioningly that they are accurate or admissible.

Defense counsel should be prepared to object to the government reading these letters aloud at sentencing when the victim is not present. The Eleventh Circuit, reviewing for plain error, has found such letters relevant to the seriousness of the offense and allowed by the CVRA. *See United States v. Horsfall*, 552 F.3d 1275 (11th Cir. 2008). Notwithstanding *Horsfall*, Rule 32(i)(4)(B), providing that the "court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard," does not contemplate an oral reading of letters from victims who are not present. For victims appearing in person, a written statement may sometimes be inadequate for those who want "to look [a] defendant in the eye and let him know the suffering his misconduct has caused." *Kenna*, 435 F.3d at 1016, 1017. For absent victims, those considerations do not apply. Hence, reading letters from absent victims aloud, particularly when the letters come from a stock of such letters that the government has on

[45] Available at http://www.fd.org/pdf_lib/After%20Irizarry.pdf.

file, does not serve a legitimate or necessary purpose under § 3553(a) or the CVRA. Because the letters themselves are available for the judge to review, reading them aloud serves no purpose other than to place public pressure on the judge to impose a stiff sentence.

These letters may not be relevant and are likely to be unduly prejudicial. Any statement of a victim at sentencing must be relevant to the "impact" on the victim, or to the defendant's own conduct or characteristics under § 3553(a). Some of the letters in the government's stock contain graphic information and details about other crimes, namely, sexual abuse by others that occurred many years ago, of which the defendant had no knowledge and for which he had no responsibility. The letters often contain graphic information about the production of the pornography. This is not relevant to the conduct of the defendant, or the "impact" of the defendant's conduct on the victim. All of this information is irrelevant and prejudicial and should be redacted.

The farther removed from the actual crime, the less probative the evidence, and the more likely that it will lead to sentences based on emotion rather than reason. *See, e.g.*, *Kenna v. United States District Court*, 435 F.3d 1011, 1014 (9th Cir. 2006) (acknowledging that district court "may place reasonable constraints on the duration and content of victims' speech"); *United States v. Hunter*, 2008 WL 53125 *6 (D. Utah Jan. 3, 2008) (no right to be heard under CVRA by persons who were not "victims," and no right under court's discretionary power because they had no information regarding the defendant's background, character or conduct); *United States v. Forsyth*, slip op., 2008 WL 2229268 (W.D. Pa. May 27, 2008) (excluding "victim impact" letter because author was not a "victim" under CVRA, and although "relevant" under § 3553(a), it did not have sufficient reliability under Due Process Clause).

Finally, many of these letters are written by parents of victims who are now adults. The CVRA provides no authority for parents of a competent adult to assert or assume her rights. *See* Part VII.A.2, *infra*.

d. Unduly prejudicial victim impact presentations

Dissenting opinions of Justices Stevens and Breyer in two cases involving inflammatory victim impact presentations provide a helpful framework for challenges to the admission of victim impact evidence *See Zamudio v. California*), 129 S.Ct. 564 (2008) (Stevens, J., dissenting from denial of certiorari); *Zamudio v. California*, 129 S.Ct 567 (2008) (Breyer, J., dissenting from denial of certiorari). In *Kelly*, the jury was shown a 20-minute video consisting of a montage of photographs and video footage of the victim's life and images of things she loved, narrated by the victim's mother with soft music playing in the background. 129 S. Ct.at 564. In *Zamudio*, the jury heard testimony from four of the victims' family members (two daughters and two granddaughters), and saw a video montage of 118 photographs of the victims' lives. *Id.*

Justice Stevens' dissent gives a good outline of challenges to the admission of victim impact evidence. He examines the background on the recent phenomenon of victim impact evidence and the Supreme Court's shifting approach to it. He then discusses due process concerns both with the usefulness of the evidence and the format in which it was presented in

both cases. In terms of the substance, Justice Stevens would have found the evidence "especially prejudicial" in these cases because it was "emotionally evocative," was "not probative of the culpability of the character of the offender or the circumstances of the offense," and was "not particularly probative of the impact of the crimes on the victims' family members." *Id*. at 567. As for the format, Justice Stevens said that "when victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming":

> [T]heir primary, if not sole, effect was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants. The videos added nothing relevant to the jury's deliberations and invited a verdict based on sentiment, rather than reasoned judgment. . . . In their form, length, and scope, they vastly exceed the "quick glimpse" the Court's majority contemplated [in *Payne v. Tennessee*, 501 U.S. 808 (1991)].

Id. Justice Stevens closed his dissent with a call to the Court to provide guidance on the scope of admissible victim evidence: "Having decided to tolerate the introduction of evidence that puts a heavy thumb on the prosecutor's side of the scale in death cases, the Court has a duty to consider what reasonable limits should be placed on its use." *Id*.

Justice Breyer's dissent stressed his concerns with the manner in which the evidence was presented. 129 S.Ct. at 567. "[T]he film's personal, emotional, and artistic attributes themselves create the legal problem. They render the film's purely emotional impact strong, perhaps unusually so." *Id*. at 568. That impact was driven, according to Justice Breyer, by the sum of its parts – the music, the voice-over, and the use of scenes without the victim or her family – which told the jury little or nothing about the circumstances of the crime. "It is this minimal probity coupled with the video's *purely emotional impact* that may call due process protections into play." *Id.* (emphasis in original). Justice Breyer would have used the cases as examples to "help elucidate constitutional guidelines."

e. Victims do not have a right to litigate the sentence or make sentencing recommendations.

In some cases, victims have claimed that the "right to be reasonably heard" includes a right to litigate the sentence and make a specific sentencing recommendation. The courts have rejected this position. *See In re Brock*, 262 Fed. Apx. 510 (4th Cir. 2008) (no right to present argument regarding, or to appeal, guideline calculations); *United States v. Hunter*, 548 F.3d 1308, 1311-12 (10th Cir. 2008) (victim has no right to appeal a defendant's sentence because a victim is not a party); *United States v. Hughes*, 283 Fed. Apx. 345, 354 n.7 (6th Cir. 2008) (disapproving district court's reliance on speculation as to the victim bank's preference for a sentence that would allow defendant to repay the debt rather than a lengthy prison term, in part because the bank's preference was speculation, but also because the court of appeals questioned "why the particular desires of this victim should affect the legal analysis necessary for sentencing Hughes"); *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006) (affirming district court's rejection of victim's claimed right to litigate guidelines as basis for disclosure of PSR); *Kenna I*, 435 F.3d at 1014 & n.2 (stating that the right to be "reasonably heard" is similar to a "right of allocution,"

not a right to present evidence and legal argument). *See also Defending Against the Crime Victim Rights Act* at 19-23 (May 5, 2007) (discussing plain language, congressional intent and constitutional principles on this point), http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf.

Although it has been suggested that *Payne v. Tennessee*, 501 U.S. 808 (1991) provides support for a right of victims to recommend a sentence, the opposite is true. There, the Court held that the Eighth Amendment does not bar the admission of "'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family" during the penalty phase of a capital trial, *id*. at 817, though such evidence may be unduly prejudicial such that it violates the Due Process Clause. *Id*. at 825. In *Payne*, a family member testified to the emotional impact on the victim's family, but did not recommend a sentence. *Id*. at 814-15. The Court explicitly limited its holding to "the impact of the victim's death on the victim's family" and explicitly left standing its previous holding prohibiting "a victim's family members' characterizations and opinions about the crime, the defendant, *and the appropriate sentence*." *Id*. at 830 n.2 (emphasis supplied). *See also Welch v. Simons*, 451 F.3d 675, 703 (10th Cir. 2006) (collecting cases).

f. Victims do not have a right to obtain the presentence report.

By statute and rule, the pre-sentence report is disclosed only to the parties.[46] Before the CVRA, a solid wall of authority held that no one but the parties may obtain the pre-sentence report.[47] All of the courts to have ruled on the question after the CVRA have held that victims may not obtain the presentence report.[48]

While victims have the right to provide the court with information about restitution, they do not have the right to review the pre-sentence report to learn about the defendant's assets or ability to pay restitution. Victims are given the opportunity to provide information *to* the court regarding restitution, *see* 18 U.S.C. § 3664(d)(1), (2), (5), but the "privacy of any records filed, or testimony heard" on the subject of restitution, whether from the defendant, other victims, or anyone else, "shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera." 18 U.S.C. § 3664(d)(4). This "is not an inherently collaborative effort" but "clearly only for gathering the necessary information, not for the solicitation of creative input." *United States v. Rubin*, 558 F. Supp. 2d 411, 426 (E.D.N.Y. 2008).

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[46] S*ee* 18 U.S.C. § 3552(d); 18 U.S.C. § 3664(b); Fed. R. Crim. P. 32(e)(2).

[47] *See Defending Against the Crime Victim Rights Act* at 23-24 (May 5, 2007) (discussing policy basis of and caselaw regarding confidentiality of PSR), http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf.

[48] *See In re Brock*, slip op., 2008 WL 268923 (4th Cir. Jan. 31, 2008); *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006); *United States v. Coxton*, 598 F. Supp. 2d 737 (W.D.N.C. 2009); *United States v. BP Products*, 2008 WL 501321 *9 (S.D. Tex. Feb. 21, 2008); *United States v. Hunter*, 2008 WL 53125 *7 (D. Utah Jan. 3, 2008) (Kimball, J.); *United States v. Citgo Petroleum Corp.*, 2007 WL 2274393 *2 (S.D. Tex. Aug. 8, 2007); *United States v. Sacane*, 2007 WL 951666 *1 (D. Conn. Mar. 28, 2007); *United States v. Ingrassia*, 2005 WL 2875220 *17 (E.D.N.Y. 2005).

E. "Reasonable Right to Confer with the Attorney for the Government," § 3771(a)(5)

Victims have a "reasonable right to confer with the attorney for the government in the case." 18 U.S.C. § 3771(a)(5). This right, however, is limited. First, "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). Second, the legislative history of the CVRA makes clear that "[u]nder this provision, victims are able to confer with the Government's attorney after charging." 150 Cong. Rec. S4260, S4268 (daily ed. Apr. 22, 2004) (emphasis supplied). Third, in addition to these statutory limits, defendants have certain due process rights that cannot be upset by victims' interference with the terms of a plea bargain; they have the right to be accurately apprised of the consequences of a plea, *Mabry v. Johnson*, 467 U.S. 504, 509 (1984), and to specific enforcement of a promise made in a plea bargain. *Santobello v. New York*, 404 U.S. 257, 262 (1971).

"[T]here is absolutely no suggestion in the statutory language that victims have a right independent of the government to prosecute a crime, set strategy, or object to or appeal pretrial or in limine orders entered by the Court whether they be upon consent of or over the objection of the government. Quite to the contrary, the statute itself provides that '[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.' 18 U.S.C. § 3771(d)(6). In short, the CVRA, for the most part, gives victims a voice, not a veto." *United States v. Rubin*, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008); *see also In re Huff Asset Management Co.*, 409 F.3d 555, 564 (2d Cir. 2005) ("Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.").

The Fifth Circuit, however, perhaps in its haste to issue a decision within 72 hours on a mandamus petition, missed this legislative analysis in *In re Dean*, 527 F.3d 391 (5th Cir. 2008). *Dean* originated in the district court as *United States v. BP Products North America Inc.*, 2008 WL 501321 (W.D. Tex. Feb 21, 2008). There, the alleged victims asked the court to reject an 11(c)(1)(C) agreement based on the claim that the government failed to comply with its duty to use best efforts to give them notice of their rights, *see* 18 U.S.C. § 3771(c)(1), by not notifying them of their right to confer until after the plea agreement was signed. The judge wrote that "[d]ecisions on whether to charge, who to charge, and what to charge, are all in the prosecutor's discretion," *id*. at *11, and that the "right to confer is not a right to approve or disapprove a proposed plea in advance of the government's decision." *Id*. at *15.

Although alleged victims do not have a right to confer before charges have been filed, *see* 150 Cong. Rec. S4260, S4268 (daily ed. Apr. 22, 2004), the government moved for and received, *ex parte*, an order from the court delaying notice until the agreement was executed based on (1) the large number of victims, (2) the extensive media coverage, (3) the potential damage to plea negotiations, and (4) the prejudice to the defendants' right to a fair trial if negotiations broke down. Counsel for the victims argued that "the government had no constitutional obligation to protect [the defendant's] right to a fair trial in the event plea negotiations failed" because "there is no constitutional right to plea bargain," and that "if there was a choice between protecting the

rights of the crime victims or the rights of [the defendant], the CVRA required the government to side with the victims." *Id.* at *17. The district court rejected these arguments on policy and constitutional grounds. *Id*. at **17-18. At the plea hearing, the victims were allowed to speak and asked the court to reject the agreement, which the court declined to do.

The victims then petitioned for mandamus seeking instructions that the plea agreement not be accepted. *In re Dean*, 527 F.3d 391, 392 (5th Cir. 2008). The Fifth Circuit panel denied the petition because the victims were allowed to be heard at the plea hearing. *Id*. at 395-96. Overlooking the legislative history that the right to confer applies only after charging, the court held that the district court violated the CVRA by not fashioning a way to inform the victims of the likelihood of criminal charges and to ascertain their views on a plea bargain. Because the panel was careful to confine this to the specific facts, circumstances and posture of this case, *id*. at 394-95, the opinion should have limited precedential value regarding a victim's right to confer with the government regarding a charge and plea.

Nor does the "right to confer" give victims a greater voice in seeking restitution. The MVRA, not the CVRA, controls the extent to which the prosecutor discusses restitution with victims. "Under 18 U.S.C. § 3664(d)(1), the government is to consult, 'to the extent practicable, with all identified victims' in order to 'promptly provide the probation officer with a listing of the amounts subject to restitution.' . . . [T]he MVRA's 'consultation' requirement [requires] the government to gather from victims and others the information needed to list the amounts subject to restitution in the report" which "does not require the victim's seal of approval, or even solicitation of the victim's opinion beyond those facts that would assist the government's required calculations," and "is not an inherently collaborative effort," but "clearly only for gathering the necessary information, not for the solicitation of creative input." *Id.* at 426.

F. "Full and Timely Restitution As Provided in Law," § 3771(a)(6); Rule 32(c)(1)(B)

Victims have a "right to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6). The CVRA "makes no changes in the law with respect to victims' ability to get restitution." *See* H.R. Rep. No. 108-711, 2005 U.S.C.C.A.N. 2274, 2283 (Sept. 30, 2004). The CVRA does not expand a victim's rights to restitution, *United States v. Rubin*, 558 F. Supp. 2d 411, 420-21, 425-27 (E.D.N.Y. 2008), and confers no right to appeal a restitution order. *United States v. Hunter*, 548 F.3d 1308, 1313 (10th Cir. 2008).

Under new Rule 32(c)(1)(B), the probation officer must conduct an investigation and submit a report with sufficient information for the court to order restitution if the law "permits" restitution. Previously, such a report was required only if the law "requires" restitution. This is to "implement[] the victim's statutory right . . . to 'full and timely restitution as provided in law.'" Fed. R. Crim. P. 32, 2008 committee note. The only apparent effect of this amendment will be to require preparation of a report on restitution when the court would otherwise find that no presentence report, or any part of a presentence report, is required for it to meaningfully exercise its discretion under § 3553(a). *See* Fed. R. Crim. P. 32(c)(1)(A)(ii).

G. Proceedings "free from unreasonable delay," § 3771(a)(7)

This provision is "not intended to infringe on the defendant's due process right to prepare a defense." 150 Cong. Rec. S4260-01 at S4268 (Apr. 22, 2004). Nor is it meant to deprive the parties or the court of adequate time to prepare the case and review the issues. In *United States v. Tobin*, 2005 WL 1868682 (D.N.H. July 22, 2005), the judge granted a joint motion for a continuance over the alleged victim's objection, noting that Congress did not intend the CVRA to undermine the Speedy Trial Act or deprive defendants or the government of a full and adequate opportunity to prepare for trial; the defendant's right to adequate preparation is of "constitutional significance"; and allowing the victim's "discrete interests" to control "runs the unacceptable risk of [the] wheels [of justice] running over the rights of both the accused and the government, and in the end, the people themselves." *See also United States v. Hunter*, 2008 WL 53125 *1 n.1 (D. Utah Jan. 3, 2008)(victims have no right to deprive the court of adequate time to review the positions of the parties and decide the issue)

H. "Right to be Treated with Fairness and with Respect for the Victim's Dignity and Privacy," § 3771(a)(8)

The "right to be treated with fairness and with respect for the victim's dignity and privacy" is one of the stated bases of the amendment to Rule 12.1(b), and the only stated basis for the amendment to Rule 17(c)(3). These rules are more fully discussed in Part VI, but the following is also relevant.

1. Decisions construing the right

Three courts have recognized that this "right" cannot be used to up-end the adversary system or infringe the defendant's rights. *See United States v. Endsley*, slip op., 2009 WL 385864 *2 (D. Kan. Feb. 17, 2009) (the right to be treated "with fairness and with respect for dignity and privacy" does not "impinge[] on a defendant's right to refute by argument and relevant information any matter offered for the court's consideration at sentencing."); *United States v. Rubin*, 558 F. Supp. 2d 411, 427-28 (E.D.N.Y. 2008) ("the Court refuses to adopt an interpretation of (a)(8) that prohibits the government [or the defendant] from raising legitimate arguments in support of its opposition to a motion simply because the arguments may hurt a victim's feelings or reputation."); *United States v. Vaughn*, slip op., 2008 WL 4615030 at **2-3 & n.1 (E.D. Cal. Oct. 17, 2008) (while "§ 3771(a)(1) and (8) point to the need to protect victims from their assailants," and even "the most civil of defense investigators may chill the desire of a victim/witness to testify simply because of the [victim's] fears," but "a defendant has the right to test the government's evidence.").

Two courts have relied on "dignity and privacy," in part, to limit press access to information about victims of extortion. *See United States v. Patkar*, 2008 WL 233062 (D. Hawaii Jan. 28, 2008); *United States v. Robinson*, slip op., 2009 WL 137319 (D. Mass. Jan. 20, 2009).

2. The right is impermissibly vague.

Defense counsel should strongly oppose any effort to use the "right" to "respect for the victim's dignity and privacy" as a standard for any decision in the trial process as impermissibly vague in violation of the Due Process Clause. Such standardless language runs afoul of the "arbitrary enforcement" component of the vagueness doctrine by authorizing determinations based on the subjective feelings of the alleged victim or the subjective views of the court, which would be impossible to contest.

Due process requires a government to provide meaningful standards to guide the application of its laws. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983). A statute, rule or policy is impermissibly vague "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Chicago v. Morales*, 527 U.S. 41, 56-57 (1999); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). "Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974); *Kolender*, 461 U.S. at 358 ("Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.").

The Supreme Court has struck down several criminal statutes as impermissibly vague. In *Coates v. Cincinnati*, 402 U.S. 611 (1971), the Court struck down a statute that based criminal liability on whether the defendant's conduct was "annoying," because it specified no standard of conduct at all, depending instead on the wholly subjective judgments of those enforcing the law. *Id*. at 614. In *Smith*, the Court struck down as impermissibly vague a statute that made it a crime to "treat contemptuously" the United States flag. *See* 415 U.S. at 575.

The law in question need not define a crime to be found impermissibly vague due to inadequate guidance or insufficient standards. "[T]he procedural or substantive law, the purposes of which are to direct a cause of action through the courts, cannot afford such vagueness." *United States v. Colorado Supreme Court*, 189 F.3d 1281, 1287 (10th Cir. 1999). For example, in *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991), the Supreme Court held that a state court's interpretation of an ethical rule was "so imprecise that discriminatory enforcement is a real possibility." *Id*. at 1048-51; *see also United States v. Wunsch*, 84 F.3d 1110 , 1119-20 (9th Cir. 1996) (quoting *Gentile)* (holding that a rule, which provided that it is the duty of an attorney to abstain from "all offensive personality," was unconstitutionally vague because it is "'so imprecise that discriminatory enforcement is a real possibility.'"). In *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), the Court struck down a statute and accompanying jury instructions that permitted a jury to place trial costs on an acquitted defendant by assessing whether his conduct was "reprehensible in some respect," "outrageous to morality and justice," or "some misconduct." *Id*. at 403-04. The Court held that the statute was "invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs." *Id*. at 402. The trial judge's additional guidance, requiring the jury to find "some misconduct," did not save it. *Id*. at 404. Nor did it matter that the issue was "civil in nature." *Id*. at 402.

These cases provide powerful tools support for arguments that the "right to be treated with fairness and with respect for the victim's dignity and privacy" is unconstitutionally vague and should be given a narrow construction.

VI. Special Procedures Created Solely by the Rules

A. Rule 12.1(b)

As amended, Rule 12.1(b) provides that after disclosing the name, address and telephone number of alibi witnesses, the defendant only receives the *name* of any alleged victim that the government intends to rely on in rebuttal. The defendant does not receive the alleged victim's address or telephone number unless he shows a "need." If the defendant shows a "need" for the address and telephone number, the court may order the government to provide it, *or* may deny disclosure under "a reasonable procedure that allows preparation of the defense and also protects the victim's interests."

The stated purpose of the amendment is to "implement[] the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused and to be treated with respect for the victim's dignity and privacy." Fed. R. Crim. P. 12.1, 2008 advisory committee note. On its face, the amendment appears to be unconstitutional and in violation of the Rules Enabling Act. According to a Committee Report, however, the Committee did not intend that the rule would actually be applied to violate defendants' rights.

In challenging the new rule, you can argue that it: (1) is invalid under the Constitution; (2) violates the Rules Enabling Act; and (3) must be interpreted to avoid violating the defendant's rights.

1. The amendment is unconstitutional.

a. A notice of alibi rule that requires the defendant to disclose information but does not guarantee reciprocal discovery violates the Due Process Clause.

The Due Process Clause, which "speak[s] to the balance of forces between the accused and the accuser," prohibits notice-of-alibi rules that are not reciprocal:

> [W]e do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. . . . Indeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor. . . . It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

Wardius v. Oregon, 412 U.S. 470, 475-76 & n. 9 (1973).

It is no answer that the court *might* order reciprocal discovery after the defendant disclosed his information:

> [I]t is this very lack of predictability which ultimately defeats the State's argument. At the time petitioner was forced to decide whether or not to reveal his . . . defense to the prosecution, he had to deal with the statute as written with no way of knowing how it might subsequently be interpreted. Nor could he retract the information once provided should it turn out later that the hoped-for reciprocal discovery rights were not granted.

Id. at 477.

b. Even when the defendant has not been required to disclose any information, placing the burden on the defendant to establish the need for a witness's address violates the Due Process Clause.

The proposed rule is also unconstitutional under Supreme Court cases holding that witnesses' addresses may not be withheld at the expense of the defendant's rights to effectively investigate, cross-examine, and call witnesses in his own behalf, and that the need for that information is presumed. *Smith v. Illinois*, 390 U.S. 129 (1968); *Alford v. United States*, 282 U.S. 687 (1931).

In *Smith*, the Supreme Court reversed a conviction where the trial court prohibited questions of a government witness regarding his real name and address, stating:

> When the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination *and out-of-court investigation*. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

Id. at 131 (internal quotation marks and citations omitted) (emphasis supplied). The Court held that no declaration of purpose for questioning the witness about his name and address was required. *Id*. at 132.

In *Alford*, defense counsel argued that he needed to elicit the witness's address (federal prison) to establish bias, but the trial judge disallowed the question. The Supreme Court stated:

> Cross-examination of a witness is a matter of right. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood; that the jury may interpret his testimony in the light

> reflected upon it by knowledge of his environment; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased.

Id. at 691-92 (internal citations omitted). To require the defendant to show a need is itself to deny a substantial right:

> To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . . The question, "Where do you live?" was not only an appropriate preliminary to the cross-examination of the witness, but on its face without any declaration of purpose as was made by [defense] counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed.

Id. at 692-93.

"*Alford* and *Smith* thus make it clear that a defendant is presumptively entitled to cross-examine a key government witness as to his address and place of employment." *United States v. Navarro*, 737 F.2d 625, 633 (7th Cir. 1984). Disclosure of a key witness's name and address before trial is often even more important than eliciting it in open court because it assures that the defendant can investigate the witness's background to discover avenues for impeachment. *Martin v. Tate*, 96 F.3d 1448 (Table), 1996 WL 506503 *6 (6th Cir. 1996).

To overcome the presumption, the government or the witness must make a specific showing that disclosure would endanger the witness' safety, or would *merely* harass, annoy, or humiliate the witness. *See Smith*, 390 U.S. at 133-34 (White, J., Marshall, J., concurring); *Alford*, 282 U.S. at 694; *see also, e.g.*, *United States v. Hernandez*, 608 F.2d 741, 745 (9th Cir. 1974); *United States v. Dickens*, 417 F.2d 958, 961-62 (8th Cir. 1969); *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969); *United States v. Varelli*, 407 F.2d 735, 750-51 (7th Cir. 1969); *United States v. Barajas*, 2006 WL 35529 **7-9 (E.D. Cal. 2006); *United States v. Fenech*, 943 F. Supp. 480, 488-89 (E.D. Pa. 1996).

c. The amended rule infringes a weighty right of the accused, fails to advance any legitimate procedural purpose, and is arbitrary and disproportionate to its stated purposes.

A rule that interferes with a weighty interest of the accused, and serves no legitimate procedural purpose, or is arbitrary or disproportionate to its purposes is invalid. *See Holmes v. South* Carolina, 547 U.S. 319 (2006). Amended Rule 12.1(b) interferes with the rights to reciprocal discovery, to investigate and prepare for trial, to cross examine the witness at trial, and not to be put at a disadvantage to the government.

The rule does not advance a procedural purpose at all, but victims' substantive interests. Moreover, the victim's interest in non-disclosure is presumed. No case-specific showing of a

need for protection is required. No case-specific showing of impairment of the impermissibly vague right to "dignity and privacy" is required. *See* Part V.H.2, *supra*. The amended rule arbitrarily presumes that all alleged victims need protection from all defendants and that their dignity and privacy are threatened by defense trial preparation

A blanket presumption of nondisclosure is not necessary to protect alleged victims in need of protection because Rule 12.1(d) already contains a good cause exception. Courts have applied this exception where necessary to protect the safety of a witness, while still protecting the defendant's rights. For example, in *United States v. Wills*, 88 F.3d 704 (9th Cir. 1996), the Ninth Circuit upheld the district's decision to allow the government's motion under Rule 12.1(d) to delay disclosure based on witness safety, and to delay witness's testimony to permit a reasonable time for defense to investigate. *Id*. at 710.

The rule is also disproportionate to its stated purpose. To justify such a rule, there must be a "strong showing of state interests." *Wardius*, 412 U.S. at 475-76. A presumption that alleged victims are in need of protection and that their dignity and privacy are threatened by ordinary trial preparation is not a strong showing of state interests. *See, e.g., Maryland v. Craig*, 497 U.S. 836, 845 (1990); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608-09 (1982).

The full Congress did not intend for the rights of a victim to "be reasonably protected from the accused" or to "dignity and privacy" to abridge defendants' constitutional rights. In the one instance in which it meant to confer a procedural right on victims or alleged victims that altered the traditional adversarial balance, it did so explicitly.[49] It did not do so here. Congress did not expect that defendants' longstanding constitutional rights to reciprocal discovery and to effectively prepare for and conduct a defense would be undone through a rule said to "implement" inherently vague and subjective "rights" to "dignity and privacy," or the right "to be protected from the accused" without any showing that protection is needed. *See United States v. Rubin*, 558 F. Supp. 2d 411, 419-21 (E.D.N.Y. 2008) (CVRA is not a "wellhead of boundless authority to fashion protection for victims in the guise of 'protecting them from the accused.'").

Defenders and NACDL asked the Committee to revise the rule to place the burden on the alleged victim or the government to show that disclosure of the address or telephone number would violate the victim's right to be reasonably protected from the accused, and, if so, to allow an alternative procedure that assured effective preparation of the defense. The Committee declined to adopt that alternative because it might have to be republished for comment and because of a letter it received from Senator Kyl.[50]

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[49] *See* 18 U.S.C. § 3771(a)(3), (b)(1) (specifying that victim witnesses have a right not to be excluded from a public court proceeding unless the court finds by clear and convincing evidence that their testimony would be materially altered by hearing the testimony of other witnesses and there is no reasonable alternative to exclusion).

[50] *See* Advisory Committee on Criminal Rules, Minutes at 6, April 16-17, 2007, http://www.uscourts.gov/rules/Minutes/CR04-2007-min.pdf.

The Committee's deliberations confirm that the rule is arbitrary. It acknowledged the extensive comments criticizing the rule for tipping the adversarial balance too far as a constitutional matter, in particular "that this violates the fundamental requirement that discovery be reciprocal, which is a condition of requiring the defendant to produce information about his defense in advance of trial; the defendant must provide the names and contact information for his alibi witnesses, but he may be denied the same information about victims who will be called as alibi witnesses."[51] Against the authority of *Wardius v. Oregon*, 412 U.S. 470 (1973), the Committee considered comments from victim advocates arguing the rule "gives too little weight" to victim interests because it allowed, on a showing of need for the information, disclosure to the defendant or a reasonable alternative procedure.[52] Weighing a Supreme Court decision directly on point against a patently absurd position that failed to recognize a defendant's constitutional rights, the Committee adopted the amendment, stating that it "strikes the appropriate balance and does not violate the requirement that discovery be reciprocal."[53]

2. The amendment violates the Rules Enabling Act.

The amendment violates the Rules Enabling Act because its stated purpose is not to manage the litigation process between the parties – the government and the defendant -- but to advance the substantive interests of alleged victims, and in doing so it abridges the defendant's constitutional rights. *See* Part IV.C, *supra*.

3. Apply the rule to avoid violating the defendant's rights.

Even if the court declines to strike down the rule as unconstitutional or a violation of the Rules Enabling Act, counsel should urge the court to narrowly construe it so as not to violate a defendant's rights. As the Supreme Court found regarding a civil rule that may have violated the Constitution and the Rules Enabling Act, a "limiting construction finds support in the Advisory Committee's expressions of understanding, minimizes potential conflict with the Rules Enabling Act, and avoids serious constitutional concerns." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999).

a. "Need" means you don't have it.

The Committee recognized that it may not be appropriate, in one of the few circumstances where defendants must disclose aspects of their defense, to require defendants "to show a need for basic contact information that they would nearly always require to conduct an investigation."[54] The Subcommittee responded that reciprocal disclosure was "maintained"

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[51] *See* Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 4, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf.

[52] *Id.*

[53] *Id.*

because establishing the need for the address and phone number was "not a heavy burden," and, if the defendant did not already know the address and telephone number, he could "easily show a need."[55] The Report to the Standing Committee stated that the showing of need was such a "low threshold" that "the defense will be able to meet this standard" unless "the defense is already aware of the . . . contact information" of the victim rebuttal witness.[56]

b. The alleged victim or the government must establish that disclosure of the information would create a "risk" to the victim's safety, such that an alternative procedure is necessary.

Once you establish a need for the information by stating that you do not have the address and/or telephone number, the court may either:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or
(ii) fashion a reasonable procedure that allows preparation of the defense and also protects the victim's interests.

Fed. R. 12.1(b)(1)(B).

The Report to the Standing Committee indicates that the burden rests on the government or the alleged victim to show a need for protection. It states that the purpose of requiring the defense to come forward with a showing of "need" for the information is merely to "bring the issue to the court," to "give[] the government or the victim time to weigh in before disclosure can occur."[57] It simply "triggers the court's consideration of all aspects of the *risk* and need analysis," which, on the "risk" side, is a need "to *protect* the victim."[58] Because no mention is made of a need to protect the victim's "dignity and privacy," such considerations should not be sufficient to preclude disclosure to the defense.

In light of this report and the defendant's constitutional rights, the government or the alleged victim must establish that the risk to the alleged victim's safety outweighs the defendant's need for the information itself, such that a "reasonable" alternative procedure is necessary.

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[54] Advisory Committee on Criminal Rules, Minutes at 5, April 16-17, 2007, http://www.uscourts.gov/rules/Minutes/CR04-2007-min.pdf.

[55] *Id*.

[56] *See* Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 4-5, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf.

[57] *Id.* at 5 (emphasis supplied).

[58] *Id.*

c. Any "reasonable procedure" cannot infringe on the defendant's rights.

A variety of procedures might be fashioned under the rule. Certain governing principles, however, should be kept in mind. The defense cannot be forced to interview the witness in the presence of the government.[59] In some cases, it may suffice to meet at a neutral location. However, the address and telephone number themselves are often critical to investigation and cross examination. The address is needed to interview the witness's neighbors. Telephone numbers are often essential to corroborate or refute the government's allegations, for example, to determine whether alleged conversations actually took place, whether there were calls the government did not disclose, or whether the witness was where he says he was at relevant times.

If the alleged victim needs protection from the accused, a "reasonable" procedure may be that the defendant not attend the interview, or that the victim's address and telephone number be disclosed to the defense team under a protective order prohibiting disclosure to the defendant. If disclosure is delayed, the court must grant sufficient additional time to investigate. *See Wills*, 88 F.3d at 710.

The court's decision in *United States v. Vaughn*, slip op., 2008 WL 4615030 (E.D. Cal. Oct. 17, 2008), shows a judicious use of a protective order to fashion a "reasonable procedure." In *Vaughn*, the defense moved for discovery of the government witnesses' identities, including names, addresses and telephone numbers, among other things. The government had produced Jencks Act material with that information redacted. The judge ordered the government to file a witness list "with appropriate identification of witnesses," to "include contact information." *Id*. at *2. The government argued that the defendant might seek retaliation against the witnesses because he had used coercion and threats in the course of the offense. *Id*.

The judge noted that while "§ 3771(a)(1) and (8) point to the need to protect victims from their assailants," and even "the most civil of defense investigators may chill the desire of a victim/witness to testify simply because of the [victim's] fears," "[t]here is no general concern of the CVRA to hide a victim's identity at all costs." *Id*. at *3. Such "costs" were:

> [A] defendant has the right to test the government's evidence, and only the most unpracticed lawyers would be satisfied with their preparation if they had no

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[59] *See Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) (Sixth Amendment violated when sheriff in whose presence defense attorney was forced to prepare client for trial passed attorney work product on to prosecutor); *Williams v. Woodford*, 384 F.3d 567, 585 (9th Cir. 2004) ("Substantial prejudice results from . . . the prosecution's use of confidential information pertaining to defense plans and strategy, and from other actions designed to give the prosecution an unfair advantage at trial."); *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) ("[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he . . . prepare his legal theories and plan his strategy without undue and needless interference."); *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (indigent defendant has a right to make an *ex parte* showing of relevance of expert testimony); *Weatherford v. Bursey*, 429 U.S. 554, 558 (1977) ("communication of defense strategy to the prosecution" would violate Sixth Amendment).

> opportunity to meet the government's star witness(es) until the day of testimony. Why even bother with cross-examination if one cannot prepare for it?

Id. The judge ordered disclosure of names, addresses, email addresses, and telephone numbers under a protective order precluding dissemination to the defendant or anyone other than the defense team.

B. Rule 17(c)(3)

The amendment to Rule 17(c)(3), requiring a court order for a subpoena "requiring the production of personal or confidential information" about a victim, and, in some circumstances, prior notice to the victim, has already engendered litigation and confusion. In particular, prosecutors and/or victim advocates have argued that the rule bars *ex parte* applications and *ex parte* approval of subpoenas; that the standard for issuance of a subpoena has been modified by the terms "personal and confidential" and "dignity and privacy"; and that the government has "standing" to contest the subpoena. It is important to understand what the amendment says and insist that it be read and applied strictly.

1. Before the Amendment

Historically, Rule 17(c) subpoenas were issued in blank at the request of a party and served without notice to opposing counsel.[60] The government and defendants able to pay requested the subpoena from the clerk. Fed. R. Crim. P. 17(a). Defendants unable to pay made an *ex parte* showing of inability to pay and necessity for an adequate defense. Fed. R. Crim. P. 17(b).

The provision for *ex parte* application for indigent defendants was added in 1966 because "[c]riticism has been directed at the requirement that an indigent defendant disclose in advance the theory of his defense in order to obtain issuance of a subpoena . . . while the government and defendants able to pay may have subpoenas issued in blank without any disclosure." Fed. R. Crim. P. 17, 1966 advisory committee note. In other words, it was obvious that a noticed application would disclose litigation strategy to the government, placing the defendant at a disadvantage. Thus, the 1966 amendment "plac[ed] all defendants, whether impoverished or with ample financial resources, on equal footing, and it prevent[ed] the Government from securing undue discovery." *United States v. Hang*, 75 F.3d 1275, 1281 (8th Cir. 1996); *see also Holden v. United States*, 393 F.2d 276 (1st Cir. 1968). Further, the court's discretion whether to approve an indigent's application was "considerably narrowed by two constitutional rights of the defendant: (1) the Sixth Amendment right 'to have compulsory process for obtaining witnesses in his favor'; and (2) the Fifth Amendment right to protection against unreasonable discrimination," which meant that "there should be no more discrimination than is necessary to protect against abuse of process." *Welsh v. United States*, 404 F.2d 414, 417 (5th Cir. 1968).

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[60] *See* Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 6, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf.

2. After the Amendment

The new rule changes the procedures for issuing subpoenas in only two ways. First, any party, able or unable to pay, must obtain a court order before serving on a third party a subpoena requiring the production of "books, papers, documents, data or other objects" containing "personal or confidential information" about an alleged victim. Fed. R. Crim. P. 17(c)(1), (3). Second, if, and only if, the court finds that there are no "exceptional circumstances," including but not limited to premature disclosure of defense strategy or that evidence might be lost or destroyed, the alleged victim receives "notice" of the application and an opportunity to "move to modify or quash the subpoena under Rule 17(c)(2) . . . on the grounds that it is unreasonable or oppressive." Fed. R. Crim. P. 17(c)(3).

While the committee note states that the amendment "implements" a victim's right to "respect for . . . dignity and privacy," the amendment can, and must, be read to have created only a procedural "mechanism" which does not work a substantive change. The Committee stated that it intended to comply with the Rules Enabling Act, which prohibits rules that "enlarge, abridge, or modify" substantive rights. In particular, the Committee stated that it created no new rights based on the right to be treated with "respect."[61] And, of course, because no rule may violate the Constitution, the Committee said that it had not altered the constitutional balance.[62]

The committee note explains the amendment as follows:

- The amendment provides a "mechanism for notifying the victim" so the "victim may move to quash or modify the subpoena under Rule 17(c)(2) – or object by other means such as a letter – on the grounds that it is unreasonable or oppressive."

- "There may be exceptional circumstances in which this procedure may not be appropriate. Such exceptional circumstances would include, evidence that might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy."

- The judge may decide "whether such exceptional circumstances exist . . . *ex parte* and authorize service of the third-party subpoena without notice to anyone."

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[61] *See* Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 20, 22 (September 2007), http://www.uscourts.gov/rules/Reports/ST09-2007.pdf. *See also* Memorandum to Criminal Rules Advisory Committee from CVRA Subcommittee at 1-2 (Sept. 19, 2005), included in http://www.uscourts.gov/rules/Agenda%20Books/CR2005-10.pdf.

[62] *See* Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 6, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf; Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 2 (Aug. 1, 2006), http://www.uscourts.gov/rules/Excerpt_CRReport1205_Revised_01-06.pdf; Report of the Advisory Committee on Criminal Rules to the Standing Committee on Rules of Practice and procedure, December 8, 2005, http://www.uscourts.gov/rules/Reports/CR12-2005.pdf.

Fed. R. Crim. P. 17, 2008 advisory committee note.

Thus, the amendment permits the defendant to file the application *ex parte*, and the judge to authorize service without notice to anyone. *See* Fed. R. Crim. P. 17, 2008 advisory committee note. The amendment did not alter in any way the standard for issuance of a subpoena, *i.e.*, whether compliance would be "unreasonable or oppressive." *See* Fed. R. Crim. P. 17(c)(2) & 2008 advisory committee note.

3. Constitutional Principles

The amendment creates the potential of interfering with defendants' ability to obtain evidence with which to present a defense. The amendment also creates a potential unfair advantage for the government because the government obtains most of its trial evidence with grand jury subpoenas, to which the rule does not apply. It applies only "[a]fter a complaint, indictment, or information is filed," Fed. R. Crim. P. 17(c)(3), and "has no application to grand jury subpoenas." *Id.*, 2008 advisory committee note. The amendment must be read narrowly to avoid constitutional problems.

a. Defendant's Right to Obtain Evidence

The Sixth Amendment guarantees that "the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend VI. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Criminal defendants have the right to "put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). "To effect this right, a defendant must have the ability to obtain that evidence." *United States v. Tucker*, 249 F.R.D. 58, 65 (S.D.N.Y. 2008).

Defendants also have the right under the Due Process Clause to obtain evidence that is favorable and material to guilt or punishment, whether it is exculpatory or impeachment. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Brady v. Maryland*, 373 U.S. 83, 87 (1963. It is often argued that Rule 17(c) may not be used for "discovery," but this misses the point. "Because Rule 16 only addresses discovery between the parties, if defendants seek documents from non-parties, it must be pursuant to some other rule. If this were not the case, the government could prevent defendants from obtaining material by choosing not to obtain it for itself. This perverse result cannot be intended by the Federal Rules of Criminal Procedure." *United States v. Tucker*, 249 F.R.D. 58, 65 (S.D.N.Y. 2008). *See also United States v. Tomison*, 969 F. Supp. 587, 593 n.14 (E.D. Cal. 1997) ("The notion that because Rule 16 provides for discovery, Rule 17(c) has no role in the discovery of documents can, of course, only apply to documents in the government's hands; accordingly, Rule 17(c) may well be a proper device for discovering documents in the hands of third parties.").

b. Defendant's Right to Obtain Evidence Without Disclosure to the Witness or the Government

Defendants have a Fifth and Sixth Amendment right against disclosure of defense strategy to the government.[63] Because the alleged victim has a "reasonable right to confer" with the government, 18 U.S.C. § 3771(a)(5), the judge must assume that if the alleged victim is given notice so that s/he can move to quash or modify the subpoena as unreasonable or oppressive, the government will learn whatever defense strategy is disclosed in that litigation.

Defendants also have a Sixth Amendment right to effectively confront and cross-examine adverse witnesses. A party may delay disclosure of impeachment information until after the witness has testified on direct, both to prevent tailoring of the testimony in expectation of cross-examination and to expose the witness' untruthfulness to the jury through the element of surprise.[64] This is explicit in Fed. R. Evid. 613(a) (cross-examiner need not show witness document from which s/he is cross-examining, abrogating "Rule in Queen Caroline's Case"). The Confrontation Clause permits impeachment "in every mode authorized by the established rules governing the trial or conduct of criminal cases."[65]

Procedures that require the defendant to disclose cross-examination to the witness in advance violate the defendant's right to confront the witnesses against him. For example, the Seventh Circuit held that a pretrial conference under Rule 17.1 may not be used to bypass the limitations of Rule 16, because to do so would require disclosure of impeachment evidence and thus impair the Sixth Amendment right to effective cross-examination.[66] In another case, the Seventh Circuit held that it was error to require defense counsel to cross-examine a witness out of the presence of the jury: "[T]he witness was permitted time by the voir dire procedure to consider her answer and to eliminate any reaction of surprise to the alleged impeaching material out of the presence of the jury. Such a practice would appear to have a strong tendency to undermine the function of confronting the witness with the question in the first place. The loss

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[63] *See Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) ("[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he ... prepare his legal theories and plan his strategy without undue and needless interference."); *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (indigent defendant has a right to make an *ex parte* showing of relevance of expert testimony); *Williams v. Woodford*, 384 F.3d 567, 585 (9th Cir. 2004) ("Substantial prejudice results from the introduction of evidence gained through the interference against the defendant at trial, from the prosecution's use of confidential information pertaining to defense plans and strategy, and from other actions designed to give the prosecution an unfair advantage at trial."); *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) (Sixth Amendment violated when sheriff in whose presence defense attorney was forced to prepare client for trial passed attorney work product on to prosecutor); *cf. Weatherford v. Bursey*, 429 U.S. 554, 558 (1977) (finding no violation of the Sixth Amendment where there was "no communication of defense strategy to the prosecution").

[64] *See, e.g., In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 893 (D.C. Cir. 1999).

[65] *Kirby v United States*, 174 U.S. 47, 55 (1899).

[66] *United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985).

to the jury of the witness's initial and immediate response is accompanied by the loss of one potentially significant aspect of the credibility determination."[67]

c. Defendant's Right to Obtain Evidence that is "Personal or Confidential" or that May Offend Alleged Victim's "Dignity and Privacy"

A defendant's right to obtain evidence may not be trumped by an alleged victim's right to "respect for [his or her] dignity and privacy." Indeed, the amendment retains, as the sole standard for quashal or modification, that "compliance would be 'unreasonable or oppressive.'" Fed. R. Crim. P. 17(c)(2) & 2008 advisory committee note.

The Supreme Court's seminal decision in *United States v. Nixon*, 418 U.S. 683 (1974), shows that the need for evidence must overcome a claim of confidentiality. In *Nixon*, the Court interpreted the "unreasonable or oppressive" standard to mean that the proponent must show relevance, admissibility and specificity. *Id.* at 700. The Court rejected the President's claim that a subpoena should be quashed based on his privilege of confidentiality. Although it was a government subpoena at issue, the Court relied heavily on defendants' constitutional rights in rejecting the President's argument:

> The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor. Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

Id. at 711. The Court weighed the "privilege of confidentiality of Presidential communications . . . against the inroads of such a privilege on the fair administration of criminal justice," in particular "the constitutional need for relevant evidence in criminal trials." *Id*. at 711-12 & n.19. The Court recognized that "the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." *Id*. at 712. The Court concluded:

> [W]hen the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Id. at 713.

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[67] *United States v. Bohle*, 445 F.2d 54, 75 (7th Cir. 1971).

Other cases also show that a witness's interest in confidentiality cannot interfere with a defendant's constitutional rights. In *Davis v. Alaska*, 415 U.S. 308 (1974), the trial judge had granted the government's motion to prohibit any reference to a witness's juvenile record on cross-examination, pursuant to state law requiring confidentiality of juvenile records. *Id*. at 310-11. Because counsel was thus "unable to make a record from which to argue why [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial," "the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness." *Id*. at 318. The Court held that "the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record-if the prosecution insisted on using him to make its case-is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." *Id*. at 319.

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the trial court had refused to order Children and Youth Services to produce records the defense had subpoenaed, because such records were "confidential" under state law. The Supreme Court rejected the state's argument that disclosure would override its compelling interest in confidentiality, and held, under the Due Process Clause, that the defendant had the right to a remand for the trial judge to examine the records to determine if the records "probably would have changed the outcome of his trial," and if so, to "be given a new trial." *Id*. at 57-58.

Judges have addressed the asserted right to "respect for the victim's dignity and privacy" in similar contexts. In *United States v. Endsley*, slip op., 2009 WL 385864 (D. Kan. Feb. 17, 2009), the judge said that the statutory right to be treated "with fairness and with respect for the victim's dignity and privacy" does not "impinge[] on a defendant's right to refute by argument and relevant information any matter offered for the court's consideration at sentencing." *Id*. at *2. In *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008), the court said that it could not "adopt an interpretation of (a)(8) that prohibits the [parties] from raising legitimate arguments in support of [their] opposition to a [victim's] motion simply because the arguments may hurt a victim's feelings or reputation." *Id*. at 427-28.

Finally, "dignity and privacy" cannot be any part of the standard in deciding whether a subpoena will issue, first, because such a rule would infringe on a weighty right of the defendant in an arbitrary manner, and second, because the phrase is impermissibly vague. *See* Part IV.B & V.H.2, *supra*.

4. Step by Step Process for Subpoenaing Information About a Victim

a. Is the information "personal or confidential"?

No court order is required if the information sought is not "personal or confidential." *See* Fed. R. Crim. P. 17(c)(3). The committee note states that "personal or confidential" information "may include such things as medical and school records." *Id*., 2008 advisory committee note. While the meaning is left to "case development," there is no requirement that the judge decide

whether the information is "personal or confidential" and no procedure for doing so. If it is unclear, you can ask the judge to decide, *ex parte*.

If the information is not "personal and confidential," and the client has the ability to pay, obtain the subpoena from the clerk without a court order under Fed. R. Crim. P. 17(c)(3). If the client is indigent, apply *ex parte* with the ordinary showing under Fed. R. Crim. P. 17(b).

b. If the information is personal or confidential, apply for a court order *ex parte*.

The judge may require notice to the victim only *if* there are no "exceptional circumstances," and then, only "[b]efore entering the order." Fed. R. Crim. P. 17(c)(3). When exceptional circumstances exist, including the premature disclosure of defense strategy or the danger of lost or destroyed evidence, the judge may "authorize service of the third-party subpoena without notice to anyone." *See* Fed. R. Crim. P. 17(c)(3), 2008 advisory committee note. The Committee intended that the amendment would "not deprive courts of their inherent power to entertain any application ex parte," for "without ex parte applications, the government could learn of the subpoena request, which might reveal defense strategy."[68] Do not file the application on the CM/ECF system.

In cases in the Eastern District of California, the government has recently filed preemptive motions seeking an order (1) "barring" the defense from moving *ex parte*, and (2) "barring" the judge from approving service *ex parte*. It has advanced three theories. One is that the CVRA gives it "standing" to assert a victim's right to "respect for dignity and privacy" under the CVRA; the amendment "implements" that right; therefore, no application may be filed *ex parte* and no subpoena may be approved *ex parte*. This is refuted by the Committee's expressed intentions noted above. *See also* Part VI.B.4.f, *infra*, regarding government's claim to "standing."

The second theory is that the only way to prevent defense "overreaching" in violation of the *Nixon* test is to require adversarial testing. Numerous decisions have rejected the notion that the government's participation is needed to decide whether the *Nixon* test is met. *See Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951); *United States v. Tomison*, 969 F. Supp. 587, 594 (E.D. Cal. 1997); *United States v. Beckford*, 964 F. Supp. 1010, 1028 (E.D. Va. 1997); *United States v. Reyes*, 162 F.R.D. 468, 471 (S.D.N.Y. 1995); *United States v. Jenkins*, 895 F. Supp. 1389, 1393-94 (D. Haw. 1995).

The third theory is that even if the amendment permits *ex parte* applications and service if defense strategy would be exposed, "everybody knows" the records will be used to impeach the alleged victims. This, of course, would mean that no subpoena could ever be issued *ex parte*.

[68] Advisory Committee on Criminal Rules, Minutes at 7, April 16-17, 2007, http://www.uscourts.gov/rules/Minutes/CR04-2007-min.pdf.

One judge in the Eastern District of California denied the government's motion in a written memorandum and order.[69] Another judge "granted" the government's motion to the extent that the defense is to follow new Rule 17(c)(3), which means the defense can continue to file *ex parte* requests.[70]

c. Make an *ex parte* showing of "exceptional circumstances" to preclude notice.

The judge may not "require giving notice to the victim" or an opportunity to "move to quash or modify the subpoena" if "there are exceptional circumstances." *See* Fed. R. Crim. P. 17(c)(3). The circumstances listed in the note as examples of "exceptional circumstances" – premature disclosure of defense strategy and potential loss or destruction of evidence, Fed. R. Crim. P. 17(c), 2008 advisory committee note – are quite ordinary.

In most cases, you should be able to make a showing that "exceptional circumstances," in the form of premature disclosure, exist. *See* Part VI.B.3.b, *supra*. The judge should therefore "authorize service of the third-party subpoena without notice to anyone." Fed. R. Crim. P. 17(c), 2008 advisory committee note.

The question of whether "exceptional circumstances" exist must itself be decided *ex parte*. While the committee note "leaves to the judgment of the court" whether to decide this question *ex parte*, *id*., this makes no sense. To allow the alleged victim, or the government, to participate in the resolution of this question would necessarily expose defense strategy and impair effective cross-examination. *See* Part VI.B.3.b, *supra*. The rule must be interpreted not to allow such participation to avoid violating the defendant's constitutional rights.

d. If no "exceptional circumstances" exist

If the judge finds that no "exceptional circumstances" exist, the judge must "require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object" (which can be "by other means such as a letter") "on the grounds that it is unreasonable or oppressive." Fed. R. Crim. P. 17 & 2008 advisory committee note.

The court should deny the application without prejudice to the defense filing a motion with notice to the alleged victim, so that the defense can modify the application or not file an application at all.[71]

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[69] *See* Memorandum and Order re: Motion to Preclude Ex Parte Rule 17(c) Subpoenas, April 7, 2009, *United States v. McClure*, S-08-100 and S-08-270 WBS (E.D. Cal.).

[70] *See* Docket entry #60, *United States v. Vaughn*, S-08-052 LKK (E.D. Cal.).

[71] *See* Memorandum and Order re: Motion to Preclude Ex Parte Rule 17(c) Subpoenas, April 7, 2009, *United States v. McClure*, S-08-100 and S-08-270 WBS (E.D. Cal.).

Although the committee note allows an alleged victim to "object by other means such as a letter," any objection obviously must be served on the defendant.

e. The applicable standard is relevance, admissibility and specificity.

Whether determined *ex parte*, or with notice to and opportunity to object by the alleged victim, the standard for approval is relevance, admissibility and specificity. It is *not* whether the information is "personal or confidential," or whether its disclosure would offend the alleged victim's "dignity and privacy." In the Eastern District of California cases, the government and a victim advocate seem to have taken the position that the victim's right to "respect" for "dignity and privacy" mean that "personal or confidential" records cannot be subpoenaed by the defense. If that were so, the amendment would work a substantive change: The defendant would be denied a subpoena, even though it met the relevance, admissibility and specificity standard, because it nonetheless offended the victim's dignity and privacy.

That is not what the amendment did. The substantive standard under which a subpoena may be quashed or modified remains: "On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive." *See* Fed. R. Crim. P. 17(c)(2). The only "grounds" for a victim's objection is that it is "unreasonable or oppressive." Fed. R. Crim. P. 17, 2008 advisory committee note. The Supreme Court has interpreted the "unreasonable or oppressive" standard to mean that the proponent must show relevance, admissibility and specificity, *United States v. Nixon*, 418 U.S. 683, 700 (1974), and interests in confidentiality and privacy – even the President's -- must bend to constitutional rights. *See* Part VI.B.3.c, *supra*. The amendment did not, and could not, change the standard.

Most courts require a showing of relevance, admissibility and specificity, though some have questioned whether the *Nixon* standard, arising in a case concerning a government subpoena of presidential documents, should be applied to defense subpoenas of evidentiary documents from third parties.[72] This paper does not attempt to cover the *Nixon* standard in any detail, but here are a few issues that may arise.

- Where it is known that a witness will be called to testify at trial, the court may order production of impeachment material before trial as long as the request is a good faith attempt to obtain evidence.[73]

- While "hearsay" is not admissible, a statement is not "hearsay" if it is not offered for the truth of the matter, *see* Fed. R. Evid. 801(c), but for some other purpose, *e.g.*, Fed. R. Evid. 801(d).

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[72] *See, e.g., United States v. King*, 194 F.R.D. 569, 574 n.5 (E.D. Va. 2000); *United States v. Tucker*, 249 F.R.D. 58, 65 (S.D.N.Y. 2008).

[73] *See, e.g., United States v. LaRouche Campaign*, 841 F.2d 1176, 1179-80 (1st Cir. 1988); *United States v. King*, 194 F.R.D. 569, 573-75 (E.D. Va. 2000).

- The records you are seeking will often meet a hearsay exception. Medical records come in under Fed. R. Evid. 803(4). Juvenile and school records are public records. *See* Fed. R. Evid. 803(8)(A). Many kinds of records, such as social services and youth services records, contain "factual findings resulting from an investigation made pursuant to authority granted by law," which are admissible "against the Government in criminal cases." Fed. R. Evid. 803(8)(C).

- A "statement of a witness" must be produced only as provided in Rule 26.2 and may not be subpoenaed under Rule 17, *see* Fed. R. Crim. P. 17(h), but Rule 26.2 applies only to statements in the possession of the party who called the witness and that relate to the witness's direct testimony, *see* Fed. R. Crim. P. 26.2(a), not to statements in the possession of a third party or that do not relate to the direct testimony.

- Seeking documents in the hands of third parties is not improper use of a subpoena for "discovery." *See, e.g.,United States v. Tucker*, 249 F.R.D. 58, 65 (S.D.N.Y. 2008); *United States v. Tomison*, 969 F. Supp. 587, 593 n. 14 (E.D. Cal. 1997).

f. Oppose the government's assertion of "standing" to challenge a subpoena.

In two of the Eastern District of California cases, the government has argued that (even if it does not have "standing" to interfere at the application stage), it has "standing" to act on an alleged victim's behalf if she decides to move to quash or modify a subpoena. The government's theory is that § 3771(d)(1) says it may "assert" the victim's rights "under subsection (a)" of the CVRA; Rule 17(c)(3)'s committee note states that it "implements" the right to be treated with "respect for the victim's dignity and privacy"; ergo, the government has standing.

The CVRA states that the government may "assert the rights described in subsection (a)" of the CVRA. 18 U.S.C. § 3771(d)(1). Neither subsection (a), nor any other part of the CVRA, creates a "right" to move to quash or modify a subpoena as unreasonable or oppressive. While the CVRA did create a right to "respect for the victim's dignity and privacy," that consideration plays no part in the determination of whether a subpoena is "unreasonable or oppressive," by the rule's own terms and as necessary to avoid conflict with the Constitution and the Rules Enabling Act. *See* Part VI.B.3.c, *supra*. The Committee specifically disavowed having "provide[d] specific rights in particular proceedings, not expressly stated in the Act but based on the Act's general right that crime victims be treated fairly and with respect,"[74] as this "would have inserted into the criminal procedural rules substantive rights that are not specifically recognized in the Act – in effect creating new victims' rights not expressly provided for in the Act."[75] As noted above, it is well-recognized that the government's assistance is not needed in determining

[74] *See* Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 22 (September 2007), http://www.uscourts.gov/rules/Reports/ST09-2007.pdf.

[75] *Id.* 20.

whether the subpoena meets the requirements of relevance, admissibility and specificity.[76] Nothing in the CVRA or the amendment to Rule 17(c)(3) changes this result.

Thus, the court may conclude that the government does not have "standing" in proceedings to determine whether a subpoena is "unreasonable or oppressive," because there is no "right" described in the CVRA for the government to "assert."

g. A Rule 17(c) subpoena can be used to obtain information to rebut a victim impact statement at sentencing.

In *United States v. Endsley*, slip op., 2009 WL 385864 (D. Kan. Feb. 17, 2009), the judge held that the right to "dignity and privacy" does not deprive the defendant of the right to present any relevant information to challenge the reliability of a victim impact statement. Thus, the defendant was free to offer information about the victim's background and misconduct to refute the victim's assertion that the defendant was the cause of the victim's behavioral problems. However, the court said that it did not have a "*sua sponte* obligation on these facts to obtain the victim's personal files." *Id*. at *2. In many cases, you will have obtained the information in preparation for trial or an informed plea, but there is no reason you cannot apply for a subpoena in preparation for sentencing. In regard to *Nixon*'s "admissibility" requirement, the rules of evidence do not apply in sentencing proceedings. *See* Fed. R. Evid. 1101(d)(3).

C. Rule 18

The amendment of Rule 18 creates an obligation on the part of the judge to consider the convenience of non-testifying *alleged* victims (the very question at trial is whether anyone is a victim, and in certain cases such as self defense, who is the victim) in setting the place of trial, "as well as" the convenience of the defendant and testifying witnesses. The rules committee identified no provision of the CVRA as the basis for this amendment. The committee note merely states that the court has "substantial discretion to balance competing interests."

While alleged victims are generally allowed to attend public court proceedings, they have no right to have the court ensure or facilitate their attendance. *See* 150 Cong. Rec. S10910 (Oct. 9, 2004). If a non-testifying alleged victim asserts a right to have the trial held in a place within the district that is inconvenient for the defendant and/or his witnesses, the defendant's right to a fair trial is superior to that of a spectator. Some alleged victims may file mandamus actions if the judge sets the trial in a place that is inconvenient for them. Such a reading of the rule would violate the Rules Enabling Act by creating a new substantive right for alleged victims that is found nowhere in the CVRA and by abridging the defendant's right to a fair trial.

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[76] *See Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951); *United States v. Tomison*, 969 F. Supp. 587, 594 (E.D. Cal. 1997); *United States v. Beckford*, 964 F. Supp. 1010, 1028 (E.D. Va. 1997); *United States v. Reyes*, 162 F.R.D. 468, 471 (S.D.N.Y. 1995); *United States v. Jenkins*, 895 F. Supp. 1389, 1393-94 (D. Haw. 1995).

D. Rule 32(d)(2)(B)

The amendment to Rule 32(d)(2)(B) struck language requiring that "information that assesses any financial, social, psychological, and medical impact on any victim" in the presentence report be "verified" and stated in a "nonargumentative style." In striking this language, the Committee did not intend for the report to include unverified information or argument. The committee note states that the amendment "makes it clear that victim impact information should be treated in the same way as other information contained in the presentence report." Fed. R. Crim. P. 32, 2008 committee note. The Committee believed that "[a]ll information in the PSR should meet these requirements,"[77] despite widespread recognition that information included in presentence reports can be woefully inaccurate and biased.[78] The Committee declined to adopt a proposal that would have stated: "All information included in the presentence report must be verified and stated in a nonargumentative style."

The requirement that victim impact information be "verified, and stated in a nonargumentative style" was added to Rule 32 by Congress in the Sentencing Reform Act of 1984. *See* Pub. L. No. 98-473, § 215 (Oct. 12, 1984). With the end of the era when courts could base sentences on any reason or no reason at all, the reliability of information included in the presentence report became critically important. *See* S. Rep. No. 98-225, 98th Cong., 1st Sess. 59, 74 (1984). According to a Probation Monograph issued at the time, victim impact letters, often urging a harsh sentence, were to be "evaluated and investigated," and only "the information the officer believes to be reliable is included in the report." *See* The Presentence Investigation Report for Defendants Sentenced Under the Sentencing Reform Act of 1984 at I5-I6, Publication 107, Probation and Pretrial Services Division, Administrative Office of the United States Courts, September 1987, revised March 1992.

If a probation officer includes unverified or argumentative information about a victim in the report, this is improper and defense counsel should challenge it. In *United States v. Endsley*, slip op., 2009 WL 385864 (D. Kan. Feb. 17, 2009), the presentence report contained victim impact statements blaming the victim's behavioral problems on the assault with which the 19-year-old defendant was charged. When the defendant attempted to offer information about the victim's background and misconduct to refute the victim's assertion that he was the cause of the victim's behavioral problems, the probation officer, remarkably, argued that "it would be

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[77] Memo to Members, Criminal Rules Advisory Committee, from Professor Sara Sun Beale, Reporter, at 4, Mar. 25, 2007, http://www.uscourts.gov/rules/Agenda%20Books/CR-2007-04.pdf.

[78] *See United States v. Booker*, 543 U.S. 220, 304 (2005) (referring to "hearsay-riddled presentence reports") (Scalia, J., dissenting in part); *Blakely v. Washington*, 542 U.S. 296, 311-12 (2004) (describing unfairness of sentencing based on "facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong"); *United States v. Kandirakis*, 441 F. Supp. 2d 282, 303 (D. Mass. 2006) ("The system relies on 'findings' that rest on 'a mishmash of data[,] including blatantly self-serving hearsay largely served up by the Department [of Justice].'"); U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 50 (2004) (recognizing that "untrustworthy information" is often used to establish relevant conduct), available at http://www.ussc.gov/15_year/15year.htm.

inappropriate for the Court to obtain additional background information on the victim." *Id*. at *2. The court rejected this argument, holding that the defendant "certainly has the right to challenge the reliability of that causation opinion by argument or evidence," noting that while the probation officer had included in some detail the victim impact statements, s/he had not independently assessed the asserted impact. *Id*. at *2 & n.2.

VII. General Procedures

A. Who is a "Victim" and Who May "Assert" or "Assume" Victim Rights?

1. Who is a "victim"?

New Rule 1(b)(11) states: "'Victim' means a 'crime victim' as defined in 18 U.S.C. § 3771(e)." Section 3771(e) states that "[f]or purposes of this chapter [which is only the CVRA], the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." As the committee note to Rule 1(b)(11) states, "disputes may arise over the question whether a particular person is a victim," and "the courts have authority to do any necessary fact finding and make any necessary legal rulings." Indeed, the question can be complex and can have a big impact on the case. Insist on full briefing, argument, and a hearing as necessary.

The defendant, the government, or a person designated by the government as a "victim" may dispute that the person is a "victim." Victim status exists only if: (1) a federal offense or an offense in the District of Columbia has been charged and is being prosecuted in a United States district court, and (2) the person claiming the rights of a "victim" was directly and proximately harmed by the commission of that offense, assuming that that offense was committed.

The definition of victim under § 3771(e) undermines a defendant's constitutional rights because it gives *alleged* victims various rights at stages of the proceedings before the defendant has been found guilty and while he is presumed innocent. It is clear, however, that the defendant must at least have been charged with an offense of which a person is an alleged victim for that person to have any rights; putative victims do not have free floating rights.

First, Congress drew the CVRA's definition of "crime victim" in part from the definition of "victim" in the Victim Witness Protection Act, 18 U.S.C. § 3663(a)(2). The Supreme Court has interpreted the definition of "victim" in 18 U.S.C. § 3663(a)(2) as authorizing restitution only for "loss caused by the conduct underlying the offense of conviction."[79] The word "directly" means that the harm resulted from and would not have occurred but for conduct underlying an element of the offense of conviction; the word "proximately" means that there was no intervening cause.[80]

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[79] *Hughey v. United States*, 495 U.S. 411, 420 (1990).

[80] *See, e.g.*, *United States v. Davenport*, 445 F.3d 366 (4th Cir. 2006); *United States v. Hunter*, 2008 WL 53125 (D. Utah Jan. 3, 2008).

Second, courts have no duty to do anything for victims or alleged victims except in a court proceeding. The CVRA itself only requires the court to "ensure" the victim rights "[i]n any court proceeding involving an offense against a crime victim." 18 U.SC. § 3771(a). Moreover, the Federal Rules of Criminal Procedure apply only in a court proceeding enumerated in Fed. R. Crim. P. 1(a). No court proceedings exist unless someone has been charged or convicted of a crime.

Third, the Committee acknowledged that victims have rights only in instances "in which a prosecution is pending."[81]

Notwithstanding the clear limitations on the meaning of "victim," the statutory phrase, "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia," has suggested to some putative victims that anyone who claims to have been harmed by an "offense" has standing to assert rights under the CVRA, and bring mandamus actions, though no one has been charged, is being prosecuted, or has been convicted, of the "offense," in federal court. Thus far, the courts have held that:

- Putative victims have no rights in criminal proceedings against persons who were not charged with any offense, were not charged (if before trial or plea) or convicted (if after trial or plea) of the offense that directly and proximately caused harm, or were acquitted.[82]

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[81] *See* Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 3, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf.

[82] *See In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 564 (2d Cir. 2005) (rejecting petition for mandamus seeking to vacate settlement agreement approved by district court between United States and convicted, acquitted and uncharged persons; "the CVRA does not grant victims any rights against individuals who have not been convicted of a crime."); *United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006) (woman who wished to speak at sentencing based on her claim that her boyfriend had mistreated her as a result of smoking marijuana he purchased from the defendant was not a "victim" within the meaning of the CVRA; "the CVRA only applies to [putative victim] if she was 'directly and proximately harmed' as a result of the commission of the Defendant's federal offense."); *United States v. Turner*, 367 F.Supp.2d 319, 326-27 (E.D.N.Y. 2005) (noting due process problems with designating a person as a victim of uncharged conduct, concluding CVRA does not mandate rights for such persons); *United States v. Hunter*, 2008 WL 53125 *4 (D. Utah Jan. 3, 2008) (woman shot by gunman on a rampage at a shopping mall and her parents were not "directly and proximately harmed" by the defendant's offense of selling the gun to the gunman with reason to believe he was a minor, where no evidence defendant was aware of his intentions), *aff'd*, *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008) (upholding district court on mandamus, and adding that gunman was an adult at time of shooting); *United States v. Merkosky*, 2008 WL 1744762 (N.D. Ohio Apr. 11, 2008) (defendant cannot be deemed victim of uncharged crimes of government agents against him in his own criminal case); *Defending Against the Crime Victim Rights Act* at 8-9 (May 5, 2007) (discussing relevant legislative history and constitutional implications), http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf.

- Victims of prior offenses that are predicates of the instant offense do not appear to have rights under the CVRA.[83]

- Alleged victims of an offense of conviction that is victimless have no rights, though an error in this regard can be harmless or subject to plain error review.[84]

- If the harm alleged to have been directly and proximately caused is too factually attenuated from the elements of the offense charged, or the government's theory of the offense, there is no victim status.[85]

- Civil plaintiffs have no right under the CVRA to intervene in criminal proceedings to seek restitution, damages, or discovery.[86]

- The CVRA is not a basis for lawsuits or mandamus actions demanding arrest, restraining orders, prosecution, sentencing, damages or injunctive relief.[87]

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[83] *United States v. Guevera-Toloso*, 2005 WL 1210982 (E.D.N.Y. 2005) (where defendant was charged with "illegally re-entering the United States after being convicted of a felony and subsequently deported," victims of predicate offenses, if any, were not entitled to notice because the predicates were state offenses, and expressing doubt that a victim of a federal predicate would be entitled to notice).

[84] *United States v. Saferstein*, slip op., 2008 WL 4925016 *3 (E.D. Pa. Nov. 18, 2008) (no victims related to tax and perjury charges); *United States v. Kennedy*, slip op., 2008 WL 4107208 (4th Cir. Sept. 5, 2008) (where charges were false statement in applying to purchase a firearm and possession of a firearm by a user of marijuana, assuming it was error to admit impact statement from widow of officer the defendant's mentally ill son shot with one of the firearms, it was harmless because sentence was at bottom of guideline range); *United States v. Poole*, 241 Fed. Appx. 153 (4th Cir. July 30, 2007) (where charge was felon in possession, suggesting it may have been error to admit victim impact statement of police officer whom defendant struck upon his arrest, but was not plain error because sentence was in middle of guideline range).

[85] *United States v. Atlantic States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 545 (D.N.J. 2009) ("the harm to the six named workers alleged by the government to have been 'directly and proximately' caused by the offenses of conviction is too factually attenuated, in relation to the offenses of conviction, for the Court to make a finding of CVRA or VWPA statutory crime victim status in this case. The conduct that allegedly harmed one or more of the six named workers may have been in violation of OSHA workplace standards (standards applicable to the employer only), and that appears to be the actual basis of the government's argument in this motion. Such conduct, however, was not conduct proscribed by the obstruction and false statement substantive offenses and conspiracy objectives of which each of these defendants was convicted, and we perceive no 'direct and proximate' causal link between those offenses of conviction and the injuries sustained by the six named workers.").

[86] *See United States v. Moussaoui*, 483 F.3d 220 (4th Cir. 2007) ("The rights codified by the CVRA . . . are limited to the criminal justice process."); *In re Searcy*, 202 Fed. Appx. 625 (4th Cir. Oct. 6, 2006) (CVRA has "no application . . . to these [civil] proceedings").

[87] *See In re Rodriguez*, slip op., 2008 WL 5273515 (3d Cir. Dec. 10, 2008); *In re Walsh*, slip op., 2007 WL 1156999 (3d Cir. Apr. 19, 2007); *In re Siyi Zhou*, 198 Fed. Appx. 177 (3d Cir., Sept. 25, 2006); *Estate of Musayelova v. Kataja*, slip op., 2006 WL 3246779 (D. Conn. Nov. 7, 2006).

- Putative victims have no right to discovery of the prosecution's investigative files or grand jury transcripts to establish victim status.[88]

The Committee Report states that the § 3771(e) definition of victim does not govern statutory "rights to obtain restitution, to bring civil actions, and so forth," but that it does apply in all criminal rules that use the term "victim," which are now Rules 12.1, 12.4, 17, 18, 32, 38 and 60.[89] However, the definition of "crime victim" in 18 U.S.C. § 3771(e) is limited in its application to "this chapter," which consists of one statute, the CVRA. Rule 12.4(a)(2) (requiring the government to file a statement identifying an organizational victim) and Rule 38(e) (authorizing court to stay a sentence and require defendant to give notice and explain to victims fraud or deceptive practices) pre-existed and are not based on the CVRA. If the CVRA definition creates a problem under Rule 12.4 or Rule 38, argue that it cannot apply.

2. Who May "Assert" or "Assume" Victim Rights?

New Rule 60(b)(2) states that a victim's rights "may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized by 18 U.S.C. § 3771(d) and (e)." "The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a) [of the CVRA]." 18 U.S.C. § 3771(d)(1). The prosecutor must advise a victim that he or she "can seek the advice of an attorney with respect to the rights described in subsection (a) [of the CVRA]." 18 U.S.C. § 3771(c)(2). "In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under [the CVRA], but in no event shall the defendant be named as such guardian or representative." 18 U.S.C. § 3771(e).

Practice tip for child pornography cases. The government has on file a stock of victim impact letters for "known victims" for use at sentencing defendants convicted of possession or receipt of child pornography. Many of these letters were written by parents of the victim. If the victim is now an adult, and is neither incompetent, incapacitated nor deceased, the CVRA does not provide the parent with any ability to "assert" or "assume" the victim's rights. The fact that the victim may have been a minor at the time of the alleged offense, or earlier, does not make the victim a minor under the CVRA.Victims' rights do not arise until, at the earliest, a "complaint, information or indictment of conduct victimizing complainant" is filed. *See United States v. Rubin*, 558 F. Supp. 2d 411, 418-19, 429 (E.D.N.Y. 2008). *See also* 18 U.S.C. § 3771(a)(4) (right to be "reasonably heard" at sentencing does not arise until there is a "public proceeding in the district court involving . . . sentencing.").

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[88] *United States v. Hunter*, 2008 WL 110488 (D. Utah Jan. 8, 2008).

[89] *See* Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 3, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf.

Beware of sharp practices by victim advocates who may misrepresent the victim's status in order to litigate claims for an adult victim without authorization from that victim. In a case in the Eastern District of California, the defendant was charged with sex trafficking, *i.e.*, running a prostitution ring. The alleged victim- prostitute was a minor at the time the offense allegedly occurred, but wasan adult by the time the defendant was charged. She provided the government with a signed declaration stating that she did not want her juvenile records disclosed to "anyone." The government informed defense counsel that it did not have the records. Defense counsel filed an application for a Rule 17(c) subpoena for the records *ex parte*, but the government received notice via the CM/ECF system. The alleged victim took no action to contest the subpoena. The government did not attempt to contest the subpoena on her behalf either; it had an admitted conflict with her, the nature of which is not shown by the record. A victim advocate filed an appearance on behalf of the alleged victim's mother. The victim advocate made no claim that the adult victim had authorized her, or her mother, to assert or assume her rights. The CVRA does not permit such assertion or assumption for an adult victim. Indeed, that would permit estranged parents, unscrupulous lawyers, and others to act without regard to an adult victim's wishes or interests (*e.g.*, dignity and privacy) on into perpetuity.

Nonetheless, the victim advocate filed a petition for mandamus in the Ninth Circuit, in which she represented that the alleged victim was a "minor,"[90] seeking a stay of disclosure of the documents to the defense. She then appeared before the district court judge, who (unlike the Ninth Circuit) knew the alleged victim was an adult. There, the victim advocate argued that "the definition of victim attaches upon the commission of a crime," "[t]hat's why we believed it was appropriate to have KK's mother as the legal guardian," and "on a case of first impression," she "would hope" the Ninth Circuit (which had been told that the victim was a "minor") would agree. Over defense counsel's objections, but with no objection from the government, the judge allowed the victim advocate to review the records the adult victim had declared she did not want disclosed to "anyone," to assist the judge in his *in camera* review of which documents should be disclosed to defense counsel, and to prepare to file another petition for mandamus.[91] After reviewing the documents, the advocate agreed not to file another petition. It is unclear why, but another petition would have exposed the fact that she had misled the court of appeals about the victim's age in her previous petition.

B. How Must Victim Rights Be Asserted and Decided?

A victim or alleged victim must "assert" any "right" by "motion." 18 U.S.C. § 3771(d)(3). Rule 60(b)(1), entitled "Time for Deciding a Motion," states that "[t]he court must promptly decide any motion asserting a victim's rights described in these rules."

Nonetheless, the defendant must be given notice and a full and fair opportunity to respond to any motion asserting a victim's rights. This is necessary to effectuate the defendant's

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[90] *See* Petition for Mandamus, *In re: Vicki Zito on behalf of her minor daughter v. United States District Court*, No. 09-70554, available on PACER.

[91] The transcript is docket number 56 on PACER, *United States v. Sanwal*, No. S-08-CR-0330 EJG (E.D. Cal.).

right to due process, to give the district court sufficient notice and information to rule appropriately, and to create an adequate factual and legal record for the court of appeals. A victim's motion must "be made on notice to all parties." *United States v. Eight Automobiles*, 356 F.Supp.2d 223, 227 n.4 (E.D.N.Y. 2005). Victims do not have a right to *ex parte* determinations, or to foreclose a defendant's ability to participate in the process, or to deprive the court of adequate time to review the positions of the parties and decide the issue. *United States v. Hunter*, 2008 WL 53125 *1 n.1 (D. Utah Jan. 3, 2008) (Kimball, J.). The defendant "certainly has the right to challenge the reliability" of any assertion by a victim "by argument or evidence." *United States v. Endsley*, slip op., 2009 WL 385864 at *2 & n.2 (D. Kan. Feb. 17, 2009).

Full development of the facts and legal arguments is crucial because of the potential adverse impact on the defendants' rights of a ruling for the victim, and because a ruling against the victim may result in a mandamus petition. Once a mandamus petition is filed, there is insufficient time to develop an effective opposing argument, and no time to develop or straighten out any facts.

C. Where May the Victim Assert Rights?

New Rule 60(b)(4), entitled "Where Rights May Be Asserted," states: "A victim's rights described in these rules must be asserted in the district where a defendant is being prosecuted for the crime." A victim may not "assert" rights in the first instance by seeking mandamus from a court of appeals. *In re Walsh*, 2007 WL 1156999 (3d Cir. Apr. 19, 2007).

Section 3771(d)(3) states that the "rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, *if no prosecution is underway*, in the district court in the district in which the crime occurred." (emphasis supplied) The committee note to Rule 60(b)(4) mentions this provision, but does not explain it, perhaps because it is inexplicable. In any event, the rules apply only in "proceedings," Fed. R. Crim. P. 1(a)(1), and alleged victims have no right under the Constitution or the CVRA to insist that a prosecution be brought. *See, e.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005); *In re Rodriguez*, slip op., 2008 WL 5273515 (3d Cir. Dec. 10, 2008); *In re Walsh*, slip op., 2007 WL 1156999 (3d Cir. Apr. 19, 2007); *In re Siyi Zhou*, 198 Fed. Appx. 177 (3d Cir., Sept. 25, 2006); *Estate of Musayelova v. Kataja*, slip op., 2006 WL 3246779 (D. Conn. Nov. 7, 2006).

D. Multiple Victims

Rule 60(b)(3), entitled, "Multiple Victims," incorporates § 3771(d)(2), and states: "If the court finds that the number of victims makes it impracticable to accord all of them their rights described in these rules, the court must fashion a reasonable procedure that gives effect to these rights without unduly complicating or prolonging the proceedings." This is likely to apply in white collar cases or the rare terrorist case with numerous victims or potential victims. *See In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555 (2d Cir. 2005); *United States v. Ingrassia*, 2005 WL 2875220 *4 (E.D.N.Y. 2005).

E. Mandamus Procedures

If the judge "denies the relief sought" in a "motion asserting a victim's right," "the movant may petition the court of appeals for a writ of mandamus," 18 U.S.C. § 3771(d)(3), no matter how specious. The court of appeals must decide the petition "within 72 hours after the petition has been filed." *Id*. The district court may, but need not, stay the proceedings or grant a continuance of no more than 5 days "for purposes of enforcing this chapter." *Id*.

The defendant has the right to respond to the petition for mandamus. The district court judge, the defendant, and the government are "respondents" to the petition. The court of appeals must order them to respond unless it denies the petition without a response. Fed. R. App. P. 21. Thus, in *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008), the court of appeals ordered the defendant to respond, and denied the putative victims' motion to strike the response. *Id*. at 1124. *See also In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006) (treating defendant as respondent). However, confusion may be engendered by the Ninth Circuit's inexplicable statement in *Kenna v. United States District Court*, 435 F.3d 1011 (9th Cir. 2006) that the defendant "is not a party to this mandamus action," although it did correctly note that "reopening his sentence in a proceeding where he did not participate may well violate his right to due process." *Id.* 1017.

Develop facts and arguments in advance. Since you must file a response almost instantaneously to receive any consideration, you should fully develop the facts and arguments in the district court.

Challenge the procedure under the Due Process Clause. In addition to challenging the substance of the petition, challenge the summary mandamus process itself under the Due Process Clause. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976); *United States. v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

Standard of Review on Mandamus. The Fifth and Tenth Circuits have held that the regular mandamus standard – "clear and indisputable right" to the writ -- applies. *See In re Antrobus*, 519 F.3d 1123, 1124-25, 1127-30 (10th Cir. 2008) (supported with statutory language and principles of statutory construction, suggesting sister circuits got it wrong because of time pressures under which they operated); *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (mandamus standard applies for reasons stated in *Antrobus*).

The Second and Ninth Circuits have held that abuse of discretion is the standard. *See In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 562 (2d Cir. 2005) (no support); *Kenna v. United States District Court*, 435 F.3d 1011, 1017 (9th Cir. 2006) (no support). The government may assert as error on appeal the district court's denial of any crime victim's right, 18 U.S.C. § 3771(d)(4), so the Second and Ninth Circuits in *Huff* and *Kenna* are not correct in saying that Congress chose mandamus as the vehicle for appellate review.

F. Relief for Victim if Mandamus Granted

If the right asserted and denied was *not* a right to be reasonably heard at a public proceeding involving a plea or sentencing, the relief can be anything the victim requests or anything else the court of appeals decides, except that a "failure to afford a victim any right described in these rules is not grounds for a new trial." *See* 18 U.S.C. § 3771(d)(5); Rule

60(b)(6). Thus, neither a victim nor a defendant can rely on the CVRA to obtain a new trial, whether the defendant is convicted or acquitted of some or all charges.

G. Motion to Re-Open Plea or Sentence

If the right asserted and denied was a right to be reasonably heard at a public proceeding involving a plea or sentencing, the victim may "make a motion to re-open a plea or sentence" under certain circumstances.

The CVRA, § 3771(d)(5), entitled "Limitation on relief," provides: "A victim may make a motion to re-open a plea or sentence only if --

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;
(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and
(C) in the case of a plea, the accused has not pleaded to the highest offense charged."

Insist that the statute be followed. Rule 60(b)(5) misstates subpart (A) of § 3771(d)(5) by permitting the victim to merely "ask to be heard" rather than requiring the victim to "assert[] the right to be heard." The difference in the language of the rule and the statute may cause confusion in two ways when the defendants' rights are threatened by "reopening" a plea or sentence after a hastily decided mandamus petition.

First, unlike 18 U.S.C. § 3771(d)(3), 18 U.S.C. § 3771(d)(5), and Rule 60(b)(1), Rule 60(b)(5) replaces "motion" with "ask." A "motion" denotes a level of formality including notice and a full and fair opportunity to respond. Rule 60(b)(5)(A) may suggest that a victim could "ask" the judge for something by phone or letter or email, without notice to anyone, and that the judge's denial of this "request" would trigger a mandamus petition and potential "reopening" of a plea or sentence.

Second, the statutory section is entitled "limitation on relief" for a reason. It requires that the victim asserted "the right to be heard" and "such right was denied." 18 U.S.C. § 3771(d)(5)(A). The "right to be heard" is defined in § 3771(a) as the "right to be reasonably heard at any public proceeding in the district court involving . . . plea [or] sentencing." Thus, the statute clearly confines the grounds for "re-opening" a plea or sentence to denial of this "right to be heard" at a plea or sentencing proceeding. Rule 60(b)(5)(A), however, suggests that such "re-opening" might be allowed if the victim "asked" to be heard on any "request," including "requests" to do something far attenuated from a public proceeding involving a plea or sentence, such as to confer with the government, to be reasonably protected from the accused, to be accorded dignity and privacy, etc. This makes no sense, violates the statute, and invites constitutional violations.

Insist that the statute be followed. As the Committee said, the rules cannot alter the self-executing provisions of the CVRA,[92] and it "sought to incorporate, but not go beyond, the rights

[92] *See* Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 23 (September 2007), http://www.uscourts.gov/rules/Reports/ST09-2007.pdf.

created by statute."[93] The committee note states that subdivision (b) "*incorporates* the provisions of 18 U.S.C. § 3771 (d)(1), (2), (3), and (5)." Fed. R. Crim. P. 60, 2008 advisory committee note (emphasis supplied). The Due Process Clause requires that only an orderly process with notice and full opportunity to respond and adequate consideration by the judge can trigger a valid mandamus petition and potential "reopening." The grounds for any "re-opening" must be confined to a denial of a "right to be heard at any public proceeding in the district court involving" plea or sentencing.

"Re-opening" a Plea or Sentence Conflicts with Due Process. A defendant has due process rights to be accurately apprised of the consequences of a plea, *Mabry v. Johnson*, 467 U.S. 504, 509 (1984), and to specific enforcement of a promise made in a plea bargain. *Santobello v. New York*, 404 U.S. 257, 262 (1971). These expectations are also grounded in the CVRA, which provides that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). Even though victims have a right to be reasonably heard at public plea and sentencing proceedings, this "does not empower victims to [have] veto power over any prosecutorial decision, strategy or tactic regarding bail, release, plea, sentencing or parole." *United States v. Rubin*, 558 F. Supp. 2d 411, 424 (E.D.N.Y. 2008). "Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement." *In re Huff Asset Management Co.*, 409 F.3d 555, 564 (2d Cir. 2005).

No re-opening may occur if the district court lacks jurisdiction. No plea or sentence can be "reopened" by the district court if it lacks jurisdiction. The filing of a notice of appeal divests the district court of jurisdiction. *See, e.g., United States v. Garcia-Robles*, __ F.3d __, 2009 WL 937244 *4 (6th Cir. 2009); *United States v. Sadler*, 480 F.3d 932, 941 (9th Cir. 2001); *United States v. Todd*, 446 F.3d 1062, 1069 (10th Cir. 2006). The defendant must file a notice of appeal within 10 days of the later of the entry of judgment or the filing of the government's notice of appeal, and the government must file a notice of appeal within 30 days of the later of the entry of judgment or the filing of the defendant's notice of appeal. Fed. R. App. P. 4(b). The CVRA states: "In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter." 18 U.S.C. § 3771(d)(3). Thus, the district may stay the proceedings without entering judgment for up to five days, thus delaying the filing of a notice of appeal, but it is not required to do so. *See United States v. Hunter*, 2008 WL 153785 (D. Utah Jan. 14, 2008) (rejecting motion to stay the sentencing hearing so that putative victims could litigate and re-litigate issues the judge and the court of appeals had already decided; CVRA does not allow putative victims to delay criminal proceedings). If judgment enters, file a notice of appeal immediately.

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[93] *See* Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 6, May 19, 2007 (revised July 2007), available at http://www.uscourts.gov/rules/jc09-2007/App_B_CR_JC_Report_051907.pdf; Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 2 (Aug. 1, 2006), http://www.uscourts.gov/rules/Excerpt_CRReport1205_Revised_01-06.pdf; Report of the Advisory Committee on Criminal Rules to the Standing Committee on Rules of Practice and procedure, December 8, 2005, http://www.uscourts.gov/rules/Reports/CR12-2005.pdf.

No re-opening may occur if the judgment is final. "Re-open" is not defined in the CVRA or in Rule 60, but if it means "vacate the sentence with the possibility of imposing a higher sentence," or "vacate the plea and re-instate greater charges," this provision has the potential to violate defendants' constitutional rights under the Double Jeopardy Clause. A defendant has a right not to be sentenced to a higher sentence once the sentence has become final, *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980), and not to have a plea to a lesser offense vacated and a greater charge reinstated. *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987).

A judgment is final when direct appeal is concluded and certiorari is denied or the 90-day period for filing a petition for certiorari has run. *See Clay v. United States*, 537 U.S. 522 (2003).

One of the reasons a victims' constitutional amendment failed was that giving victims constitutional rights could result in a sentence being vacated and the defendant being re-sentenced, which, if the new sentence was more severe, would create a double jeopardy problem.[94] The CVRA does not contemplate a double jeopardy violation. *See* 150 Cong. Rec. S4275 (April 22, 2004) (CVRA "addresses my concerns regarding the rights of the accused," including "the Fifth Amendment protection against double jeopardy") (statement of Senator Durbin). It contemplates a maximum of 21 days between the district court's denial of a motion asserting a victim's right to be heard at a public proceeding involving plea or sentence and the court of appeals' decision on a petition for mandamus: 10 days to file the petition; any intermediate Saturdays, Sundays and holiday; no more than 5 days for stay or continuance; 3 days for decision. 18 U.S.C. § 3771(d)(3), (5).

However, things do not always go as planned. In *Kenna v. United States District Court*, 435 F.3d 1011 (9th Cir. 2006), the Ninth Circuit did not issue its opinion until over six months after the petition for mandamus was filed. In the interim, the judgment became final. The panel posed this task for the district court: "In ruling on the motion [to re-open], the district court must avoid upsetting constitutionally protected rights, but it must also be cognizant that the only way to give effect to Kenna's right to speak as guaranteed to him by the CVRA is to vacate the sentence and hold a new sentencing hearing." *Id*. at 1017. The district court judge then held a new sentencing hearing, permitting Kenna and other victims to speak. Having received further information from defense counsel and the government, the court considered imposing a lower sentence, but ultimately imposed the same sentence. If the district court had imposed a higher sentence, the defendant's Double Jeopardy rights would have been violated, and the procedures set forth in the CVRA violated as well.

H. Defendant's Right to Relief

Section 3771(d)(1) provides that "[a] person accused of the crime may not obtain any form of relief under this chapter." This does not mean that the defendant cannot rely on the procedures and substantive limitations of the statute in defending against any assertion of rights in the district court or a mandamus petition. It simply means that the defendant cannot "assert any of the victim's rights to obtain relief." 150 Cong. Rec. S10912 (Oct. 9, 2004). For example, if a victim who wished to urge the judge to impose a low sentence was not allowed to be heard at sentencing, the defendant could not seek re-sentencing as relief on appeal on the basis of the

[94] *See* S. Rep. 108-191 at 103 (Nov. 7, 2003) (minority views).

CVRA. The victim in such a case could petition for mandamus, and the defendant could appeal on another basis, *e.g.*, the district court failed to comply with 18 U.S.C. §§ 3553(a)(1) and 3661.

The defendant can, of course, raise any violation of his rights through the correct or incorrect application of the CVRA. For example, a defendant can object in the district court and appeal his conviction on the basis that a victim fabricated her trial testimony because the judge followed the CVRA in allowing her to be present for the testimony of others; or that the judge erred in permitting an alleged victim to be present during the testimony of others because there was clear and convincing evidence that her testimony would be materially altered; or that the judge failed to give the defendant an adequate opportunity to show that the testimony would be materially altered.

I. What Does "Rights Described in These Rules" Mean?

The phrase "rights described in these rules" in Rule 60(b)(1)-(4) and (6) means "rights" that are "provided by the statute *and* [by the] implementing rules." Fed. R. Crim. P. 60, 2008 advisory committee note (emphasis supplied). It does not mean that the rules did or could create rights beyond those created by the CVRA.

VIII. Reach Out to Victims and Make Amends in a Constructive Way

Traditionally, defense counsel avoids victims, fearing that victim involvement makes things worse for clients, not better. Wholesale avoidance, however, is an outdated approach incompatible with counsel's duties to represent his or her client. In part, this is due to a developing understanding that the needs of victims do not always collide with a defendant's interests and a victim may actually assist the defense in many cases. In part, it reflects the increasing demands of victims who wish to participate in the criminal justice process and congressional action granting victim's certain rights under the CVRA. Whether we like it or not, victims will be in court. Ignoring victims is simply not possible. Victim outreach can prevent their presence from dooming our clients.

Victims appreciate the opportunity to be heard, regardless of whether it is a prosecutor or defense lawyer who is listening. Sometimes, what victims have to tell us can help us ameliorate the harm they've experienced, diminishing their anger and even turning them into allies who want the same sentencing results we do, or at least a sentence that is not as harsh as they would want otherwise. Consider, for example, fraud cases, in which victims have an interest in being compensated for their loss. If the defendant can begin to make payments, the victim may be supportive of a non-prison sentence so that payments can continue uninterrupted.

Many victims are receptive to hearing our clients' stories as well. Often victims come from the same communities as our clients and can relate to their backgrounds and experiences. For some victims, the knowledge that our clients are remorseful and that we are attempting to fashion a sentence that will achieve both punishment and rehabilitation, is comforting. It gives them reassurance that some benefit to their communities may come out of the trauma inflicted on them. Consider, for example, robbery cases in which the victims are from the clients' own neighborhoods. Many victims have siblings or children who have been in our clients' position.

If we help those victims relate to our clients, it will be harder for them to favor harsh prison sentences.

Victim outreach may also incorporate components that are directed at assisting the defendant make amends and repair the harm caused by his or her conduct, as well as help victims come to terms with what they've experienced. This concept is called "restorative justice," the idea being that victims are restored – emotionally and/or financially – through some action by the defense. Consider incorporating restorative justice options into your plea agreement or sentencing proposals. While not all cases lend themselves to restorative justice, the practice of seeking to meet the needs of victims has much to commend it. For more information on restorative justice, *see* Howard Zehr, *The Little Book of Restorative Justice* (2002). For an inspiring power point on the application of restorative justice principles in a case involving the descreration of a temple, see Denise Barrett, Beyond *Retribution: Restorative Justice Principles in Federal Criminal Cases*, http://www.ussc.gov/SYMPO2008/Material/Barrett.pdf; *see also* Benji McMurray, *The Mitigating Power of a Victim Focus at Sentencing*, 19 Fed. Sent. R. 125 (Dec. 2006).

Of course, victim outreach must be conducted with great caution and careful planning. Counsel may choose to consult with a specially-trained mitigation specialist to determine when and how to approach victims. Often, mitigation specialists or investigators approach the victim, creating a little distance between the client and defense counsel and the victim. In no event should the client contact victims directly.

APPENDIX
Rules and Committee Notes Effective December 1, 2008
Amendments to Existing Rules in Redline and Strikeout

Rule 1(b)(11). Scope; Definitions

"Victim" means a "crime victim" as defined in 18 U.S.C. § 3771(e).

Committee Note

This amendment incorporates the definition of the term "crime victim" found in the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(e). It provides that "the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."

Upon occasion, disputes may arise over the question whether a particular person is a victim. Although the rule makes no special provision for such cases, the courts have authority to do any necessary fact finding and make any necessary legal rulings.

Rule 12.1. Notice of an Alibi Defense

(a) Government's Request for Notice and Defendant's Response.

(1) Government's Request. An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense.

(2) Defendant's Response. Within 10 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and
(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

(b) Disclosing Government Witnesses.

(1) Disclosure.

(A) In General. If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(i) the name of each witness – and the address and telephone number of each witness other than a victim – that the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and

(ii) each government rebuttal witness to the defendant's alibi defense.

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(B) Victim's Address and Telephone Number. If the government intends to rely on a victim's testimony to establish that the defendant was present at the scene of the alleged offense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows preparation of the defense and also protects the victim's interests.

(2) Time to Disclose. Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) Continuing Duty to Disclose.

(1) In General. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness – and the address and telephone number of each additional witness other than a victim -- if:

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(A) the disclosing party learns of the witness before or during trial; and

(B) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

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(2) Address and Telephone Number of an Additional Victim Witness. The address and telephone number of an additional victim witness must not be disclosed except as provided in Rule 12.1(b)(1)(B).

(d) Exceptions. For good cause, the court may grant an exception to any requirement of Rule 12.1(a)--(c).

(e) Failure to Comply. If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.

(f) Inadmissibility of Withdrawn Intention. Evidence of an intention to rely on an alibi defense, later withdrawn, or of a statement made in connection with that intention, is not,

in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Committee Note

Subdivisions (b) and c). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning an alibi claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (c).

Rule 17. Subpoena

(a) Content. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena--signed and sealed--to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(b) Defendant Unable to Pay. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(c) Producing Documents and Objects.

(1) In General. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

(2) Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(3) Subpoena for Personal or Confidential Information About a Victim. After a complaint, indictment, or information is filed, a subpoena requiring the

production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

[subsections (d)-h) omitted]

Committee Note

Subdivision (c)(3). This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their "dignity and privacy." The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim's interests, and the victim may be unaware of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The phrase "personal or confidential information," which may include such things as medical or school records, is left to case development.

The amendment provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) – or object by other means such as a letter – on the grounds that it is unreasonable or oppressive. The rule recognizes, however, that there may be exceptional circumstances in which this procedure may not be appropriate. Such exceptional circumstances would include, evidence that might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy. The Committee leaves to the judgment of the court a determination as to whether the judge will permit the question whether such exceptional circumstances exist to be decided *ex parte* and authorize service of the third- party subpoena without notice to anyone.

The amendment applies only to subpoenas served after a complaint, indictment or information has been filed. It has no application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

Rule 18. Place of Prosecution and Trial

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim,

and the witnesses, and the prompt administration of justice.

Committee Note

The rule requires the court to consider the convenience of victims – as well as the defendant and witnesses – in setting the place for trial within the district. The Committee recognizes that the court has substantial discretion to balance competing interests.

Rule 32. Sentencing and Judgment

(a) [Reserved]

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(c) Presentence Investigation.

(1) Required Investigation.

(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

(B) Restitution. If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

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(d) Presentence Report.

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(2) Additional Information. The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

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(i) Sentencing.

Deleted: Definitions. The following definitions apply under this rule:¶
(1) "Crime of violence or sexual abuse" means:¶
(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or¶
(B) a crime under 18 U.S.C. §§ 2241-2248 or §§ 2251-2257.¶
(2) "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.

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(4) Opportunity to Speak.

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

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Deleted: speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:¶
(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or¶
(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated

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Committee Note

Subdivision (a). The Crime Victims' Rights Act, codified as 18 U.S.C. § 3771 (e), adopted a new definition of the term "crime victim." The new statutory definition has been incorporated in an amendment to Rule 1, which supersedes the provisions that have been deleted here.

Subdivision (c)(1). This amendment implements the victim's statutory right under the Crime Victims' Rights Act to "full and timely restitution as provided in law." *See* 18 U.S.C. § 3771(a)(6). Whenever the law permits restitution, the presentence investigation report should contain information permitting the court to determine whether restitution is appropriate.

Subdivision (d)(2)(B). This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771. The amendment makes it clear that victim impact information should be treated in the same way as other information contained in the presentence report. It deletes language requiring victim impact information to be "verified" and "stated in a nonargumentative style" because that language does not appear in the other subparagraphs of Rule 32(d)(2).

Subdivision (i)(4). The deleted language, referring only to victims of crimes of violence or sexual abuse, has been superseded by the Crime Victims' Rights Act, 18 U.S.C. § 3771(e). The act defines the term "crime victim" without limiting it to certain crimes, and provides that crime victims, so defined, have a right to be reasonably heard at all public court proceedings regarding sentencing. A companion amendment to Rule 1(b) adopts the statutory definition as the definition of the term "victim" for purposes of the Federal Rules of Criminal Procedure, and explains who may raise the rights of a victim, so the language in this subdivision is no longer needed.

Subdivision (i)(4) has also been amended to incorporate the statutory language of the Crime Victims' Rights Act, which provides that victims have the right "to be reasonably heard" in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771 (a)(4). The amended rule provides that the judge must speak to any victim present in the courtroom at sentencing. Absent unusual circumstances, any victim who is present should be allowed a reasonable opportunity to speak directly to the judge.

Rule 60. Victim's Rights

(a) In General.

(1) *Notice of a Proceeding.* The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.

(2) *Attending the Proceeding.* The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

(3) *Right to Be Heard on Release, a Plea, or Sentencing.* The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.

(b) Enforcement and Limitations.

(1) *Time for Deciding a Motion*. The court must promptly decide any motion asserting a victim's rights described in these rules.

(2) *Who May Assert the Rights*. A victim's rights described in these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized by 18 U.S.C. § 3771(d) and (e).

(3) *Multiple Victims*. If the court finds that the number of victims makes it impracticable to accord all of them their rights described in these rules, the court must fashion a reasonable procedure that gives effect to these rights without unduly complicating or prolonging the proceedings.

(4) *Where Rights May Be Asserted*. A victim's rights described in these rules must be asserted in the district where a defendant is being prosecuted for the crime.

(5) *Limitations on Relief.* A victim may move to reopen a plea or sentence only if:

(A) the victim asked to be heard before or during the proceeding at issue, and the request was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days after the denial, and the writ is granted; and

(C) in the case of a plea, the accused has not pleaded to the highest offense charged.

(6) *No New Trial*. A failure to afford a victim any right described in these rules is not grounds for a new trial.

Committee Note

This rule implements several provisions of the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771, in judicial proceedings in the federal courts.

Subdivision (a)(1). This subdivision incorporates 18 U.S.C. § 3771 (a)(2), which provides that a victim has a "right to reasonable, accurate, and timely notice of any public court proceeding. . . ." The enactment of 18 U.S.C. § 3771(a)(2) supplemented an existing statutory requirement that all federal departments and agencies engaged in the detection, investigation, and prosecution of crime identify victims at the earliest possible time and inform those victims of various rights, including the right to notice of the status of the investigation, the arrest of a suspect, the filing of charges against a suspect, and the scheduling of judicial proceedings. *See* 42 U.S.C. § 10607(b)&(c)(3)(A)-(D).

Subdivision (a)(2). This subdivision incorporates18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim's testimony would be materially altered by attending and hearing other testimony at the proceeding, and 18 U.S.C. § 3771(b), which provides that the court shall make every effort to permit the fullest possible attendance by the victim.

Rule 615 of the Federal Rules of Evidence addresses the sequestration of witnesses. Although Rule 615 requires the court upon the request of a party to order the witnesses to be excluded so they cannot hear the testimony of other witnesses, it contains an exception for "a person authorized by statute to be present." Accordingly, there is no conflict between Rule 615 and this rule, which implements the provisions of the Crime Victims' Rights Act.

Subdivision (a)(3). This subdivision incorporates 18 U.S.C. § 3771(a)(4), which provides that a victim has the "right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing . . . ."

Subdivision (b). This subdivision incorporates the provisions of 18 U.S.C. § 3771 (d)(1), (2), (3), and (5). The statute provides that the victim, the victim's lawful representative, and the attorney for the government, and any other person authorized by 18 U.S.C. § 3771(d) and (e) may assert the victim's rights. In referring to the victim and the victim's lawful representative, the committee intends to include counsel. 18 U.S.C. § 3771(e) makes provision for the rights of victims who are incompetent, incapacitated, or deceased, and 18 U.S.C. § 3771(d)(1) provides that "[a] person accused of the crime may not obtain any form of relief under this chapter."

The statute provides that those rights are to be asserted in the district court where the defendant is being prosecuted (or if no prosecution is underway, in the district where the crime occurred). Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

Finally, the statute and the rule make it clear that failure to provide relief under the rule never provides a basis for a new trial. Failure to afford the rights provided by the statute and implementing rules may provide a basis for re-opening a plea or sentence, but only if the victim can establish all of the following: the victim asserted the right before or during the proceeding, the right was denied, the victim petitioned for mandamus within 10 days as provided by 18 U.S.C. 3771 (d)(5)(B), and – in the case of a plea – the defendant did not plead guilty to the highest offense charged.

5 March 2013

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, Respondent v. Airman First Class (E-3) **NICHOLAS E. DANIELS,** USAF, Real Party in Interest v. Airman First Class (E-3) L.R.M., USAF, Petitioner	OUT-OF-TIME *AMICUS CURIAE* BRIEF ON BEHALF OF ARMY DEFENSE APPELLATE DIVISION IN OPPOSITION TO L.R.M.'S PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS Misc Dkt. No. 2013-05

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

COME now *amicus curiae* the United States Army Defense Appellate Division, in support of Party in Interest Airman First Class (E-3) Nicholas E. Daniels. It is the position of the Army Defense Appellate Division that this Court has no jurisdiction to hear the writ of mandamus of the purported victim in this case, and the Air Force Special Victim's Counsel Program fundamentally alters military justice in the Air Force, and eventually would inflict severe damage on this Court and any surviving notion of military justice. Accordingly, the petition for a writ of mandamus must fail.

This Court has no jurisdiction over the Petition. Petitioner seeks to establish jurisdiction via a statute, 18 U.S.C. § 3771, that has no applicability to courts-martial. Even if this Court determines 18 U.S.C. § 3771 is in some way applicable, the statute does not afford Petitioner the

remedy she seeks. Finally, as established in the brief of *Amicus* Navy-Marine Corps Appellate Defense, the application of longstanding constitutional and jurisdictional traditions must result in denial of the writ of mandamus.

In criminal proceedings in United States district courts, 18 U.S.C. § 3771 affords a "crime victim" the following:

> (1) The right to be reasonably protected from the accused.
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
> (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.
> (6) The right to full and timely restitution as provided in law.
> (7) The right to proceedings free from unreasonable delay.
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a)(1-8)(2012). If a crime victim is denied these enumerated rights in United States district court, the victim may petition a United States court of appeals for a writ of mandamus. *Id.* at (d)(3). It is upon this statute Petitioner's claim of jurisdiction rests in asserting a right to be represented and participate as a party-equivalent in Airman Daniels' court-martial.

Petitioner maintains a "holistic reading exhorts all federal agencies comply" with 18 U.S.C. § 3771. Petitioner's Petition at 21. However, the statute, as was true with its predecessors, is a statute of general applicability, with no applicability to courts-martial.

In *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999), the Court of Appeals for the Armed Forces (CAAF) examined whether 42 U.S.C. § 10606, a predecessor statute to the one at

issue here, applied to courts-martial. That statute, in pertinent part, gave crime victims "the right to 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." *Id.* at (b)(4). The military judge in *Spann* determined the federal statute prohibited him from sequestering the victim and her mother from Spann's court-martial. 51 M.J. at 90. On appeal, Spann claimed 42 U.S.C. § 10606 should not apply to courts-martial. *Id.*

The CAAF agreed with Spann. The CAAF noted its "great caution" in overlaying generally applicable statutes onto the military justice system. *Id.* at 92, quoting *United States v. Dowty*, 48 M.J. 102, 106 (C.A.A.F. 1998). The CAAF refused to apply 42 U.S.C. § 10606 to courts-martial for two reasons. First, CAAF found the effect of the application of the federal statute in U.S. district court anything but clear, specifically in its effect on Federal Rule of Evidence (Fed.R.Evid.) 615. 51 M.J. at 92. Because of this ambiguity, CAAF refused to apply the statute to courts-martial.

Second, CAAF found significant the President had not amended Military Rule of Evidence 615 since passage of the two renditions of the applicable statute. *Id.* at 92-93. The Court identified two possible reasons for the President's inaction --He was at yet undecided whether the federal statute should apply, and if so, whether it should be modified to fit military practice. *Id.* at 93. The CAAF emphasized Congress established a system by which the Manual for Courts-Martial is amended through a deliberative process, and not through the application of statutes outside the UCMJ. *Id.* "If government counsel or others involved in the administration of military justice believe such rules should apply in courts-martial, the appropriate route is not through litigation involving statutes outside the UCMJ that are subject to interpretive uncertainties, but through amendments to the Manual for Courts-Martial or, if necessary, through

legislative changes." *Id.*

Similarly, CAAF found the statute of limitations in the Victims of Child Abuse Act (VCAA), applicable in federal district courts, inapplicable to courts-martial. *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000). That statute of limitations stated:

> No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years.

54 M.J. at 125, quoting 18 U.S.C. § 3283 (1994). The CAAF noted the "military and civilian justice systems are separate as a matter of law." 54 M.J. at 124. The Court observed Congressional intent was to "separate military justice from the federal system. 54 M.J. at 124, quoting *United States v. Dowty*, 48 M.J. 102, 111 (C.A.A.F. 1998).

The Court found the VCAA inapplicable in part because the text of the statute indicated is applied to federal courts, and not courts-martial. 54 M.J. at 125. The statute referred to the Department of Justice and used terms familiar to federal district courts, not courts-martial, such as "jury," "guardian *ad litem*, and "clerk of court." *Id.* "None of the foregoing terms apply in the military justice system, where courts-martial are convened by military officers for the trial of a single case, the prosecution function is performed by judge advocates appointed as trial counsel, verdicts are rendered by the members of the court-martial, and the proceedings are governed by the Military Rules of Evidence." *Id.* at 126.

For the same reasons, 18 U.S.C. § 3771 does not apply to courts-martial. The terms employed in the statute indicate its application to federal district courts, and not courts-martial. A motion for relief must be filed "in the district court in the district in which the crime occurred," and the "district court" must decide the motion. 18 U.S.C. § 3771(d)(3). Additionally, the "court of appeals may issue the writ on the order of a single judge pursuant to

circuit rule or the Federal Rules of Appellate Procedure." *Id.* This and other terms in the statute establish the statute applies in U.S. district courts, but not courts-martial. *McElhaney*, 54 M.J. at 126.

Additionally, the applicability of the statute to federal district court cases is unclear (*see Spann*, 51 M.J. at 92), although it is clear none have afforded a victim the right to participate in the proceedings that Petitioner seeks. Additionally, the President has not amended procedural or evidentiary rules to allow the non-party participation Petitioner seeks. *Id.* at 93.

18 U.S.C. § 3771 has no applicability to courts-martial. Because that statute appears to be the thin reed on which Petitioner relies for the jurisdictional hook for her writ, *amicus* submit her Petition must be denied.

Even if 18 U.S.C. § 3771 had applicability to courts-martial, the rights afforded to crime victims by the statute do not entitle Petitioner to be accorded the equivalence of party status at Airman Daniels' court-martial. The statute affords crime victims a number of rights, but these rights appear geared toward attendance, sentencing, protection, and restitution. The victim has a right to be "reasonably heard," but that right is limited to proceedings "involve[ing] release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(3). Further, a victim has a right to notice of proceedings, and may not be excluded unless the trial court determines the victim's attendance would materially alter the victim's testimony. *Id.* at (a)(2) & (3). Additionally, a victim has a right to be "reasonably protected," and a "reasonable right to confer with the attorney for the government." It is *amicus'* understanding none of these rights, if the statute were applied, have been violated in this case.

Nonetheless, Petitioner claims she has a right to be heard through counsel when the victims' rights afforded by 18 U.S.C. § 3771 are cobbled together with Mil. R. Evid. 412 and

513. However, Petitioner presents no support from either the U.S. district courts hearing cases applying Fed. R. Evid. 412 or 513 for that proposition, nor has *amicus*' research revealed such support. Furthermore, the language employed in those Rules of Evidence do not support Petitioner.

Mil. Rule Evid. 412 provides that a party seeking to admit evidence pursuant to that rule must file a motion and serve the motion on the court and opposing party "and notify the alleged victim or, when appropriate, the alleged victim's representative." Mil. R. Evid. 412(c)(1)(B). Thus, the purported victim is given notice, but has no "right" to service of the motion. *Id.* Additionally, the term "representative" is undefined, and is absent from the remainder of Rule 412. While the rule affords the purported victim "a reasonable opportunity to attend and be heard," the term representative is significantly absent from Rule 412(c)(2). Thus, the plain language of the Rule does not contemplate legal representation for the purported victim at the hearing, and only contemplates notification to a representative in "appropriate" cases, most likely in the event of minority or disability. "Unless ambiguous, the plain language of a statute will control unless it leads to an absurd result." *U.S. v. King,* 71 M.J. 50, 52 (C.A.A.F. 2012), *citing* United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F.2007); *see* generally Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-75 (2012) (if possible every word and provision should be given effect).

Nor can Petitioner, despite her claim to the contrary, find solace in Mil. R. Evid. 513 or 514. Pursuant to Rule 513, the production or admission of a patient record or communication, if the patient is not the accused, requires service of a motion on the military judge and opposing party, "and, if practicable, notif[ication to] the patient or patient's guardian, conservator, or representative and that the patient has an opportunity to be heard as set forth" by the Rule. Mil.

R. Evid. 513(e)(1). And what is that opportunity to be heard? "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." *Id.* at (e)(2).

Similarly, Mil. R. Evid. 514, which directs a limited privilege for victim advocates-victims, requires, upon admission or production of victim advocate-victim communication, the same service on the opposing party and military judge, and "and, if practicable, notif[ication to] the victim or victim's guardian, conservator, or representative and that the victim has an opportunity to be heard as set forth" by the Rule. Mil. R. Evid. 514(e)1)(B). The victim is afforded the same right at the hearing, "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." *Id.* at (e)(2).

The plain language of the applicable Rules simply do not provide the "rights" Petitioner claims she is entitled to. As CAAF noted in *United States v. Custis*, 65 M.J. 366 (C.A.A.F. 2007), the privileges found in the Military Rules of Evidence "are expressly delineated," not the product of common law evolution, as they are in federal court. 65 M.J. at 370. Rather, in the military system "the policy making branches of government" codify the Rules for Court-Martial and applicable Rules of Evidence, not the Service courts or CAAF. *Id.* at 369. See also Art. 36(a), UCMJ. "When the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." 65 M.J. at 370 citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). Petitioner seeks a quasi-party status that no other United States court affords purported

victims, nor should this Court.[1] Instead, this Court should maintain traditional notions of party status and military justice. This Court can find support for that stand in the Manual. The Manual defines "Party" as:

> (A) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial in question; and
>
> (B) Any trial or assistant trial counsel representing the United States and agents of the trial counsel when acting on behalf of the trial counsel with respect to the court-martial in question.

Rule for Courts-Martial [hereinafter R.C.M.] 103(16). This Court has recognized, almost from its inception, the impropriety of accusers serving as trial counsel because of the necessary lack of impartiality. *United States v. Long*, 13 C.M.R. 775, 777-78 (A.F.B.R. 1953). This Court should stake a similar position in denying the purported victim, the ultimate accuser, a position in Air Force court-martials not permitted in any other court in America.

---

[1] In *amicus curiae* National Crime Victim Law Institute's brief, *amicus* claims it is "not uncommon for victims to be granted standing for limited purposes in connection with criminal proceedings." *Amicus* is apparently relying upon a different definition of "common" than that in common usage. The cases *amicus* relies upon indicate how uncommon, and limited, standing is. For example, *In re Dean*, 527 F.3d 391 (5th Cir. 2008), involved the criminal charges and trial of British Petroleum following an explosion where fifteen people were killed. *Id.* The Court mentions that "[a]ll victims who wished to be heard, personally or through counsel, were permitted to speak." *Id.* at 393. However, the victims challenged the district court's decisions in that case pursuant to 18 U.S.C. § 3227, and it is not surprising some of the victim's attorneys were allowed to address the court. After all, some of the victims were dead. *Id.* at 391. *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981), is not only long in the tooth, limited to Rule of Evidence 412 motions, but has been called into question by other circuits. *United States v. Alcatel-Lucent France, S.A.*, 688 F.3d 1301, 1307 (11th Cir. 2012); *United States v. Monzel*, 641 F.3d 528, 542 (D.C. Cir. 2011).

Conclusion

Based upon the foregoing, *amicus* United States Army Defense Appellate Division asserts this Court lacks jurisdiction to review Petitioner's writ and the write should be denied.

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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Airman First Class (E-3) L.R.M., USAF *Petitioner*	)	Misc Dkt. No. 2013-05
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF *Respondent*	)	SECOND MOTION FOR STAY OF TRIAL PROCEEDINGS
&	)	
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party In Interest*	)	Panel No. 2

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

COMES NOW A1C L.R.M., the Petitioner, by and through her undersigned counsel, and pursuant to Rule 23.7 of this Honorable Court's Rules of Practice and Procedure, moves to stay the trial proceedings of the lower court until this Honorable Court may issue its ruling. In its initial request for a Writ of Mandamus, the Petitioner requested a stay of the proceedings and included the request in the caption, per this Honorable Court's rules. The litigants in this case have researched and briefed this Court in an effort to resolve matters of heavy concern to current and future trials in Air Force courts-martial. The court received answers from both the United States, the Real Party in Interest, a reply brief from the Petitioner, as well as five briefs from Amicus Curiae and graciously heard oral argument. The trial in the lower court is set to continue on 18 March 2013. The government will soon begin to travel witnesses to the trial and incur significant travel expenses. The issues before this Court are weighty and may impact L.R.M.'s ability to be represented at the trial in matters pursuant to Mil.R.Evid. 412 and 513. As this court has been fully briefed on these

CERTIFICATION OF COMPLIANCE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division and to the Air Force Appellate Government Division on 7 March 2013 via electronic filing.

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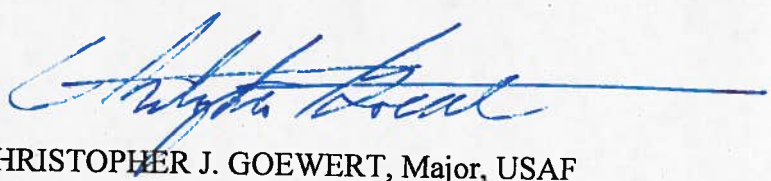
issues which are of great importance to A1C L.R.M. and other's similarly situated, we respectfully request this court issue a Stay of Proceedings while it deliberates these issues.



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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

Airman First Class (E-3)	)	
L.R.M,	)	
USAF,	)	
Petitioner	)	PETITIONERS' MOTION FOR
	)	RECONSIDERATION
v.	)	EN BANC
	)	
Lieutenant Colonel (O-5)	)	&
JOSHUA E. KASTENBERG,	)	
USAF,	)	
Respondent	)	PETITION FOR STAY OF
	)	PROCEEDINGS
Airman First Class (E-3)	)	
NICHOLAS E. DANIELS,	)	
USAF,	)	Misc Dkt. No. 2013-05
Real Party In Interest	)	

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Comes now the Petitioner, A1C L.R.M., pursuant to Rule 17 of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, and requests that this Honorable Court reconsider, en banc, its recent ruling, holding that it lacked jurisdiction to consider a petition requesting, *inter alia*, the proper enforcement of a Military Rule of Evidence.

Additionally, A1C L.R.M. requests that this Honorable Court immediately stay the proceedings in this case pursuant to Rule 23.7 until the completion of this Honorable Court's en banc reconsideration of this issue.

ISSUE PRESENTED

WHETHER THE PANEL ERRED IN FINDING IT HAD NO SUBJECT MATTER JURISDICTION TO CONSIDER AN AIR FORCE TRIAL JUDGE'S RULINGS REGARDING MILITARY RULE OF EVIDENCE 412 AND MILITARY RULE OF EVIDENCE 513.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On 12 February 2013, A1C L.R.M. filed a petition for extraordinary relief in the form of a writ of mandamus. (Appendix 1). She sought relief from the military judge's erroneous determination regarding the procedures mandated in Mil. R. Evid. 412 and 513. (Appendix 1).

On 20 February 2013, this Court issued an order to the Government to show cause why such a writ should not issue. (Appendix 2). On 22 February 2013, the Government filed an Answer. (Appendix 3). The Government Answer agreed that this Court had subject matter jurisdiction to resolve rulings regarding military rules of evidence. The Government Answer also agreed that a writ should issue to correct the trial judge's errors. *Id.*

On 4 March 2013, the Real Party in Interest Answer was filed. (Appendix 4). The Real Party in Interest argued that this Court lacked the jurisdiction to supervise the lower trial court's decision and in the alternative that the lower court's decisions regarding Military Rules of Evidence 412 and 513 were not in error. *Id.*

On 11 March 2013, oral arguments were heard on this case and a stay of the trial proceeding was subsequently ordered on 13 March 2013. (Appendix 5). On 2 April 2013, an order issued denying A1C L.R.M.'s request for a writ of mandamus and vacating the stay. The order held that this Court lacked jurisdiction to review the Air Force trial court's decisions regarding Mil. R. Evid. 412 and 513. (Appendix 6).

ARGUMENT

This Court's subject matter jurisdiction must include the authority to supervise its lower court's legal and evidentiary decisions. There is nothing that is more firmly within this Court's subject matter jurisdiction than the review of evidentiary decisions of trial judges. In this case, the trial judge improperly interpreted and applied Mil. R. Evid. 412 and 513 in violation of existing law and the Constitution.

In addressing the procedural background of the case, the panel described the Special Victims' Counsel (SVC) program in great detail. However, the existence of the SVC program is not relevant to any legal question before this Court. The SVC program does not create jurisdiction, remove jurisdiction, provide standing, or remove standing. The rights of victims exist independent of the program; the rights existed before the SVC pilot program and will continue regardless of whether the program continues. Any consideration of the program either negative or positive in the analysis of this issue is simply not germane. Any victim or witness that desires to be heard through counsel under Mil. R. Evid. 412 and 513 who happens to procure civilian counsel would face the same legal predicament as A1C L.R.M.

THE PANEL ERRED WHEN IT CONFUSED SUBJECT MATTER JURISDICTION WITH STANDING.

Subject matter jurisdiction is determined by the subject of the matter to be addressed. It is not determined by the participant raising the issue—standing addresses an individual's ability to seek relief in court. If the Honorable Court's rationale for finding lack of jurisdiction is, as suggested by its dicta, that the court lacks jurisdiction to hear a writ brought by a non-party because of their status as a non-party, such a rationale must also fail.

In the final paragraphs of its order, the panel notes that to grant jurisdiction to hear A1C L.R.M.'s petition would be an invitation to "open-ended jurisdiction to entertain every challenge brought by interested parties regarding aspects of the court-martial." (Appendix 6 at 9). Such a fear is misplaced as only participants with standing could seek review of these issues. Historically and practically, standing is a demanding legal test that can only be met by those closest and most directly tied to case.

As a result of conflating subject matter jurisdiction and standing, the panel failed to conduct the constitutionally necessary standing analysis. *See, United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008) (Applying the *Lujan* test in courts-martial, an individual has standing to assert rights in court if: 1) the litigant has suffered an "injury in fact"; 2) there is a causal connection between the injury and the conduct complained of; and 3) the injury is redressable by a favorable decision of the court).

Had the panel conducted the proper standing analysis, this Honorable Court would have determined that A1C L.R.M. had standing under Military Rules of Evidence 412 and 513 to be heard by the lower court, the denial constituted an injury, and the injury was redressable by this court's action.

A1C L.R.M. was thus no differently situated than members of the press or individuals battling the propriety of subpoenas. *See, e.g.*, *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008); *ABC Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997); *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F 1995); *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996). A1C L.R.M's standing gave her the right to bring an issue to this Honorable Court's attention via extraordinary writ in a case that potentially could come to it through Article 66.

THE PANEL ERRED WHEN IT DETERMINED THAT THE APPLICATION OF A MILITARY RULE OF EVIDENCE IS A COLLATERAL, CIVIL OR ADMINISTRATIVE ISSUE.

The application of the Military Rules of Evidence in an Air Force court-martial is fundamentally within the purview of this Honorable Court's jurisdiction. The strict question before the panel was the application of the procedural rules in Mil. R. Evid. 412 and 513. The panel misconstrued the issue by characterizing the application of the rule as "collateral, civil/administrative" in nature. (Appendix 6 at 7). However, "terming an action an administrative matter is not a talisman" that "may remove a case from [y]our jurisdiction." *United States v. Ouimette*, 52 M.J. 691, 695 (CGCCA 2000).

In denying jurisdiction, the Court's reliance on *Clinton v. Goldsmith* is misplaced. 526 U.S. 529, 535 (1999). *Goldsmith* did not deal with a case, a court-martial, an Article 32, or even a rule of evidence. *Id.* *Goldsmith* involved an officer who was "dropped from the roles" in an administrative action subsequent to his court-martial. *See, Goldsmith*, 526 U.S. at 531. In finding the military court lacked jurisdiction, the Supreme Court instructed military appellate courts on the scope of their authority when dealing with actors outside of the court-martial system. *Id.* However, the Supreme Court did not speak to supervisory jurisdiction -- the jurisdiction of a superior court to confine an inferior court to act within the law. *Id*. The present case is an ongoing court-martial, and the issue before this Court is the application of procedural rules in an actual Air Force courtroom.

Further, *Goldsmith* has been limited to the facts of the decision. *See, e.g., United States v. Ouimette*, 52 M.J. 691, 695 (CGCCA 2000)(appellant's complaints of conditions of confinement at the naval brig were reviewable by the appellate court); *see also, United States v. Reinert*, 2008 WL 8105416 pg. 8 (Army Ct. Crim. App.)(in a writ of prohibition brought by the Government to preclude a military judge from ordering the government to train and counsel drill sergeants to avoid a violation of Article 13 the court concluded that "the All Writs Act empowers us to issue a writ of prohibition in aid of our jurisdiction over a pending court-martial, even if the case does not fall strictly within the jurisdiction conferred by Articles 62, 66, 69, 73 UCMJ").

The Court of Appeals for the Armed Forces has exercised its supervisory jurisdiction in assessing the application of procedural issues – even when the application of those rules was to benefit limited trial participants. Specifically, in *Carlson and Ryan-Jones v. Smith*, CAAF explicitly told trial courts how to handle rules of evidence when enforcing the rights of limited participants. 43 M.J. 401, 402 (C.A.A.F 1995)(summary disposition). *Carlson and Ryan-Jones v. Smith* involved the subpoena of EEO records. CAAF granted a writ of mandamus and ordered the military judge to examine the records *in camera*, in order to scrub them of matters related to Mil. R. Evid. 412 and other privileges. *Id*. The hearing was to be conducted in the manner prescribed under Mil. R. Evid. 412. *Id*. To protect the victim-petitioners' interests in the release of the materials, the court noted that the victims will "be given an opportunity, *with the assistance of counsel* if they so desire, to present evidence, argument and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents." *Id.* (emphasis added). Although the summary disposition lacks detail, in order to hear the writ, CAAF would have necessarily concluded that it

had jurisdiction over a writ brought by limited–participants seeking to vindicate their rights to privacy. CAAF would have also concluded that a writ was "in aid" of its jurisdiction, in order to prevent the court from otherwise disclosing materials that might have fallen under Mil. R. Evid. 412 and other privileges.

In *Carlson and Ryan-Jones v. Smith*, CAAF did precisely what we are requesting this Honorable Court do, namely, instruct a lower court on the proper procedures to allow a limited-participant the ability to protect her right to privacy by hearing from her counsel on matters relating to the release of her private sexual history and mental health matters.

THIS PANEL ERRED WHEN IT LIMITED ITS SUPERVISORY JURISDICTION TO ISSUES DIRECTLY INVOLVING "A FINDING OR SENTENCE."

In avoiding jurisdiction, the panel concluded the military judge's ruling did not directly involve a finding or sentence. However, there is nothing unprecedented or unusual for a military appellate court to inform a lower trial court about the proper construction of a military rule of evidence. The view that the military judge's ruling "does not directly involve a finding or sentence that was or potentially could be imposed in a court proceeding," confuses this court's jurisdiction analysis. *See*, Appendix 6 at 7. It is generally impossible to tell whether any particular decision of a trial judge will impact the findings or sentence in a particular case. Accordingly, issue-based analysis has never been a jurisdictional test. According to the panel's logic, decisions regarding delays, experts, counsel qualifications, bias of judges and members, investigative support, and evidentiary rulings, (just to name a few) would rarely if ever be reviewable.

This Honorable Court has traditionally viewed supervisory jurisdiction as the "authority over the actions of trial judges in cases that may **potentially** reach the appellate court." *San Antonio Express-News v. Morrow*, 44 M.J. 706, 708 (A.F. Ct. Crim. App. 1996) citing, *Dettinger v. U.S.*, 7 M.J. 216, 220 (C.M.A. 1979). This is explicitly contrary to the issue-based analysis or outcome-based analysis the panel seemingly adopted. In determining the extent of its supervisory jurisdiction, this Court does not parse the individual decision being appealed to determine if it could, on its own, result in a "finding" or "sentence" because the court has jurisdiction not over individual decisions, but over cases. "As the highest Air Force Court, through [y]our reviews [you] exercise supervisory authority over the actions of Air Force trial judges , and where… an injustice has been done, [you] have the inherent power to correct it." *San Antonio Express-News*, 44 M.J. at 708.

The panel's order breaks with well-established precedent because the decision makes jurisdiction over a ruling contingent on its potential to directly involve a "finding" or "sentence." This creates a precedent where the Court must parse every assignment of error in an appeal to see if the individual ruling below directly involved a finding or sentence in order to determine if the court had jurisdiction in the first instance to then decide the merits of those many individual rulings. Not only is this unworkable, the Court should not do so because the Court has subject matter jurisdiction over the entire case and all attendant issues. *See, Id.*

The military judge's ruling in this case involved an interpretation of the Military Rule of Evidence and due process rights. To illustrate the logical inconsistency of the panel's order, consider the result if the military judge had ruled the other way – that is, allowing A1C L.R.M. to be heard though counsel and such ruling was challenged by the accused. This Court would undoubtedly say

it had jurisdiction because the case was before it under UCMJ Article 66. If the issues in the case could somehow come before it through Article 66, then bringing the same issues before it now, when resolution is meaningful, would clearly be "in aid" of its "potential" jurisdiction. [1]

THE PANEL'S DETERMINATION THAT SUBJECT MATTER JURISDICTION CAN BE EXPANDED TO CONSIDER ALL "CONSTITUTIONAL ISSUES" IS BOTH MISTAKEN AND WAS NOT APPLIED IN THIS CASE.

In order to explain contradictory case law, the panel observed that it has jurisdiction to hear from a non-party petitioner when the petitioner has a complaint grounded in the United States Constitution whether or not statutory jurisdiction otherwise exists. (Appendix 6 at 6); *United States v. Denedo*, 556 U.S. 904, 912 (2009). This was a necessary attempt to explain this Court's prior ruling on supervisory jurisdiction in *San Antonio Express-News* by creating novel special jurisdiction for petitions by limited party participants only if a constitutional issue is at stake. *See*, Appendix 6 at 8.

The panel's analysis was both in error and misapplied to this case. On the issue of subject matter jurisdiction, the constitutionality of the issue is not a relevant factor. The existence of a constitutional issue does not create or expand subject matter jurisdiction unless the case could somehow reach the court through Article 66. For example, had the petitioner in *Goldsmith* been asserting a constitutional violation for dropping him from the rolls, the court would still have had no jurisdiction. 526 U.S. 536. The decision to drop him from the rolls would still have been outside the subject matter jurisdiction of a court-martial because there was no "potential" case.

[1]For further support of this argument, scholars have noted that in extraordinary writ cases for purposes of jurisdiction, a case has the potential to fall within the scope of Article 66, although it has no adjudged sentence when it has the potential to fall within the court's statutory jurisdiction upon completion of the trial; conversely, no writ will issue over summary courts-martial, nonjudicial punishment or letters of reprimand because they are not part of the "court-martial process that can result in a 'findings' or 'sentence.'" Patrick B. Grant, *Extraordinary Relief: A Primer For Trial Practitioners*, ARMY LAWYER, Nov. 2008 at 31.

Second, even if there were some case or law that authorized this Court to expand its subject matter jurisdiction to hear all constitutional issues, the panel summarily ignored the constitutional issues in this case. That is, application of the panel's own rationale mandates that A1C L.R.M.'s issues be heard by this Court. A1C L.R.M. has submitted two constitutional issues for this Honorable Court to resolve: violation of her constitutional right to informational privacy and a violation of her constitutional due process rights for not being permitted the assistance of her counsel. *See, Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *see also, Chandler v. Fretag*, 348 U.S. 3, 9 (1954). The panel failed to address the constitutional violations in this case. Had they done so, using their own constitutional-issue based analysis, the panel would have determined that it had jurisdiction to hear the writ.

THE HONORABLE COURT SHOULD DECIDE THIS CASE EN BANC IN ORDER TO RESOLVE A RULING THAT IS INCONSISTENT WITH ITS PREVIOUS VIEWS OF SUPERVISORY JURISDICTION.

In its prior decisions involving extraordinary writ cases, this Honorable Court has analyzed its supervisory jurisdiction to hear petitions based not on the discrete issue presented but on the fact that the case itself could come before it pursuant to Article 66. The court has consistently applied the view that writs exist over cases, not specific issues: "[o]ur superior court holds that military appellate courts may exercise this authority **over cases** that may potentially reach the appellate court." [Emphasis added]. *In re Al Halabi*, Misc. Dkt. 2003-07 (A.F. Ct. Crim. App.)(requesting the examination of a blanket order closing an Article 32 hearing to protect classified information), citing, *Dettinger v. United States*, 7 M.J. 216, 220 (C.M.A. 1979); *United States. v. Richards*, 2012 WL 3136497(A.F. Ct. Crim. App.)(jurisdiction to hear a writ of habeas corpus questioning the lawfulness and procedures of pretrial confinement when even after 99 days of confinement no charges had yet been preferred); *United States v. Holsey*, 2012 WL 1556189 (A.F. Ct. Crim.

App.)(finding jurisdiction to hear a writ of mandamus requesting the appointment of several expert consultants prior to the conducting of an Article 32 hearing and referral of charges); *United States v. Cron*, Misc. Dkt. No 2011-06 (A.F. Ct. Crim. App.)(finding jurisdiction to hear a writ of mandamus, citing *Clinton v. Goldsmith* for authority to do so, when the accused requested appointment of a Portuguese translator to assist at an Article 32 hearing, though no charges had yet been referred to trial); *Murphy v. Smolen*, Misc. Dkt. No. 2007-03 (A.F. Ct. Crim. App.)(in a writ requesting the IO be ordered to recuse himself and order the convening authority to appoint a new Article 32 officer, the court noted "we have jurisdiction to hear this petition," citing, *San Antonio Express-News v. Morrow* at 709).

It is readily apparent from this Honorable Court's recent orders addressing extraordinary writs that this Honorable Court has never truncated its jurisdiction by claiming it exists only over particular issues rather than cases. This Court has never viewed the holding of *Clinton v. Goldsmith* as a bar to exercising its supervisory authority over cases that might one day come before it under Article 66. As this Honorable Court's most recent view of its jurisdiction is so disparate from the interpretation that persisted over the last decade, this Honorable Court should decide the issues in the case, en banc, in order to preserve uniform application of the law and to resolve questions that are of great importance to A1C L.R.M., other victims, witnesses, and accuseds.

WHEREFORE, A1C L.R.M. respectfully requests this Honorable Court reconsider its opinion, en banc, and order a stay of the proceedings at trial until it can fully reconsider its ruling on jurisdiction and the underlying issues in the case.

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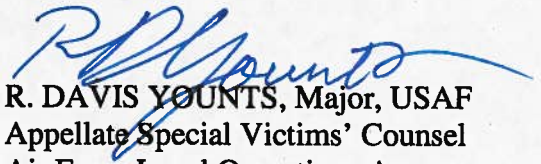

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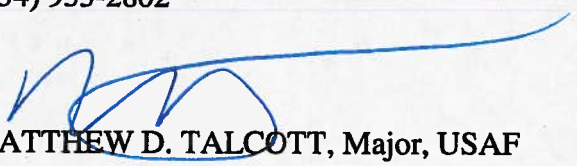

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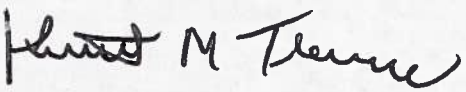

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CERTIFICATION OF COMPLIANCE

I certify that a copy of the foregoing was delivered to the Air Force of Court of Criminal Appeals, to the Appellate Government Division, to Appellate Defense Counsel and to Lieutenant Colonel Joshua Kastenberg, on 10 April 2013.

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United States Court of Appeals
for the Armed Forces
Washington, D.C.

Airman First Class LRM, USAF, Appellant	)	USCA Dkt. No. 13-5006/AF Crim.App. No. 2013-05
v.	)	DOCKETING NOTICE
Lieutenant Colonel Joshua E. KASTENBERG, USAF, Military Judge, Appellee	)	
and	)	
Airman First Class Nicholas E. DANIELS, USAF, Real Party In Interest	)	

Notice is hereby given that a certificate for review of the decision of the United States Air Force Court of Criminal Appeals and supporting brief were filed under Rule 22 on the 1st day of May, 2013, on the following issues:

I. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS

II. WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION

III. WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS

Pursuant to Rule 17, the Judge Advocate General of the Air Force shall appoint counsel for the Appellee and the Real Party In Interest.

The Appellee and the Real Party In Interest shall file answers under Rule 22(b) on or before May 13, 2013. Appellant may file a reply within 5 days after the filing of Appellee's answer. Absent extraordinary circumstances, requests for enlargement of time will not be granted.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Special Victims' Counsel (GOEWERT)
Appellate Government Counsel (CHRISTENSEN)
Appellate Defense Counsel (POSCH)
Counsel for Real Party In Interest (JAMES)

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Petitioner*	)	BRIEF ON BEHALF OF A1C LRM
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, *Respondent*	)	
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party In Interest*	)	USCA Dkt. No. _____/AF Crim. App. Misc Dkt. No. 2013-05

Brief on Behalf of Petitioner

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Petitioner*	)	BRIEF ON BEHALF OF A1C LRM
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, *Respondent*	)	
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party In Interest*	)	USCA Dkt. No. _____/AF Crim. App. Misc Dkt. No. 2013-05

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED

I. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS

II. WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION

III. WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS

STATEMENT OF STATUTORY JURISDICTION

This Court has jurisdiction to review the decision of the Air Force Court of Criminal Appeals (hereinafter AFCCA) under Article 67(a)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(2), and authority to grant the relief sought under the All Writs Act, 28 U.S.C. § 1651.

STATEMENT OF THE CASE

On 16 October 2012, Airman First Class (A1C) Nicholas Daniels was charged with raping and sexually assaulting A1C LRM in violation of Article 120, UCMJ, 10 U.S.C. § 920. Arraignment in the case of *U.S. v. Daniels* was held on 29 January 2013. (J.A. at 89-96). At the hearing, the military judge held that Airman LRM's attorney would not be permitted to make any arguments before him nor would he be permitted to speak on behalf of A1C LRM in hearings pursuant to Military Rule of Evidence (MRE) 412 and MRE 513. (*See* J.A. at 177). The military judge reconsidered his decision, but he denied all relief requested on 9 February 2013. (*See* J.A. at 215).

On 12 February 2013, A1C LRM filed a petition for extraordinary relief in the form of a writ of mandamus and a stay. She sought relief from the military judge's erroneous determination regarding the procedures mandated in MRE 412 and 513. On 2 April 2013, AFCCA issued an order

denying A1C LRM's request for a writ of mandamus and vacating the stay. (J.A. at 1). The order held that AFCCA lacked jurisdiction to review the Air Force trial court's decisions regarding interpretation of the procedural rules of MRE 412 and 513.

On 10 April 2013, the petitioner filed a motion for reconsideration en banc. As a result of the stay being lifted, the trial is now set to proceed on 22 July 2013. On 18 April 2013, AFCCA denied petitioner's motion for reconsideration en banc and her request for a stay of the proceedings. (J.A. at 11).

STATEMENT OF FACTS

Airman LRM, 627 LRS, McChord AFB, Washington, reported to authorities that on 13 August 2012, A1C Nicholas Daniels, 49 CES, Holloman AFB, New Mexico, penetrated her vagina and anus with his finger and penis despite her repeated statements to him to stop, that he was hurting her, and that she was done having sex. This allegation led to two specifications of a violation of UCMJ Article 120 being preferred against him on 16 October 2012 and then being referred to trial by General Court-Martial on 28 November 2012. (J.A. at 13-14).

On 23 January 2013, Capt Seth Dilworth, 27 SOW/JA, Cannon AFB, New Mexico, was detailed to be A1C LRM's Special Victims' Counsel. Captain Dilworth provided notice of representation to the trial court via email. (J.A. at 189). The military judge, Lt Col Kastenberg, requested that Capt Dilworth provide formal notice of his appearance along with any information supporting his detailing. (J.A. at 15). Captain Dilworth provided formal notice on 24 January 2013, including his request for standing to receive documents related to his representation and to represent A1C LRM in pretrial motions under the Military Rules of Evidence. (J.A. at 17). Captain Dilworth's request for standing was opposed in part by the trial counsel and completely by defense counsel. (J.A. at 81, 85).

Arraignment in the case of *U.S. v. Daniels* was held on 29 January 2013. Prior to the arraignment, defense counsel submitted a motion under MRE 412 and 513 seeking to admit evidence involving A1C LRM. (*See* J.A. at 81). After arraignment, the military judge took up the issue of Capt Dilworth's representation of A1C LRM. (J.A. at 101). During oral argument, Capt Dilworth initially indicated that he did not need to be heard on any pretrial motions under MRE 412 but eventually indicated to the court that his role would be to protect her privacy interests and asked the trial court to allow

him to reserve the right to represent her under MRE 412 should the need arise. (J.A. at 103, 149). The military judge treated his motion to reserve the right to be heard later under MRE 412 as "a motion in fact," that is, as a motion to represent A1C LRM at any MRE 412 hearing by making arguments on her behalf. (J.A. at 62). The trial judge held that Capt Dilworth would not be permitted to make any arguments before him nor would he be permitted to speak on behalf of A1C LRM in hearings pursuant to MRE 412 and 513. (J.A. at 177). Airman LRM's attorney subsequently filed a motion to reconsider in which he clarified his position and demanded A1C LRM be permitted to be heard through counsel and to be provided documents and court filings related to MRE 412 and 513. (J.A. at 195). The military judge reconsidered the motion, but denied all relief requested on 9 February 2013. (J.A. at 215).

SUMMARY OF ARGUMENT

The military judge deprived A1C LRM of the opportunity to be heard through her counsel during evidentiary hearings in violation of the Military Rules of Evidence. During the course of the proceedings, this discrete issue has been obfuscated. Four distinct distracters have served to divert attention from the primary issue.

First, A1C LRM is not seeking to expand the jurisdiction of military appellate courts through misapplication of the All Writs Act. Her complaint is not a collateral civil issue; the review of a military judge's application of the rules of evidence is core to an appellate court's jurisdiction. In this case, the trial judge misapplied MRE 412 and 513 in violation of existing law – the military judge arbitrarily prevented A1C LRM's lawyer from advocating on her behalf. A right to be heard has the potential to affect the admission of evidence that directly impacts the findings and sentence of a court-martial proceeding.

Second, A1C LRM is not requesting this Court allow her to control the prosecution or to take action intended to harm the accused. She seeks to assert her rights in evidentiary proceedings outside the presence of court members. She is not a "stranger to the court," she asserts her rights in a process specifically designed to promote victim and patient participation on issues that primarily affect their right to privacy – hearings under MRE 412 and 513.

Third, A1C LRM is not claiming she has a right to counsel – she is simply stating that the military judge should not deprive her of the full use of her own lawyer in hearings where she has a right to be heard. Any victim or witness that desires to be heard through counsel under MRE 412 and 513 who happens to procure civilian counsel would face the same legal predicament as A1C LRM.

Because A1C LRM has appointed military counsel, she should not be placed at a disadvantage as compared to numerous circumstances where military courts have allowed limited participants to be represented by civilian counsel in court-martial proceedings affecting their rights.

Fourth, A1C LRM is not seeking a referendum on the Air Force Special Victims' Counsel (SVC) Program. The SVC pilot program does not create jurisdiction, remove jurisdiction, provide standing, or remove standing. The rights of victims exist independent of the program; the rights existed before the SVC pilot program and will continue regardless of whether the program continues. Any consideration of the program either negative or positive in the analysis of this issue is simply not germane.

Setting these distractions aside, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 3 *William Blackstone, Commentaries* 23. Despite this bedrock principle of American jurisprudence, the military judge in *United States v. Daniels* denied A1C LRM, a victim of a crime in a military court-martial, the reasonable opportunity to be heard through counsel during proceedings specifically designed to protect her right to privacy. Further, AFCCA declined to remedy this error, claiming they lacked jurisdiction over a military judge's application of Military

Rules of Evidence in a court-martial proceeding. This Honorable Court should reverse the AFCCA's decision that they lack jurisdiction and issue the writ of mandamus that A1C LRM seeks.

STANDARD OF REVIEW

"Jurisdiction is a question of law that we review de novo." *United States v. Daly,* 69 M.J. 485, 486 (C.A.A.F. 2010). Construction of a military rule of evidence is a question of law reviewed de novo. *United States v. Matthews*, 68 M.J. 29, 35 (C.A.A.F. 2008.) Interpretation of statutes, the UCMJ, and Rules for Courts-Martial (hereinafter RCM) are questions of law reviewed de novo. *See United States v. Lopez Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008); *United States v. St. Blanc,* 70 M.J. 424, 427 (C.A.A.F. 2011).

ARGUMENT

ISSUE I: WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ERRED BY DENYING THEY HAD JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS[1]

Core to AFCCA's jurisdiction is the ability to act on findings and sentence. The findings and sentence rest upon only those facts that the military judge admits pursuant to the Military Rules of Evidence. To preclude error, the rules,

[1] This Honorable Court has jurisdiction to review the AFCCA decision pursuant to UCMJ, Article 67(a)(2). *See, U.S. v. Curtin,* 44 M.J. 439, 440 (C.A.A.F. 1996)(Art 67(a)(2) authorizes jurisdiction over the action by an intermediate appellate court in a petition for extraordinary relief).

including MRE 412 and 513, contain required procedures to enable a military judge to properly assess evidentiary issues. Failure to apply these required procedures invites error that directly affects findings and sentence. By declining jurisdiction in this case, the AFCCA has abdicated its supervisory responsibility under Article 66 and the All Writs Act.

The Air Force Court of Criminal Appeals erred when it determined that it lacked jurisdiction to grant A1C LRM the relief requested. Airman LRM sought review under the All Writs Act, 28 U.S.C. § 1651, of the military judge's ruling that she lacked standing to assert her right to be heard through counsel during evidentiary hearings. Contrary to this Court's reasoning in another case, A1C LRM is not "a stranger to the court." *Compare, Center for Constitutional Rights et al. v. United States and Colonel Denise Lind, Military Judge United States*, (*CCR*), __ M.J. __, No. 12-8027/AR, slip op. at 8 (C.A.A.F. Apr. 16, 2013). She is not asking for the adjudication of "what amounts to a civil action" and, if being granted a reasonable opportunity to be heard under the rules of evidence means anything – it means the opportunity to influence the admissibility of evidence that would have a direct bearing "on any finding and sentence that may eventually be adjudged." *Id.*

a. The Air Force Court of Criminal Appeal's jurisdiction to hear A1C LRM's petition under the All Writs Act flows directly from Article 66

The All Writs Act grants the power to "all courts established by act of Congress to issue all writs necessary and appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The United States Supreme Court has recognized that "military courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act". *United States v. Denedo*, 556 U.S. 904, 911 (2009); *see also CCR,* slip op. at 6. Extraordinary writs are used by appellate courts "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." *Banker's Life & Casualty v. Holland*, 346 U.S. 379, 382 (1953).

The All Writs Act does not expand this Court's existing jurisdiction. Instead, it requires two determinations: (1) whether the requested writ is "in aid of" the court's existing jurisdiction; and (2) whether the requested writ is "necessary or appropriate." *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008). In the context of military justice, "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." *Id*. at 120.

The All Writs Act still requires subject matter jurisdiction, which flows directly from the appellate court's statutory jurisdiction. Article 66(c), UCMJ, 10 U.S.C. § 866(c)(2006)(statutory jurisdiction for service courts of criminal appeals); Article 67(c), UCMJ, 10 U.S.C. § 866(c)(2006)(statutory jurisdiction for Court of Appeals for the Armed Forces); *CCR,* slip op. at 9 ("any potential jurisdiction we may have in this case must turn on the extent of our own statutory jurisdiction"). However, the jurisdiction to act on findings and sentence includes the ability to act on interlocutory matters where no finding or sentence has been entered in the court-martial. As the United States Supreme Court determined in *Roche v. Evaporated Milk Association,* the authority "is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal, but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." 319 U.S. 21, 25 (1943).

In denying jurisdiction, AFCCA's reliance on *Clinton v. Goldsmith* was misplaced. 526 U.S. 529, 535 (1999). *Goldsmith* did not deal with a case, a court-martial, an Article 32, or even a rule of evidence. *Id.* *Goldsmith* involved an officer who was "dropped from the rolls" in an

administrative action subsequent to his court-martial. *See Goldsmith*, 526 U.S. at 531. In finding the military court lacked jurisdiction, the Supreme Court instructed military appellate courts on the scope of their authority when dealing with actors outside of the court-martial system. *Id.* However, the Supreme Court did not speak to supervisory jurisdiction - the jurisdiction of a superior court to confine an inferior court to act within the law. *Id*. The present case is an ongoing court-martial, and the issue before this Court is the application of rules of evidence in an actual Air Force courtroom.

While neither A1C LRM nor AFCCA had the benefit of this Court's decision in *Center for Constitutional Rights,* that case clarifies what subject matter jurisdiction entails. The petitioner in that case was a coalition of journalists seeking access to court documents in *United States v. Manning*. *CCR,* slip op. at fn 1. This Court reasoned that it lacked jurisdiction to hear the case because it "amount[ed] to a civil action, maintained by strangers to the courts-martial, asking for relief – expedited access to certain documents – that [had] no bearing on any finding and sentence that may eventually be adjudged by the court-martial." *Id.* at 8. In essence, the *CCR* petitioner was using the court-martial process to litigate what

amounts to a Freedom of Information Act request. Release or non-release of those records could not potentially affect the findings or sentence in Private Manning's court-martial.

In contrast, the present petition involves a required hearing under the Military Rules of Evidence — not a civil action – and how those hearings are to be conducted in accordance with the rules. While A1C LRM is not a party to the court-martial, she is certainly no stranger. As the named victim in a case brought under UCMJ Article 120, she is an essential, though limited, participant. Her presence and participation may even be compelled against her will. The rules of evidence through which she desires to be heard were created for her benefit. Finally, and most certainly, regardless of how the military judge rules on the admissibility of evidence admitted, that ruling has the potential to affect the finding and sentence.

b. The Air Force Court of Criminal Appeals erred when it limited its supervisory jurisdiction to issues directly involving "a finding or sentence"

This Court recently held that jurisdiction is appropriate when the harm alleged by the petitioner has "the **potential** to directly affect the findings or sentence." *CCR,* slip op. at 8 (citing to *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012). In

denying jurisdiction to hear A1C LRM's petition, AFCCA concluded that the military judge's ruling **did not directly** involve a finding or sentence. The Air Force Court of Criminal Appeals' conclusion that the military judge's ruling "does not directly involve a finding or sentence that was or potentially could be imposed in a court proceeding" confuses this Court's jurisdiction analysis. (*See*, J.A. at 7). It is generally impossible to tell whether any particular decision of a military judge will directly impact the findings or sentence in a particular case. Applying AFCCA's logic, decisions regarding delays, experts, counsel qualifications, bias of judges and members, investigative support, and evidentiary rulings, (just to name a few) would rarely if ever be reviewable.

Airman LRM's meaningful opportunity to be heard on a rule of evidence potentially affects the finding or sentence. Evidence is only relevant and admissible if it has the potential to make a fact of consequence more or less probable – thereby potentially affecting the finding or sentence. MIL. R. EVID. 401. More specifically, MRE 412 requires a military judge to conduct a hearing and to balance the victim's right to privacy against the probative value of the evidence to be admitted. *See* MIL. R. EVID. 412(c)(3). Parties are permitted to call witnesses, including the victim. *See* MIL. R. EVID. 412(c)(2). The victim must be afforded the independent right to attend and the

"opportunity to be heard." *Id.* An opportunity to be heard would be rendered meaningless if it did not have at least the potential to influence the military judge's evidentiary ruling.

c. Appellate courts may exercise jurisdiction over petitions brought by limited participants

This Court has exercised its supervisory jurisdiction in assessing the application of procedural issues – even when the application of those rules was to benefit limited trial participants.[2] Specifically, in *Carlson and Ryan-Jones v. Smith*, this Court explicitly told trial courts how to handle rules of evidence when enforcing the rights of limited participants. 43 M.J. 401, 402 (C.A.A.F 1995)(summary disposition). *Carlson and Ryan-Jones v. Smith* involved the subpoena of Equal Employment Opportunity records. This Court granted a writ of mandamus and ordered the military judge to examine the records *in camera*, in order to scrub them of matters related to MRE 412 and other

[2] Victims, as limited participants in the criminal justice process, have been permitted access to federal appellate courts in petitions for extraordinary relief and interlocutory appeals. In *F. Doe v. United States*, the Fourth Circuit specifically permitted a victim to file an interlocutory appeal of a federal judge's ruling that the past sexual behavior and habits of that victim were admissible in a rape trial. 666 F.2d 43 (4th Cir. 1981). The court opined that Federal Rule of Evidence (F.R.E.) 412 "makes no reference to the right of a victim to appeal an adverse ruling. Nevertheless, this remedy is implicit as a necessary corollary of the rule's explicit protection of the privacy interests Congress sought to safeguard." 666 F.2d at 46. Victims have also been permitted the opportunity to seek a writ of mandamus in various appellate courts when trial courts have deprived them of specific rights under various crime victims' rights statutes. In fact, the Crime Victims' Rights Act, 18 U.S.C. § 3771 (2009) (CVRA) specifically contains a provision that a victim "may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3).

privileges. *Id*. The hearing was to be conducted in the manner prescribed under MRE 412. *Id*. To protect the victim-petitioners' interests in the release of the materials, the court noted that the victims will "be given an opportunity, ***with the assistance of counsel*** if they so desire, to present evidence, argument and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents." *Id* (emphasis added). Although the summary disposition lacks detail, in order to hear the writ, this Court would have necessarily concluded that it had jurisdiction over a writ brought by limited–participants seeking to vindicate their rights to privacy. This Court concluded that a writ was "in aid" of its jurisdiction, in order to prevent the court from otherwise disclosing materials that might have fallen under MRE 412 and other privileges.

In *Carlson and Ryan-Jones v. Smith*, this Court did precisely what we are asking today, namely, to instruct a lower court on the proper procedures to allow a limited-participant the ability to protect her right to privacy by hearing from her counsel on matters relating to the release of her private sexual history and mental health matters.

d. The Air Force Court of Criminal Appeals erred when it confused subject matter jurisdiction with standing

Subject matter jurisdiction is determined by the subject of the matter to be addressed. It is not determined by the identity of the participant raising the issue — it is standing that addresses an individual's ability to seek relief in court. If the AFCCA's rationale for finding lack of jurisdiction is, as suggested by its dicta, that the court lacks jurisdiction to hear a writ brought by a non-party because of their status as a non-party, such a rationale must fail. (*See* J.A. at 8.)

In the final paragraphs of its order, the AFCCA noted that to grant jurisdiction to hear A1C LRM's petition would be an invitation to "open-ended jurisdiction to entertain every challenge brought by interested parties regarding aspects of the court-martial." (J.A. at 9). Such a fear is misplaced, as only participants with standing could seek review of these issues. Historically and practically, standing is a demanding legal test that can only be met by those closest and most directly tied to a case.

As a result of conflating subject matter jurisdiction and standing, the AFCCA failed to conduct any standing analysis. *See United States v. Wuterich,* 67 M.J. 63, 69-70 (C.A.A.F. 2008)(applying the *Lujan* test in courts-martial). An individual has standing to assert rights in court if: 1) the litigant has

suffered an “injury in fact”; 2) there is a causal connection between the injury and the conduct complained of; and 3) the injury is redressable by a favorable decision of the court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *see also, Rakas v. Illinois,* 439 U.S. 128, 134–40 (1978)(“[t]he issue of standing involves two inquiries: first, whether the proponent of a particular legal right has alleged “injury in fact,” and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties.”).

Had AFCCA conducted the proper standing analysis, that court would have determined that A1C LRM had standing under MRE 412 and 513 to be heard by the military judge, the denial constituted an injury, and the injury was redressable by both AFCCA and this Court. Airman LRM was thus situated no differently than members of the press or individuals battling the propriety of subpoenas. *See*, *e.g.*, *CCR,* No. 12-8027 (C.A.A.F. 2013)(assumes that CCR had trial level standing to make request); *United States v. Wuterich,* 67 M.J. 63 (C.A.A.F. 2008); *United States v. Johnson,* 53 M.J. 459, 461 (C.A.A.F. 2000); *ABC Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997); *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F 1995); *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996). Airman LRM’s standing gave

her the right to bring an issue to AFCCA's attention via an extraordinary writ in a case that potentially could come to it through Article 66.

ISSUE II: WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION

Military Rules of Evidence 412 and 513 require that A1C LRM be given the opportunity "to be heard" at a "hearing." MIL. R. EVID. 412(c)(2); MIL. R. EVID. 513(c)(2). The military judge deprived her of that right by redefining "to be heard" into merely "to testify" – thereby disallowing A1C LRM the ability to make legal arguments. He further nullified her right to be heard by depriving her of her counsel's services. Fundamental due process entitles one with a "right to be heard" to address a court with facts and legal argument and to do so through counsel, if represented. The Supreme Court has described that a "hearing" must include the opportunity to make argument through counsel, if represented. Further, the phrase "to be heard" has a consistent meaning when used in the UCMJ and in the Military Rules of Evidence. Last, the exact phrase "to be heard" has been interpreted to mean legal argument through victim's counsel in federal courts.

The military judge erred by ruling A1C LRM lacks standing to assert her rights. Even if there were no explicit language from Congress or the President guaranteeing A1C LRM a "hearing" and a "right to be heard," due process requires that an individual be given notice and an opportunity to be heard before the Government takes action injuring her rights.

Airman LRM's rights are established from three separate sources of authority. First, as a patient and victim, her right to the privacy of her mental health history and prior sexual history are established by MREs 412 and 513. Second, A1C LRM has a right to privacy and dignity that is created by the CVRA. Finally, A1C LRM has a right to informational privacy flowing from the Constitution. Each of these three separate authorities establishes standing for A1C LRM "to be heard" through counsel prior to the court's injury to her rights.

a. Airman LRM has a right "to be heard" at a hearing" provided by MRE 412 and 513

The military judge failed to comply with the requirements of MRE 412 and 513. The Military Rules of Evidence require the military judge to hold an evidentiary "hearing" at which A1C LRM has a right to be "heard." MIL. R. EVID. 412(c)(2); MIL. R. EVID. 513(c)(2). A "hearing" and a right "to be heard" require at a minimum the ability to argue one's position, and that argument can be through counsel, if represented.

1. **The Supreme Court has established what a hearing must include, namely, the opportunity to make argument through counsel if provided**

Over eighty years ago, the Supreme Court held that the denial of the requirement of a hearing was a denial of constitutional due process rights:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45, 69 (1932).[3]

The Supreme Court has further defined what a hearing, such as that described in MRE 412[4] and 513, requires:

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[3] While this bedrock maxim stressing representation by counsel as integral to the judicial process now seems obvious, it was not at the time. Indeed, at the time of *Powell*, the Sixth Amendment requirement for attorneys in criminal trials did not yet apply to the states under the then unincorporated Fourteenth Amendment. *Id.* Accordingly, the holding of *Powell* is regarding a Fifth Amendment right to the assistance of counsel and cannot be limited to criminal accused's right to counsel under the Sixth Amendment. *Id.*

[4] Commenting on the procedures and rights of victims the authors note "pretty clearly the motion should lead to a hearing where the parties and the complaining witness have a right to attend and to be heard, or where guardians or representatives ***(such as lawyers)*** can be heard." (emphasis added) *See,* MUELLER & KIRKPATRICK, FEDERAL EVIDENCE, § 4:8 (3d Edition, 2012). Not surprisingly, with such explicit language and purpose, the Fourth Circuit in *F. Doe v. United States*, 666 F.2d 43 at 45, had no difficulty holding that a victim of sexual assault had standing to appeal (in the middle of trial) an evidentiary ruling under F.R.E. 412. In *Doe*, the holding was based on the

> What, then, does a hearing include? Historically and in practice, in our own country at least, it has nearly always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman[5] has small and sometimes no skill in the science of law.

Id. at 69

Almost forty years later the Supreme Court reiterated and magnified what is required by a hearing. *Goldberg v. Kelly,* 397 U.S. 254 (1970). In *Goldberg*, welfare recipients sought relief in federal court for Constitutional violations of their due process rights. *Id.* at 255. They claimed they were being denied welfare payments without adequate due process, namely a

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recognition that sexual assault victims have legally cognizable rights under F.R.E. 412 and necessarily have standing to asset those rights. *Id.*

[5] The Court's acknowledgment that "even the intelligent and educated layman has small and sometimes no skill in the science of law" is all the more powerful in the context of people victimized by sexual assault or suffering from a mental disease or defect. Any rule precluding victims or patients from being heard through their counsel will effectively silence those victims and patients most in need of the assistance of counsel. Those victims with injuries either psychological or otherwise, or patients whose mental defect or disease are most egregious, will be the exact victims and patients most injured by the creation of such an unconstitutional and historically absurd rule. The very victims and patients most traumatized, most disabled, most afraid, and most physically injured, would be the most silenced.

hearing. *Id.* The Supreme Court held that the welfare recipients were entitled to an evidentiary hearing prior to their welfare payments being terminated. *Id.* at 266-71. The Supreme Court then defined what such a hearing must include at a minimum: cross-examination, presentation of evidence, and argument by counsel when provided. *Id.*

Just as in *Powell* and *Goldberg*, A1C LRM is entitled "to be heard" at a "hearing." *Powell*, 287 U.S. at 69; *Goldberg,* 397 U.S. at 254. Congress and the President provided those rights to victims and patients through MREs 412 and 513. The military judge erred when he redefined those entitlements as just the ability to provide facts and deprived A1C LRM the ability to make legal arguments through her counsel.

2. The phrase "to be heard" has a consistent meaning when used in the UCMJ and in the military rules of evidence

The phrase "to be heard" is used in both the Military Rules of Evidence and the Rules for Court-Martial(RCM). Each and every time it is used it refers to an occasion when the parties (through counsel) can provide argument to the military judge on a legal issue. It never refers to an occasion when a witness must or should testify.[6] *See, e.g.,* R.C.M. 806(d), Discussion,

[6] By limiting A1C LRM to "factual matters," the military judge effectively ignored the language used by Congress and only permitted A1C LRM the right to testify. Testify means "to give evidence as a witness." BLACK'S LAW DICTIONARY 1476(6th ed. 1990).

(parties have an opportunity to be heard before issuing 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 39a sessions); MIL. R. EVID. 201(e)(parties have an opportunity to be heard regarding judicial notice).

Accordingly, there are several discrete events in every trial at which point parties in the case have a right "to be heard" through their counsel. *See, e.g.,* R.C.M. 806(d); R.C.M. 917(c); R.C.M. 920(c); R.C.M. 920(f); R.C.M. 1005(c); R.C.M. 1102(b)(2); MIL. R. EVID. 201(e). The effect of these rights is that the Accused can be heard at several keys points without having to testify. His attorney is permitted to make legal arguments and advocate on his behalf based on his right "to be heard."

In addition to those examples, Congress and the President sought to provide victims and patients the same rights as parties in at least three hearings. In MRE 412, 513, and 514, Congress and the President deliberately chose to provide victims and patients the same rights as parties in those hearings by

using the identical language they used at other places within the MREs and the RCMs. The effect of Congress's and the President's language is to give victims and patients the right to have their attorneys make legal arguments and advocate on their behalf.

Beside Congress and the President's deliberate choice of the legal term of art "to be heard," the statutory construction of MRE 412 and 513 also reveals the military judge's error. One need look no further than the text of MRE 412 or 513 to realize that the President and Congress intended far more rights for victims and patients than merely being able to testify. Both rules permit the parties to "call witnesses, including the patient [and or victim]." MIL. R. EVID. 412(c)(2); MIL. R. EVID. 513(e)(2). However, both rules also state in separate provisions that the victim and patient have an opportunity to "be heard." The military judge's determination that victims and patients can only provide testimony ignores the statutory construction of both rules and does not give effect to the extra provisions. MIL. R. EVID. 412(c)(2); MIL. R. EVID. 513(e)(2). "To be heard" must mean something more than being a witness, otherwise the rule is redundant. The phrase "to be heard" at a "hearing" are terms of art both Congress and the President have repeatedly used throughout the MREs and RCMs to permit legal argument – argument that is generally made through counsel.

3. The phrase "to be heard" has been interpreted to mean legal argument through counsel in federal courts

The federal district and circuit courts of appeal have been hearing legal arguments from victim's counsel for decades now. *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981). District and circuit courts of appeal have consistently held that "to be heard" includes the right to be heard through counsel and to make legal arguments. *In re Dean*, 527 F.3d 391 (5th Cir. 2008), is illustrative of this point. In *Dean*, the victims exercised their right to be "reasonably heard" regarding pretrial decisions of the judge and prosecutor "personally [and] through counsel." *Id.* "The attorneys reiterated the victim's requests" and "supplemented their appearance at the hearing with "substantial post-hearing submissions." *Id.* In similar fashion, the Fourth Circuit determined that the "right to be heard" "accords [victims] standing to vindicate their rights." *Brandt v. Gooding,* 636 F.3d 124, 136 (4th Cir. 2011). In *Brandt* the victim wished to prevent the Accused from being released at a habeas hearing. *Id.* The court held that motions from attorneys were "fully commensurate" with the victim's "right to be heard." *Id*.[7]

[7] *See also, Pann v. Warren*, 2010 WL 2836879 (E.D. Mich. 2010)(permitting victims to be "reasonably heard" by written "arguments" regarding a habeas hearing).

b. Limited participants have standing in a trial by court-martial to vindicate their rights

In this case, A1C LRM has satisfied the requirements for standing: "(1) an injury in fact; (2) causation; and (3) redressability." *Sprint Commun'ns Co. v. APCC Servs., Inc.*, 554 U.S. at 273 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561 (1992)).

Airman LRM has standing to assert her rights as a limited participant. Airman LRM is not a party to this case. Indeed, she is a witness in the case. However, unlike strangers to the court, she is not free to walk away. Before the Government is permitted to injure one of her rights she is permitted to be heard by the military judge through counsel. Airman LRM's request is not remarkable. Indeed, a basic principle of constitutional law is that rights may be asserted by their holder and must have a remedy. *See Marbury v. Madison,* 5 U.S. 137, 163 (1803)("it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." (quoting, 3 *William Blackstone, Commentaries* 23)).

Limited participant standing has been recognized by military courts, federal courts, and the Supreme Court. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)

(standing created by First Amendment right); *Church of Scientology v. United States*, 506 U.S. 9 (1992) (standing created by attorney-client privilege); *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995)(standing for victims created to avoid "unwarranted invasions of privacy," "violations of MRE 412," and "breach[es] of privilege[s]")(summary disposition); *ABC, Inc. v. Powell,* 47 M.J. 363, 364 (C.A.A.F. 1997) (standing under First Amendment); *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008) (assuming standing for CBS in part under RCM 703); *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006) (assuming standing for *victim*'s mental health provider).

The test for standing in a military court is no different than the test generally applied in federal district courts. See *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008)(citing *Sprint Commun'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269 (2008). Military courts, although Article I courts, have adopted the same constitutional standards as Article III courts for determining standing. *Id.* (citing *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003)).

c. Airman LRM's rights arise from the Military Rules of Evidence, the CVRA, and the Constitution

1. The Military Rules of Evidence provide A1C LRM procedural rights

Airman LRM's rights under MRE 412 and 513 are indistinguishable from rights commonly recognized to bestow standing. These rights recognize the unique role that victims and patients play in the court-martial process.[8] In criminal cases and hearings, privileges have repeatedly been found sufficient to justify limited participant standing. See, *Church of Scientology v. United States*, 506 U.S. 9 (1992)(non-subpoenaed party granted standing base on attorney-client privilege); *In re Grand Jury Impaneled v. Freeman*, 541 F.2d 373, 377 (3d Cir. 1976)(standing created by prothonotary "Local Rule 202"); *United States v. Nixon*, 418 U.S. 683 (1974)(non-

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[8] The legislative history to Federal Rule of Evidence (FRE) 412 states Congress's purpose: "to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives." 124 Cong. Rec. at H 11945 (1978). This purpose is echoed in the advisory comments to MRE 412, which state that the purpose is to "safeguard the alleged victim against the invasion of privacy." Manual for Court-Martial, Appendix 22, Mil. R. Evid. 412. Similarly, the advisory comments to the 1994 amendment to FRE 412 reiterate the victim-focused purpose of the rule as well. The FRE 412 advisory committee's notes:

> The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process.

Not only did Congress and the President create these rules for the special protection of the privacy interests of victims and patients, they had another purpose in mind as well. "By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute *and to participate in* **legal proceedings** against alleged offenders." *Id* (emphasis added).

subpoenaed party permitted standing under executive privilege); *See also, In re Grand Jury John Doe*, 705 F.3d 133, (3d Cir 2012). The decision in *Freeman* is illustrative. In *Freeman*, the Grand Jury sought a subpoena of the Honorable Americo V. Cortese,[9] the Philadelphia County Prothonotary, for certain documents. Although Mr. Freeman was not subpoenaed and not a party to any case, the court held that Mr. Freeman had limited participant standing to be heard "on the basis of his claim of privilege." *Freeman*, 541 F.2d at 377.

The existence of a right alone can establish standing to seek a remedy. The Fourth Circuit Court of Appeals found a victim had a trial and interlocutory appellate remedy based on F.R.E. 412.[10] *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981). There is no meaningful difference between FRE 412 and MRE 412. Importantly, neither rule use the term "standing," and neither explicitly permit appeals. However, this Court, like the Fourth Circuit, should apply the Supreme Court's unambiguous direction that "this remedy is implicit as a 'necessary corollary of the rule's explicit protection of the privacy

[9] The court in *Freeman* found standing for both the Prothonotary and Mr. Freeman to challenge the subpoena. Both were permitted standing even though their positions on the issue were identical, namely, Local Rule 202 provided a privilege. *Freeman*, 541 F.2d at 377.

[10] All courts are required to evaluate standing at all stages of a proceeding because standing is a jurisdictional issue. *FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215 (1990). The Court's resolution of the issue on appeal can only be interpreted one way -- the court must have also found trial level standing for the assertion of the rights. *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981).

interests Congress sought to safeguard.'" *Id.* (*citing Cort v. Ash*, 422 U.S. 66 (1975)).

The owner of a privilege has standing to defend that privilege when it is imperiled. *See United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006)(assuming trial standing for the lawyer of a victim's doctor to assert MRE 513 privilege); *see also generally, Church of Scientology v. United States*, 506 U.S. 9 (1992)(non-subpoenaed party granted standing under attorney-client privilege); *In re Grand Jury Impaneled v. Freeman*, 541 F.2d 373, 377 (3d Cir. 197); *In re Grand Jury John Doe*, 705 F.3d 133 (3d Cir 2012)(standing based on attorney-client privilege).

Perhaps no case demonstrates the simplicity of this issue better than this Court's decision in *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995). In *Carlson*, two sexual assault victims filed a petition for extraordinary relief to protect their rights. *Id.* Specifically, they sought to protect their rights that were in jeopardy in the trial of CDR Reeves. *Id.* They asserted standing to defend their rights under MRE 412, Article 31 of the UCMJ, generalized "invasions of privacy," and their "privileges." *Id.* This Court granted relief and ordered the military judge to review the records sought *in camera*. *Id*. This Court further ordered that, "in addition to trial and defense counsel in the *Reeves* case, petitioners will be given an

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." *Id.* (emphasis added). Airman LRM's request is no different. She wishes only the "opportunity, with the assistance of counsel...to present evidence, arguments and legal authority to the military judge." *Id.*

2. Airman LRM has rights that arise from the Crime Victims' Rights Act (CVRA)

Independent of rights flowing from the rules of evidence, A1C LRM has a right to privacy protected by the CVRA.[11] The CVRA protects the rights of all victims of federal offenses, including those within the military justice system. Airman LRM has an explicit right to "dignity and privacy" under the CVRA. 18 U.S.C. 3771(a)(8). This is the same right often at issue under MRE 412 and 513. This right provides A1C LRM standing to defend this right, including the right to make arguments through counsel.

Although this Court has yet to address the applicability of the Crime Victims's Rights Act to military members, this Court's

[11] Obviously, if this Court determines that A1C LRM has the right to make legal arguments through counsel at the MRE 412 and 513 hearings, it need proceed no further. This Court could determine that A1C LRM independently has standing and the right to be heard based on the rights to privacy created by the CVRA and the Constitution, but that determination is not necessary.

precedent supports a finding that it does. *See United States v. Dowty*, 48 M.J. 102, 107 (C.A.A.F. 1998). The CVRA is meant to be a broad right-creating statute applicable to all U.S. citizens and there is no facet of the UCMJ or military law that is contrary to the CVRA.

The passage of the broad-sweeping CVRA by Congress marked a turning point for all victims in the United States. Victims' advocates received nearly universal congressional support for a "broad and encompassing" statutory victims "bill of rights." 150 Cong. Rec. S4261 (daily ed. 22 April 2004)(statement of Sen. Feinstein).

As this Court and the Supreme Court have acknowledged, "Congress has plenary control over ***rights***, duties, and responsibilities within the framework of the Military Establishment, including regulations, procedures, and remedies". *United States v. Dowty*, 48 M.J. at 106 (emphasis added, quoting *Weiss v. United States*, 510 U.S. 163 (1994). In making the CVRA applicable to "any court" and for all "federal offenses," Congress ensured that victims who are sexually assaulted by military members would be treated with no less "privacy" and "dignity" than all other citizens of the United States. Victims, military or civilian, hauled into military courts should not have to suffer the further indignity of being told

they are the only victims of a federal offense in the United States without the right of privacy or dignity.

Absent an explicit and clear military necessity, military members are afforded the same statutory and constitutional rights as civilians. *See Dowty*, 48 M.J. at 107 ("in the absence of a valid military purpose requiring a different result, generally applicable statutes are normally available to protect service members"). As this Court has recognized, absent clear inconsistency or contrary purpose, there is a "general direction to apply civilian procedures." *Dowty*, 48 M.J. at 107.

Not only are there no contrary provisions or inconsistent purposes in the Manual for Court-Martial, the existing provisions are entirely consistent with the robust recognition and protection of victim's rights. *See generally* MIL. R. EVID. 303; MIL. R. EVID. 502; MIL. R. EVID. 503; MIL. R. EVID. 513; MIL. R. EVID. 514, discussion of R.C.M. 806 (recognizing prohibitions on degrading questions, various privileges and accordant rights therewith, and the ability to close the courtroom to avoid "embarrassment or extreme nervousness"). Further, the now defunct version of MRE 615, which in 1999 appeared contrary to federally created victim's rights, was repealed and superseded by an amendment to the Military Rules of Evidence. Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002); Crime Victims' Rights Act, 18 U.S.C. § 3771 (2004). In 2002, the President

corrected and ensured the fullest protection of victims' rights in courts-martial by amending MRE 615 to include two additional rights for victims. *Id.*

The purpose and language of the CVRA is wholly aligned and consistent with current military law. The rights provided by the CVRA are not alien to those currently provided to victims within the Department of Defense. For eight years, the Department of Defense has expressly instructed, *inter alia*, that a victim has the right to "[b]e treated with fairness and respect for the victim's dignity and privacy." DoDD 1030.01 page 2. That directive and its accompanying instruction, DoDI 1030.2, implemented 42 U.S.C. § 10606, the predecessor to the CVRA. Virtually all of the rights provided by the CVRA are included in this DoD Directive and Instruction and were further implemented in Air Force Instruction (AFI) 51-201 Chapter Seven, which states unequivocally that a victim has the right to "[b]e treated with fairness and respect for the victim's dignity and privacy." (J.A. at 221)

Before applying a federal statute to court-martial practice, *Dowty* directed that courts consider as factors (1) whether the statute interfered with a fundamental principle of military law and whether or not the military had implemented any of the rights contained in the legislation. 48 M.J. at 110-11. The Department of Defense has for eight years instructed its

trial counsel and law enforcement officials that a victim's rights to privacy and dignity are paramount. A victim's rights to privacy and dignity have themselves become a fundamental principle, having been included in instructions and directives for eight years with little reverberation in the greater body of military law. While the current Department of Defense and Air Force Instructions reference the implementation of 42 U.S.C. § 10606, that statute was superseded in 2004 by the CVRA. Hence, current DoD Directives and Instructions, Air Force Instructions, and Military Rules of Evidence should be read to incorporate the CVRA.

The plain meaning of the words in the CVRA speak volumes—"in ***any court*** proceeding involving an offense against a crime victim." 18 U.S.C. § 3771 (emphasis added). Crime victim is defined to include any person directly or even proximately harmed as a result of any "federal offense."[12] *Id.* Further, in addition to the mandate for all courts to apply these rights, all "**departments** and agencies of the **United States** engaged in the detection, investigation, or prosecution of crime" are assigned this task as well. *Id.* (emphasis added).

The conclusion that the CVRA provides rights that can be exercised in military court is consistent with current law and

[12] All military offenses under the UCMJ are federal offenses. *See* 10 U.S.C. § 877 et. seq.

controlling precedent. *See Dowty,* 48 M.J. at 102. In *Dowty,* the Court was forced to address the applicability of the Right to Financial Privacy, 12 U.S.C. § 3401-3422 (RFPA). *See Dowty*, 48 M.J. at 102. The RFPA was created by Congress in response to a Supreme Court decision denying the Fourth Amendment protection to certain types of searches and seizure of bank records. *Id.* at 106. In response, Congress created the RFPA which provided privacy rights with regard to their banking records. *Id.* Just like the RFPA the CVRA was created by Congress to provide rights in response to Congress's perceived need for additional protection.

The argument for the application of the CVRA to military courts is much stronger than the argument which prevailed in applying the RFPA to military courts. Unlike the CVRA the RFPA was directly inconsistent with the UCMJ. Accordingly, this Court, in *Dowty*, was cautious in holding that the RFPA was applicable. *See Dowty*, 48 M.J. at 105 (noting conflict between RFPA and UCMJ Art. 43). Ultimately, this Court correctly decided that RFPA did apply to trials by court-martial. *Id.* at 108. In overcoming the dilemma raised by the inconsistency, thia Court first noted that the RFPA created actionable rights for all service members. *Id.* at 108. This Court in *Dowty* relied on the language from the act extolling its application by "any agency or **department** of the United States." *Id.* at 108

(emphasis added). This is similar to language Congress used in the CVRA. *See* 18 U.S.C. § 3771(c)(1)("Officers and employees of the Department of Justice *and other departments and agencies of the United States* engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)"). This Court further noted that, although Congress could have excluded the Department of Defense, the Act "provides **no exemption** for the Department of Defense in general or **military disciplinary matters** in particular"[13] (emphasis added). 48 M.J. at 109. Likewise, there is no military disciplinary exemption in the CVRA. 18 U.S.C. § 3771.

After finding the RFPA created rights for service members, the Court had to determine if it would also incorporate the Act's contradictory provisions regarding the statute of limitations — UCMJ Art 43 was directly contrary to the RFPA. *Dowty,* 48 M.J. at 110-11. The RFPA mandated that the tolling provision apply to "any applicable statute of limitations." Accordingly, the Court found with "no reservations" that the RFPA was applicable to the military's statute of limitations.

[13] In applying a rule of evidence, the presumption that federal statutes and regulations apply to trial by court-martial is even stronger. *See* MIL. R. EVID. 1102 (requiring the President to affirmatively opt out of the existent Federal Rules of Evidence before they are automatically applied to Military Rules of Evidence).

Id. at 110. The CVRA uses similar sweeping language; it applies in "any court proceeding." *See* 18 U.S.C. § 3771.

In *Dowty*, this Court explicitly rejected the argument that Congress was required to use any specific language when passing legislation that had the effect of modifying prior legislation. *See Dowty,* 48 M.J. at 109 ("Congress is not required to use specific language"). Further, the Court rejected an argument that an intervening amendment to UCMJ Art. 43 had any effect on their analysis. *Id*. at 110. After the passage of the RFPA, Congress amended UCMJ Art. 43--extending the statute of limitations from 3 to 5 years and modifying some of the exceptions. *Id.* Congress did not in those amendments acknowledge, embrace, reference, or codify the tolling exception from the RFPA. *Id.* In *Dowty*, the appellant argued that Congress's inaction or silence with regard to the RFPA's application to UCMJ Art. 43 suggested their intent. *Id.* This Court rejected this "repeal by implication" argument. *Id.* at 110.

In finding the RFPA applicable, significant to this Court was the absurdity of ruling otherwise — that active duty military members would have recognizable privacy rights in civilian courts, but military courts would be forbidden from enforcing the corollary response to the exercise of those

rights. *Id*. at 111. No such absurdity was tolerated in *Dowty*, nor should it be in the present case.

Two other decisions from this Court are similarly instructive on this issue. See *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999); *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000). In *McElhaney,* this Court addressed an issue similar to *Dowty*, namely, whether to enforce a federal law that was inconsistent with existing military law. 54 M.J. at 120. Unlike in *Dowty*, *McElhaney* did not deal with the creation of broad encompassing federal rights. *McElhaney,* 54 M.J. at 120; *Dowty*, 48 M.J. at 106. Instead, *McElhaney* addressed the narrower issue of the congressional update to federal child abuse laws. 54 M.J. at 120. Congress extended the statute of limitations for child abuse cases. *Id.* The military already had crimes for child abuse victims and already had a statute of limitations. *See* UCMJ Art. 128; Art. 134; Art. 43. Additionally, this Court noted that the law appeared to only apply to crimes "prosecuted by the Department of Justice" as opposed to the language of the RFPA and CVRA, applicable to "any agency or department of the United States." *McElhaney,* 54 M.J. at 125-6; *Dowty*, 48 M.J. at 106. Not surprisingly, this Court ultimately held that the new contrary and inconsistent statute of limitations did not repeal *sub silentio* the existing UCMJ Art. 43. *McElhaney,* 54 M.J. at 120. *McElhaney* and *Dowty,* when

read together, reveal only what *Dowty* actually stated: absent clear inconsistency or contrary purposes, there is a "general direction to apply civilian procedures," and "in the absence of a valid military purpose requiring a different result, generally applicable statutes are normally available to protect service members." *Dowty*, 48 M.J. at 106-7.

The decision in *Spann* now serves as a historical marker and turning point for victims' rights in the military justice system. In *Spann*, this Court addressed whether the Victim's Rights and Restitution Act, 42 U.S.C. § 10606, repealed by implication the then existing MRE 615. 51 M.J. 89. At the time of *Spann*, the military's existing evidentiary rule of sequestering witnesses was entirely inconsistent with the rights putatively created by the new law. *See* Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002). In 1999, there were only three existing exceptions to the general rule of sequestration at the behest of either party: (1) the accused, (2) a representative of the United States designated by trial counsel, and (3) a person whose presence is shown by a party to be essential to the presentation of the party's case. *See Spann*, 51 M.J. at 90. In addition to the inconsistency, it was unclear if the Victim's Rights and Restitution Act--which purported to create a host of new rights for victims--actually created any rights. *United States v. McVeigh*, 106 F.3d 325 (10th Cir.

1997)(holding that victims had no appellate standing because the act did not create legally recognizable rights). Indeed, this Court in *Spann* was "primar[ily] concern[ed with] the lack of clarity as to the effect of 42 U.S.C. § 10606 in federal civilian criminal trials." *Spann*, 51 M.J. at 92. It was the ambiguities of the language, legislative history and judicial interpretation that kept this Court from applying the statute. *Id*.

Faced with an ambiguous provision that was inconsistent with military law and not apparently creating any federally recognizable rights, this Court, for good reason, found that MRE 615 was not "repealed by implication" by 42 U.S.C. § 10606. The landscape of victims' rights could not be more different now. The CVRA's language is clear, and the rights therein are unambiguous.[14]

This Court's decision in *Spann* prompted both congressional and presidential action to correct the apparent inconsistency between MRE 615 and their desire for the broadest recognition of victim's rights. See Exec. Order No. 13,262, 67 Fed. Reg. 18773

[14] The CVRA has been successfully applied by counsel for victims in the 5th Circuit Court of Appeals, 4th Circuit Court of Appeals, 10th Circuit Court of Appeals, 2d Circuit Court of Appeals, and the 9th Circuit Court of Appeals. *See Brandt v. Gooding,* 636 F.3d 124, 136 (4th Cir. 2011);*In re Dean*, 527 F.3d 391 (5th Cir. 2008); *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008); *Kenna v. United States,* 435 F.3d 1011 (9th Cir. 2006);*In re Huff Asset Mgmt. Co.,* 409 F.3d 555 (2d Cir. 2005). Indeed, in the decade of victims exercising their rights, we are aware of no federal district or circuit court of appeals that failed to enforce the rights created by the CVRA.

(Apr. 11, 2002); Crime Victims' Rights Act, § 3771. First, the President fixed MRE 615. Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002). Federal Rule of Evidence (FRE) 615 and subsequently MRE 615 were both amended to add a fourth exception forbidding automatic sequestering of "a person authorized by statute to be present." *See* Mil. R. Evid. 615(4). Both federal cases and the analysis of the amendments of Rule 615 make clear that "a person authorized by statute to be present" refers to victims protected by victims' rights legislation.[15] *United States v. Edwards,* 526 F.3d 747 (11th Cir. 2008)(holding that CVRA is a statute under the fourth exception of FRE 615 and that the accused has no Constitutional right to exclude witnesses).

Next, Congress, in response to the *McVeigh* decision passed the CVRA. *McVeigh*, 106 F.3d at 325. The CVRA superseded the earlier victims' rights legislation "mov[ing]" and "amplify[ing] the current rights." H.R. REP. 108-711, pt. A, at pg 2. The newly drafted legislation worked. The CVRA ushered in a renaissance in federal courts where victims were afforded limited participant standing through counsel to exercise their rights. *See, e.g., In re Dean*, 527 F.3d 391 (5th Cir. 2008); *Brandt v. Gooding*, 636 F.3d 124, 136 (4th Cir. 2011); *Kenna v. United States*, 435 F.3d 1011 (9th Cir. 2006); *Pann v. Warren*,

[15] *See*, MIL. R. EVID. 101, which directs a court-martial to apply federal district court interpretation of rules of evidence.

2010 WL 2836879 (E.D. Mich. 2010); *United States v. Mahon*, 2010 WL 94247 (D. Ariz. 2010). Federal courts throughout the country have uniformly recognized that victim's now have standing to assert their rights created by the CVRA. *Id.*

This Court's decision in *Spann* was based on the existing landscape of victim's rights. 51 M.J. at 89. At the time, they were inconsistent with military law and it was uncertain whether they even existed as drafted. *Id.* The current landscape could not be more certain. Since the time *Spann* was decided, Congress has passed new legislation, the President has updated the Military Rules of Evidence, and the Department of Defense and military departments have updated regulations and instructions. All of these provide significant rights for victims. Accordingly, this Court should recognize the applicability of the CVRA and permit A1C LRM standing to assert her rights.

3. Airman LRM has rights that arise from the United States Constitution

The right to privacy is a Constitutional right sufficient to provide standing for A1C LRM to defend her privacy in regard to her prior sexual history and mental health history.[16]

The Supreme Court has recognized that the Constitutional right to privacy would be sufficient to provide standing for more than thirty years. *See United States v. Nixon,* 433 U.S. 425, 457 (1977)(*quoting Whalen v. Roe,* 429 U.S. 589, 599-600 (1977)). Indeed, the Constitutional right to privacy, insofar as it is a right that creates standing, was used as support for the media's standing to demand a right to an open trial. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). In *Richmond*, the accused moved the Court for closure and the state joined. The trial judge closed the trial. The press appealed citing to a "First Amendment" right to a public trial. *Id.* at 559. At the Supreme Court, the state argued that, although the Accused has a 6th Amendment right to a public trial, the press

[16] Although there can be little serious debate remaining as to whether there is a Constitutional right to privacy, this truth says little about what evidence will ultimately be admitted at trial. In an Accused's criminal trial, his constitutional right to fair trial cannot be subordinated to a victim's right to privacy. However this acknowledgment says nothing about standing. The victim and patient still have legally cognizable rights to privacy, and accordingly, have the right to a hearing and argument through their counsel to demonstrate for example that prior sexual history or mental health history are not relevant or material in a particular case. The Accused's right to a fair trial does not include a right to admit irrelevant evidence; when appropriate, a victim must be permitted to point this out.

has no independent right to a public trial. *Id.* at 579. The State argued that the text of the Constitution does not mention anything about the press's right to a public trial. The Supreme Court dismissed the state's argument, noting that many "recognized" and "important" Constitutional rights are not included in the text of the Constitution. *Id.* In noting the Constitutional rights that provide standing, the Supreme Court listed the right "of privacy." *Id.*

Airman LRM has a constitutional right to privacy with regard to her past sexual relationships based on established Supreme Court case law. In *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992), the Supreme Court reaffirmed the substantive force of the liberty interests protected by the Due Process Clause. The *Casey* decision confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.* at 851. In discussing the respect the Constitution demands for personal privacy, dignity, and autonomy, the Supreme Court stated:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the

> Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id.

Even before the *Casey* decision, the Supreme Court in *Whalen* and *Nixon,* while upholding the constitutionality of the statutes at issue in those cases, noted that an element of constitutionally protected privacy rights includes, "the individual interest in avoiding disclosure of personal matters...." *United States v. Nixon,* 433 U.S. 425, 457 (1977) (*quoting Whalen v. Roe,* 429 U.S. 589, 599-600 (1977)). Assessing an individual's legitimate expectation of privacy is part of the constitutional analysis that must occur before information is disclosed to the public by government action. "When information is inherently private, it is entitled to protection." *Fraternal Order of Police, Lodge 5 v. City of Philadelphia,* 812 F.2d 105, 116 (3d Cir.1987); *see also, York v. Story,* 324 F.2d 450, 455 (9th Cir.1963)("We cannot conceive of a more basic subject of privacy than the naked body.").

The privacy interests that are protected from disclosure by the Constitution include the highly personal and "intimate aspects of human affairs" that are at issue in the present case. *See, Eagle v. Morgan,* 88 F.3d 620, 625 (8th Cir. 1996)(quoting, *Wade v. Goodwin,* 843 F.2d 1150, 1153 (8th Cir.) *cert. denied,* 488 U.S. 854, 109 S.Ct. 142, 102 L.Ed.2d 114 (1988)). Intimate details of a person's sexual history fall squarely within that protected sphere. Airman LRM has a constitutionally protected right to privacy that is at issue in the present case.

ISSUE III: WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS

As set out above, this Court, like the AFCCA below, has the jurisdiction to grant extraordinary relief and issue a writ of mandamus in an appropriate case.[17] The next question is whether this Court should issue a writ of mandamus.[18] Issuance of a writ

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[17] Although the CVRA also provides for enforcement in federal district and circuit courts, this Court should consider ACCA's reasoning in examining its own authority to issue an extraordinary writ. In agreeing to hear a petition for extraordinary relief, ACCA concluded that "we will not force soldiers to bring collateral attacks of their courts-martial in the civilian federal courts or the U.S. Court of Appeals for the Armed Forces." *Dew v. United States*, 48 M.J. 639, 647 (A.C.C.A. 1998).

[18] At least two federal circuit courts would interpret the CVRA's enforcement mechanism as lowering the hurdle for a crime victim seeking a writ of mandamus in federal circuit court. In *Kenna v. United States,* the Ninth Circuit held that "we must issue the writ whenever we find that the district court's order reflects an abuse of discretion or legal error." 435 F.3d 1011, 1017 (9th Cir. 2006). In similar fashion, in *In re Huff Asset Mgmt. Co.,* the Second Circuit held "a petitioner seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus." 409 F.3d 555, 562 (2d Cir. 2005).

of mandamus is discretionary on the part of this Court and is "a drastic remedy ... [that] should be invoked only in truly extraordinary situations, and we pointed out that to justify reversal of a discretionary decision by mandamus, the judicial decision must amount to more than even 'gross error;' it must amount to a judicial 'usurpation of power,' or be 'characteristic of an erroneous practice which is likely to recur.'" *Murray v. Haldeman,* 16 M.J. 74, 76 (C.M.A. 1983) (quoting *United States v. Labella,* 15 M.J. 228, 229 (C.M.A. 1983), *United States v. DiStefano,* 464 F.2d 845, 850 (2d Cir.1972)) (internal quotations removed). Without the benefit of guidance from this Court, the erroneous practice of the military judge and others presented with a similar issue is certain to recur.

The Army Court of Criminal Appeals borrowed a useful framework for determining whether a writ of mandamus should be issued in *Dew v. United States,* 48 M.J. 639, 648-49 (A. Ct. Crim. App. 1998). The Army Court of Criminal Appeals used guidelines synthesized from the Sixth and Ninth Circuits, referred to as "*Bauman*" factors "to frame the boundaries of their mandamus power." *Id.* at 648 (citing to *In re American Medical Systems, Inc.,* 75 F.3d 1069, 1078 (6th Cir.1996); *Bauman*

v. United States District Court, 557 F.2d 650, 654–55 (9th Cir.1977)). The guidelines are as follows:

> (1) The party seeking relief has no other adequate means, such as direct appeal, to attain the relief desired;
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal;
>
> (3) The lower court's order is clearly erroneous as a matter of law;
>
> (4) The lower court's order is an oft-repeated error, or manifests a persistent disregard of federal rules;
>
> (5) The lower court's order raises new and important problems, or issues of law of first impression.

Id. at 648-49.

In applying the framework, ACCA cautioned that a petitioner need not satisfy all of the factors and not all will be relevant in every case, and "rarely will they all point to the same conclusion." *Id.* However, the current case is the rare case where all five of the *Bauman* factors are present, and all point to the same direction – a writ of mandamus is appropriate. First, A1C LRM has no other adequate means of challenging the

military judge's ruling through the appellate process. While a federal *habeas petition* is available through the enforcement section of the CVRA, such courts lack expertise in the field of military justice and military courts have expressed a reluctance to force military members to seek relief in civilian federal courts. *See,* 18 U.S.C. § 3771(d)(3); *Dew v. United States*, 48 M.J. at 647. Second, A1C LRM will be damaged or prejudiced in a way not correctable on appeal. In this case, the right to be heard on A1C LRM's issues relating to her privacy and dignity cannot be corrected on subsequent appeal. No possible ruling of this Court at a later point in time can redress the error. Third, the military judge's ruling in this case is plainly erroneous. As discussed below, the military judge denied the victim's right to be heard, through counsel, prior to depriving her of constitutional, statutory, and regulatory rights. Fourth, absent any guidance from this Court, the military judge's ruling, and those of military judges with a similar mindset, will be "oft-repeated." With no other meaningful way for these issues to reach appellate review, every military judge will be free to determine the scope and extent of a victim's rights with neither guidance nor oversight. Such a result will create a judicial landscape where a victim's rights vary from courtroom to courtroom with no clear guiding principles. *See, e.g.,* Douglas E. Beloof, *The Third Wave of Crime Victims'*

Rights: Standing, Remedy, and Review, 2005 BYU L. Rev. 255 (2005). Finally, the military judge's ruling raises new and important problems, and also issues of law of first impression. There is no precedent in military law addressing these issues.

It is appropriate for this Court to grant extraordinary relief at this stage rather then returning the case to AFCCA for further review. Both the accused and petitioner have a common interest in a speedy resolution of this matter that would be thwarted by further appellate delay. *See ABC, Inc. v. Powell* M.J. at 364.

CONCLUSION

To allow AFCCA to claim they lack jurisdiction to review a military judge's interpretation of a rule of evidence is to allow them to abdicate their supervisory responsibility. To deny A1C LRM a writ of mandamus that ensures that she has a meaningful way to voice her position is to deny justice to a victim and a patient. "It is said to be a writ of discretion. But the discretion of a court always means a found, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court [is] bound to grant it. They can refuse justice to no man." *Marbury v. Madison,* 5 U.S. at 153. For the reasons set out above, we respectfully request this Court

reverse AFCCA's decision that they lack jurisdiction and to issue on behalf of A1C LRM the writ of mandamus that she seeks.

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CERTIFICATION OF FILING

I certify that a copy of the foregoing was delivered to the Court, the Respondent, Government Trial and Appellate Division, and the Appellate Defense Division

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CERTIFICATION OF COMPLIANCE WITH RULE 24(D)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains 12,254 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief was prepared using Microsoft Word Version 2007 with Courier New 12-point font, a monospaced font.

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8 May 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) L.R.M., USAF, *Petitioner,*	)	AMICUS CURIAE BRIEF OF THE AIR FORCE APPELLATE GOVERNMENT DIVISION
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, *Respondent,*	)	USCA Dkt. No. 13-5006/AF Crim. App. No. 2013-05
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party in Interest.*	)	

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) L.R.M., USAF, *Petitioner,*	)	AMICUS CURIAE BRIEF OF THE AIR FORCE APPELLATE GOVERNMENT DIVISION
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Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party in Interest.*	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issues Presented

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS.

II.

WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION.

III.

WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) determined that it lacked jurisdiction under the All Writs Act, 28 U.S.C. §

1651, to reach the substantive issues raised in Petitioner's request for extraordinary relief in the form of a petition for writ of mandamus. The Air Force Appellate Government Division asserts that jurisdiction exists for this Honorable Court to review the jurisdictional issue raised in this case under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2), and the All Writs Act, 28 U.S.C. § 1651.

Statement of the Case

Petitioner's Statement of the Case is accepted.

Statement of Facts

Petitioner's Statement of the Facts is accepted.

Summary of Argument

The military judge's restrictive reading of Mil. R. Evid. 412 and 513 has the potential to influence the findings and sentence in this case. Therefore, AFCCA's review of Petitioner's writ of mandamus was in aid of its subject matter jurisdiction and it erred by holding that jurisdiction did not exist.

If this Court finds that jurisdiction exists over Petitioner's request for extraordinary relief, reading Article 67, UCMJ, as an integrated whole, this Court's review cannot extend beyond the jurisdictional question and the remaining substantive issues must be remanded back to AFCCA for a decision on the matters of law raised by Petitioner.

Finally, Mil. R. Evid. 412 and 513 confer a regulatory right for a victim to be heard through counsel during these limited evidentiary hearings. For this reason only, the writ should issue.

Argument

I.

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO REACH THE SUBSTANTIVE ISSUES RAISED IN THE PETITION FOR A WRIT OF MANDAMUS.

Standard of Review

Jurisdiction is a legal question which this Court reviews de novo. United States v. Ali, 71 M.J. 256, 261 (C.A.A.F. 2012).

Law and Analysis

1. AFCCA erred by holding that it lacked jurisdiction to reach the substantive issues.

The Air Force Appellate Government Division generally agrees with Petitioner's legal analysis contained in Issue I, subsections a.-b. (Pet. Br. at 8-15.) At its core, the substantive issues raised below required AFCCA to review a specific ruling interpreting specific Military Rules of Evidence in a specific ongoing court-martial. Therefore, AFCCA's review of Petitioner's writ of mandamus was in aid of its subject matter jurisdiction, and it erred by holding that jurisdiction did not exist.

This Court's jurisdiction is "narrowly circumscribed." Clinton v. Goldsmith, 526 U.S. 529, 535 (1999). This Court is empowered to issue writs pursuant to the All Writs Act. Center for Constitutional Rights et al. v. United States, 72 M.J. 126, No. 12-8027/AR, slip op. at 6 (C.A.A.F. 2013) (internal citations omitted) (hereinafter CCR). The All Writs Act is not an independent grant of jurisdiction, nor does it enlarge this Court's existing statutory jurisdiction. Goldsmith, 526 U.S. at 535 (internal citations omitted). Rather, the Act provides that "all courts established by Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Id. The Act requires two separate determinations: first, whether the requested writ is "in aid of" the court's existing jurisdiction; and second, whether the requested writ is "necessary or appropriate." Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008); Goldsmith, 526 U.S. at 534-35.

The precise contours of the phrase "in aid of" have not been well-defined by the courts. In Denedo, however, this Court stated that a petition for extraordinary relief is "in aid of" the Court's jurisdiction when the 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. The Supreme Court subsequently affirmed that portion of Denedo: "As

the text of the All Writs Act recognizes, a court's power to issue any form of relief--extraordinary or otherwise--is contingent on that court's subject-matter jurisdiction over the case or controversy." United States v. Denedo, 556 U.S. 904, 911 (2009).

A writ petition may be "in aid of" AFCCA's statutory jurisdiction even though it addresses an interlocutory matter, where no finding or sentence has yet been entered in the court-martial. *See, e.g.,* Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012); Courtney v. Williams, 1 M.J. 267, n.2 (C.M.A. 1976); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943).

Although Petitioner is not a party to the criminal action as defined by R.C.M. 103(16), the President has afforded her a procedural right to attend and be heard during limited evidentiary hearings to evaluate whether evidence regarding her prior sexual behavior or sexual predisposition under Mil. R. Evid. 412 and privileged communications under Mil. R. Evid. 513 should be admitted or excluded during trial.[1] Mil. R. Evid.

[1] The Air Force Appellate Government Division disagrees with Petitioner's assertion that "MRE 412 requires a military judge to conduct a hearing and to balance the victim's right to privacy against the probative value of the evidence to be admitted" as stated in lines 19-21 on page 14 of her brief. As emphasized by this Court in United States v. Gaddis, 70 M.J. 248, 250 (C.A.A.F. 2011), the "'alleged victim's privacy' interests cannot preclude the admission of evidence 'the exclusion of which would violate the constitutional rights of the accused.'" Instead, "whether evidence is constitutionally required--so as to meet the M.R.E. 412(b)(1)(C) exception to M.R.E. 412's general prohibition of sexual behavior or predisposition evidence--demands the ordinary contextual inquiry and balancing of countervailing interests, e.g., probative value and the right to expose a

412(c)(2) and 513(e)(2). The substantive legal issues presented in this appeal--whether Petitioner has standing, whether she can be heard through her counsel during these limited evidentiary hearings, and whether the writ should issue--invited AFCCA to evaluate the military judge's application of Mil. R. Evid. 412 and 513 during an ongoing general court-martial, which potentially impacted Petitioner's privacy interest, the accused's right to present a complete defense, and ultimately the outcome of the trial. AFCCA was not being asked to adjudicate "what amounts to a civil action, maintained by persons who are strangers to the court-martial." *See* CCR, slip op. at 8. Instead, the Court was asked to interpret the legal contours of specific evidentiary rules; rules governing evidentiary matters deemed so meaningful to the findings and sentence of a court-martial that an erroneous interpretation or application of them can rise to the level of constitutional error. *See, e.g.* United States v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011); United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006) (demonstrating the military judge's broad authority to abate court-martial proceedings when the government could not provide the victim's mental health records in a sexual assault case).

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witness's motivation in testifying versus the danger of 'harassment, prejudice, confusion of the issues, the witness' safety, or [evidence] that is repetitive or only marginally relevant.'" Id. at 252.

In many respects, this case is similar to Hasan. Just as this Court found in Hasan, 71 M.J. at 419, that the military judge's perceived bias against the petitioner had the "potential" to impact the findings and sentence, the military judge's restrictive reading of Mil. R. Evid. 412 and 513 similarly has the potential to influence the findings and sentence in this case. No one is better situated to assist Petitioner in understanding the relevance of her sexual history or mental health treatment to the proceeding than her detailed attorney. Assistance from her attorney in this area may promote victim cooperation in the court-martial process because her attorney is best situated to explain her rights and fully explore her background in relation to these evidentiary rules in a privileged setting. *See* United States v. Gaddis, 70 M.J. 248, 254 (C.A.A.F. 2011) (citing United States v. Banker, 60 M.J. 216, 219 (C.A.A.F. 2004) (noting that Mil. R. Evid. 412 was intended to encourage victim cooperation in courts-martial and to prevent embarrassment, invasion of privacy, and the infusion of sexual innuendo into the factfinding process). Moreover, her attorney can assist in the presentation of this information so it can be placed in proper context for the court. During the proceeding, Petitioner's attorney could also advocate points of law so that the military judge is fully apprised of the legal issues before weighing the countervailing considerations

involved in Mil. R. Evid. 412 and 513 proceedings, such as balancing the probative value of the evidence and the right to expose a witness' motivation in testifying versus the danger of harassment, prejudice, confusion of the issues, repetitiveness, or marginal relevance.

As explained by this Court in CCR, the question is not whether Petitioner's right to be heard through counsel "directly involved a finding or sentence that was--or potentially could be--imposed by a court-martial proceeding," L.R.M. v. Kastenberg, Misc. Dkt. No. 2013-05, slip op. at 7 (A.F. Ct. Crim. App. 2 April 2013) (unpub. op.); the question is whether the "harm alleged by [the Petitioner] . . . [has] the potential to directly affect the findings and sentence." CCR, slip op. at 9 (citing Hasan, *supra*). By fettering Petitioner's limited right to be heard, the jurisdictional threshold was exceeded and this Honorable Court should reverse AFCCA's decision and find that the lower Court erred by holding that jurisdiction did not exist to review the merits of Petitioner's request for extraordinary relief.

2. Because AFCCA determined that jurisdiction did not exist, it did not err by failing to conduct a standing analysis.

Similar to CCR, this case presented two threshold issues. First, did AFCCA have jurisdiction to hear Petitioner's extraordinary writ petition? Second, did Petitioner, as a

nonparty to the court-martial, have standing to assert a right to be heard through counsel in proceedings under Mil. R. Evid. 412 and 513? Subject matter jurisdiction concerns the "classes of cases . . . falling within a court's adjudicatory authority." Bowles v. Russell, 551 U.S. 205, 212-13 (2007). Standing concerns a person's right to complain of an injury and seek relief. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). The former focuses on the power of the court-martial; the latter focuses on the position of the complainant. Both involve separate inquiries.

In subsection d. of Issue I, Petitioner alleges that "AFCCA failed to conduct any standing analysis" as a result of conflating subject matter jurisdiction and standing. (Pet. Br. at 17.) Because jurisdiction and standing are separate threshold issues, AFCCA was not required to analyze Petitioner's standing. Once it concluded that jurisdiction did not exist, it had no duty to continue its analysis. To the extent that the last two paragraphs of AFCCA's decision can be read to conflate the concepts of jurisdiction and standing, this was error.

II.

THIS HONORABLE COURT LACKS JURISDICTION UNDER ARTICLE 67(a)(2)&(c), UCMJ, TO DECIDE THE SUBSTANTIVE ISSUES IN THIS CASE. EVEN IF THIS COURT IS AUTHORIZED TO EXERCISE JURISDICTION OVER THE SUBSTANTIVE ISSUES, AS A PRUDENTIAL MATTER, THIS COURT SHOULD

REMAND THE CASE TO AFCCA TO DECIDE THE SUBSTANTIVE ISSUES.

Standard of Review

Jurisdiction is a legal question which this Court reviews de novo. United States v. Ali, 71 M.J. 256, 261 (C.A.A.F. 2012).

Law and Argument

Congress has constrained this Court's authority by statute. CCR, slip op. at 6. Article 67(a)(2), UCMJ, provides that "[this Court] shall review the record in--all *cases reviewed by a Court of Criminal Appeals* which the Judge Advocate General orders sent to [this Court] for review . . . ." (Emphasis added). Article 67(c), UCMJ, provides in part, "[this Court] may act only with respect to the findings and sentence as approved by the convening authority and *as affirmed or set aside as incorrect in law by the Court of Criminal Appeals*." (Emphasis added.) Reading Article 67, UCMJ, as an integrated whole,[2] this Court's review cannot extend beyond the jurisdictional question and the remaining substantive issues must be remanded back to AFCCA for a decision on the matters of law raised by Petitioner; namely, Petitioner's standing, her

[2] Since the beginning of jurisprudence under the UCMJ, this Court has read the statutes governing jurisdiction as an integrated whole, with the purpose of carrying out the intent of Congress in enacting them. United States v. Lopez de Victoria, 66 M.J. 67, 69 (C.A.A.F. 2008).

right to be heard through counsel, and whether the writ should issue.[3]

Even though The Judge Advocate General has ordered this case to be reviewed by this Court, the "case" was not "reviewed" by AFCCA as required by Article 67(a)(2), UCMJ, because the lower Court did not transcend the jurisdictional threshold. Furthermore, AFCCA did not render a final decision determining whether the military judge's ruling on the substantive issues was correct or incorrect in law as required by Article 67(c), UCMJ. Nothing in Article 67, UCMJ, authorizes this Court to act with respect to matters of law when the lower court has not acted with respect to the same matters of law.[4]

Petitioner whistles past this second jurisdictional question. If this Court were to render a decision on the

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[3] Unlike when reviewing matters under Article 62(b), UCMJ, where the lower court may act only with respect to matters of law, *see* United States v. Baker, 70 M.J. 283, 287-88 (C.A.A.F. 2011), AFCCA is authorized to exercise factfinding power and rule on matters of law when reviewing Petitioner's request for extraordinary relief. Unlike AFCCA, this Honorable Court is not a fact-finding body. United States v. Gray, 40 M.J. 25 (C.A.A.F. 1994) (citing Article 67(c), UCMJ)).

[4] The Air Force Appellate Government Division is mindful that this Court may, in its discretion, entertain original petitions for extraordinary relief when filed by a petitioner. *See* CAAF's Rules of Practice and Procedure, Rule 4(b)(1); *see also* McPhail v. United States, 1 M.J. 457, 462 (C.M.A. 1976) (finding that this Court's authority to issue an appropriate writ in aid of its jurisdiction is not limited to the appellate jurisdiction defined in Article 67, UCMJ). Rule 4(b)(1) emphasizes that such writs rarely will be granted. Id. Although this Court is authorized to consider original petitions for extraordinary relief, this case presents a unique twist on this Court's statutory authority because this case was certified under Article 67(a)(2), UCMJ, and is not being reviewed as an original writ. Even if Petitioner would have filed a writ-appeal petition with this Court, vice TJAG certification, as a prudential matter, this Court would be limited to reviewing the decision of the Court of Criminal Appeals, i.e., the jurisdictional question, and would not review the substantive issues, which remained unresolved by the lower Court.

substantive issues in this case, its action would be analogous to granting interlocutory review of a decision of a Court of Criminal Appeals resulting from an Article 62 appeal and rendering a decision on the substantive issues even though the lower court's decision only addressed the government's failure to satisfy the jurisdictional requirements of Article 62 and R.C.M. 908, without deciding the substantive issues of the interlocutory appeal. Under this hypothetical, this Court would not have jurisdiction to analyze the merits of the Article 62 appeal via TJAG certification because the merits of the "case" had not been reviewed by the Court of Criminal Appeals. Under that circumstance, this Honorable Court would be compelled to remand the case to the lower court to comply with its statutory jurisdiction.[5] This case requires the same result.

Even if this Court finds that it has jurisdiction to review the substantive issues based on its authority under the All Writs Act, as a prudential matter, it should remand the case to the lower Court to decide the substantive issues.

III.

EVEN IF THIS COURT IS AUTHORIZED TO REVIEW THE SUBSTANTIVE ISSUES, PETITIONER'S RIGHT TO BE HEARD THROUGH COUNSEL IS DERIVED FROM THE MILITARY RULES OF EVIDENCE; NOT THE CONSTITUTION OR THE CVRA, 18 U.S.C. § 3771.

[5] *See also* United States v. Humphries, 69 M.J. 491 (C.A.A.F. 2011) (remanding the certified case to AFCCA because the lower Court had not acted on the findings; therefore, review of the case was not complete as required by Article 67(c), UCMJ).

Standard of Review

The interpretation of a statute or regulation is a question of law reviewed by this Court de novo. United States v. Faulk, 50 M.J. 385, 390 (C.A.A.F. 1999).

1. Mil. R. Evid. 412 and 513 provide Petitioner standing and the opportunity to be heard through counsel during these limited evidentiary hearings.

The President has provided victims in military courts-martial a limited right to be heard under Mil. R. Evid. 412 and 513; a right which reasonably includes the right to be heard through counsel to present facts and legal argument.

In Carlson and Ryan-Jones v. Smith, 43 M.J. 401 (C.A.A.F. 1995), this Court previously provided extraordinary relief to two sexual assault victims who had sought to protect their rights under Mil. R. Evid. 412, Article 31, UCMJ, generalized "invasions of privacy," and other privileges recognized by law. Although a detailed description of the circumstances of this case are not outlined in the summary disposition, this Court ordered that the victims "will be given an 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." Id. The Petitioner's request in this case is no different. Under the authority in 10 U.S.C. §§ 1044 and 1565(b), Congress has authorized victims of sexual assault to be

provided legal representation as part of the Department of Defense Legal Assistance Program. The Judge Advocate General of the Air Force has created the Special Victims' Counsel Program to provide legal representation to victims of sexual assault consistent with Congress' intent. Petitioner requested legal counsel under this Program and expressed a desire to be heard through her detailed counsel during limited evidentiary hearings as permitted by the Military Rules of Evidence. She should not be denied this right.

In a similar context, military law recognizes a nonparty's right to object to a subpoena compelling witness testimony or production of evidence when compliance is unreasonable or oppressive. *See* United States v. Wuterich, 66 M.J. 685 (N.M. Ct. Crim. App. 2008) (Wuterich I) *overruled by* United States v. Wuterich, 67 M.J. 63 (C.A.A.F. 2008) (Wuterich II); United States v. Wuterich, 68 M.J. 511 (N.M. Ct. Crim. App. 2009); R.C.M. 703(e)(2)(F). As demonstrated by Wuterich I and Wuterich II, the right of limited intervention in the motion to quash context encompasses the right to be represented by counsel and advocate legal arguments to demonstrate why compliance with the subpoena should not be required. These cases also demonstrate the nonparty's right to seek a writ of mandamus with military appellate courts to resolve such question of law. Similar to R.C.M. 703(e)(2)(F) in providing a right to challenge a

subpoena, the President has expressly stated the victim/patient has a right to attend and be heard in evidentiary hearings under Mil. R. Evid. 412 and 513.

The term "to be heard" is a legal term of art within the MCM. Throughout the MCM, the President has provided the parties an opportunity "to be heard" before a military judge rules on legal issues, which includes making arguments orally and in writing. *See* R.C.M. 806(d), Discussion (the military judge should not issue a protective order without first providing the parties an opportunity to be heard); R.C.M. 917(c) (requiring the military judge to give each party an opportunity to be heard on a motion for finding of not guilty); R.C.M. 920(c) (providing the parties an opportunity to be heard on the proposed findings instructions); R.C.M. 920(f) (giving the parties the right to be heard on an objection on instructions outside of the presence of the members); R.C.M. 1005(c) (authorizing the parties a right to be heard on proposed sentencing instructions); R.C.M. 1102(b)(2) (requiring each party have an opportunity to be heard before ruling on legal issues raised in post-trial hearings); Mil. R. Evid. 201(e) (providing the parties a right to be heard on the propriety of taking judicial notice).[6] The foregoing provisions

[6] *See also* R.C.M. 905(h): "upon request, either party is entitled to an Article 39(a) session to present oral argument or have an evidentiary hearing concerning the disposition of written motions;" United States v. Savard, 69 M.J. 211 (C.A.A.F. 2010) (although harmless under Article 59(a), UCMJ, and

provide the right to be heard, which in practice includes the right to be heard through counsel, but more importantly, the right to argue points of law. The President decidedly chose to use the term, "to be heard," which in all other contexts within military justice practice includes the right to have an attorney speak on the party's behalf and argue points of law. The intentional use of this phrase demonstrates an awareness by the President that crime victims have a right to be heard through counsel.

Therefore, the Air Force Appellate Government Division agrees that, if this Court reviews the substantive issues in this case, Petitioner has demonstrated the extraordinary circumstance where the writ should issue for this limited purpose. The Air Force Appellate Government Division only interprets Mil. R. Evid. 412 and 513 as conferring a regulatory right for a victim to be heard through counsel during these limited evidentiary hearings. Nothing in the plain language of the Rules authorize a victim to seek reconsideration of a military judge's ruling, appeal the ruling, or petition an appellate court to challenge the correctness of the judge's substantive decision concerning Mil. R. Evid. 412 and 513. If the President or others involved in the administration of military justice desire to implement such rights in courts-

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the facts of the case, it was error for the military judge to fail to hold a requested hearing on a motion.)

martial, the appropriate route is through amendments to the MCM or, if necessary, legislative changes.

2. Petitioner's right to privacy regarding her past sexual behavior and right to protect privileged communications to her mental health provider are not grounded in the Constitution.

Petitioner's rights under Mil. R. Evid. 412 and 513 are derived directly from the Military Rules of Evidence, not the Constitution. In fact, the congressional history of the CVRA serves as the best evidence to demonstrate that victims' rights do not involve constitutional implications.

In 1995, victims' rights advocates made an effort to enact a federal constitutional amendment to the Sixth Amendment designed to place victims' rights on a firm foundation. *See* Paul G. Cassell, In Defense of Victim Impact Statements, 6 Ohio St. J. Crim. L. 611, 614-15 (2009). To place victims' rights in the Constitution, victims' advocates approached the President and Congress with a proposed amendment. Id. at 615. As a result of the discussions, Senators Jon Kyl, Orrin Hatch, and Dianne Feinstein, with the backing of President Bill Clinton, introduced a federal victims' rights amendment. *See* 142 Cong. Rec. S3792 (Daily ed. 22 April 1996) (statement of Sen. Kyl). Although the proposed amendment was well received by Congress, it never succeeded in attracting the required two-thirds support. As a result, in 2004, the victims' rights movement instead pressed for a far-reaching federal statute designed to

protect victims' rights in the civilian federal criminal justice system. In exchange for setting aside the federal amendment in the short term, victims' advocates received nearly universal congressional support for a "broad and encompassing" statutory victims' bill of rights. 150 Cong. Rec. S4261 (daily ed. 22 April 2004) (statement of Sen. Feinstein). Consequently, on 30 October 2004, the 108th Congress passed the Justice for All Act, Pub. L. 108-405, 118 Stat 2260, which encompassed the Crime Victims' Rights Act codified in 18 U.S.C. § 3771. The congressional history of the CVRA demonstrates that victims' rights are not embedded in the Constitution.

In contrast, a military victim's right to be heard at evidentiary hearings stems from the Military Rules of Evidence. Although the Supreme Court of the United States has created a class of cases creating fundamental liberty interests involving the right to privacy,[7] no federal criminal court has extended this zone of protection to include victims' rights, nor has Petitioner cited to any mandatory authority. Even though the Supreme Court has carved out a narrow class of protected liberty interests, these interests are not absolute. As illustrated by

[7] *See, e.g.,* Loving v. Virginia, 399 U.S. 1 (1967) (fundamental right to marriage); Skinner v. Oklahoma, 316 U.S. 535 (1942) (fundamental right to procreation); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (fundamental right for a woman to choose to have an abortion before fetal viability); Eisenstadt v. Baird, 405 U.S. 438 (1972) (the fundamental right to use contraceptive devices); Lawrence v. Texas, 539 U.S. 558 (2003) (fundamental right to private consensual sexual conduct).

United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004) (finding the accused's conduct fell outside the liberty interest in private, consensual sexual activity between adults because of the compelling military interest), constitutionally protected liberty interests and privileges can appropriately yield to countervailing concerns. Likewise, the constitutional right of an accused to present a complete defense may bow to accommodate other legitimate interests in the criminal trial process. Rock v. Arkansas, 483 U.S. 44 (1987); *see also* Ogden v. Kentucky, 488 U.S. 227 (1988); Delaware v. Van Arsdall, 475 U.S. 673 (1987); Holmes v. South Carolina, 547 U.S. 319 (2006). This measured balancing of rights between the trial participants is conducted on a routine basis. Mil. R. Evid. 412 and 513 were specifically designed to promote the balance between the witness' privacy interest and the accused's overriding interest in accessing constitutionally required evidence. *See* Gaddis, *supra*; Harding, *supra*. Mil. R. Evid. 412 and 513 strike an appropriate balance between shielding victims from the unnecessary exposure of their sexual history and the disclosure of privileged communications, and providing a fair mechanism for the accused to prepare and present a complete defense. Petitioner's position goes too far in this regard.

3. The CVRA, 18 U.S.C. § 3771, does not apply to military courts-martial without Congressional or Presidential action.

The CVRA, 18 U.S.C. § 3771, is not controlling law in the military justice system. Congress exercises control over discipline in the military through the UCMJ, and although military courts frequently look to civilian statutes for guidance, the military and civilian justice systems are separate as a matter of law. United States v. McElhaney, 54 M.J. 120, 124 (C.A.A.F. 2000). Title 18 of the United States Code, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence do not directly affect proceedings under the UCMJ except to the extent that the UCMJ or MCM specifically provides for incorporation of such provisions. Id. Congressional intent to separate military justice from the civilian federal criminal system requires military appellate courts to exercise great caution in overlaying a generally applicable statute specifically onto the military justice system. Id. Congress intended the deliberative process of amending the MCM to prevail over uncritical application of statutes outside the UCMJ. Id.; *see, e.g.,* Articles 36 and 134 (clause 3), UCMJ, 10 U.S.C. §§ 836 and 934; Mil. R. Evid. 101(b)(1), Manual for Courts-Martial, United States (2012 ed.) (MCM).

This Court has previously declined to apply § 502 of the Victims' Rights and Restitution Act of 1990, 42 U.S.C. § 10606,

to courts-martial (expressing a preference for a victim's presence in the courtroom at trial) in United States v. Spann, 51 M.J. 89 (C.A.A.F. 1999). The Court observed that the essentially civilian nature of the federal statute was in conflict with Mil. R. Evid. 615 (which has since been amended by the President to reflect the rejected statute), and added that the President had not amended the rule to address whether, or how, the civilian procedures should apply in military proceedings under Article 36, UCMJ. The Court emphasized that Congress intended the deliberative process of amending the MCM to prevail over "uncritical application of statutes outside the UCMJ." Spann, 51 M.J. at 93.

The CVRA does not contain language expressly extending its applicability to military courts-martial. It is commonly accepted that when a statute's language is plain, the sole function of the courts, at least where the disposition required by the text is not absurd, is to enforce it according to its terms. United States v. Watson, 71 M.J. 54 (C.A.A.F. 2011). The Air Force Appellate Government Division acknowledges that many of the rights contained in the CVRA have been adopted by the Department of Defense in DoDD 1030.1, Victim and Witness Assistance, and DoDI 1030.2, Victim and Witness Assistance Procedures; however, the plain language of the CVRA envisions application and enforcement of its provisions in the federal

civilian criminal justice system. *See* 18 U.S.C. § 3771(b)(2) (describing the application of victims' rights in the context of federal habeas proceedings); 18 U.S.C. § 3771(c)(1) (establishing an aspirational policy that all departments and agencies of the United States provide the same victims' rights listed in subsection (a) of the statute without mandating these departments follow the same procedural framework); 18 U.S.C. § 3771 (d)(3) (establishing the procedural process for seeking a writ of mandamus in the federal court system if a victim has been denied rights listed in the statute); 18 U.S.C. § 3771(d)(4) (authorizing the government to assert as error the federal district court's denial of a victim's rights on appeal); 18 U.S.C. § 3771(b)(6) (noting that nothing in the statute shall be construed to impair the prosecutorial discretion of the Attorney General); and 18 U.S.C. § 3771(f) (mandating the implantation of procedures by the Attorney General to promote compliance with the statute).

The CVRA, located in Title 18 of the Code, is only applicable under military law if the text of the statute clearly indicates it is plainly applicable in the military context. The CVRA does not contain such plain language, and a close reading of the statute demonstrates that its enforcement mechanisms and procedures to promote compliance are unworkable in the military context without further guidance from Congress or the President.

Additionally, the President has not acted to incorporate the CVRA into military law through his delegated powers under Article 36, UCMJ. Given the detailed construct of the CVRA, it is imperative for the President or Congress to decide which CVRA rights will be applied in the military context and how those rights will be enforced through the trial and appellate construct. Furthermore, the victim's "right to be heard" cannot reasonably be said to have derived from CVRA considering that the versions of Mil. R. Evid. 412 and 513 instituting the victim's right to be heard significantly predates the CVRA.[8] The President's inaction to adopt the CVRA is even more compelling considering that he took swift action to amend Mil. R. Evid. 615 after this Court's holding in Spann to specifically adopt provisions of the Victim Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997. *See* Drafter's Analysis of Mil. R. Evid. 615, MCM A22-51 (2012 ed.). However, no action has been taken yet by the President or Congress to incorporate the CVRA into military court-martial practice despite having over eight years to adopt a workable framework.[9]

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[8] *Compare* Mil. R. Evid. 412, MCM 1995, and Mil. R. Evid. 513, adopted on 6 October 1999,[8] *with* 18 U.S.C. 3771, effective 30 October 2004, Pub.L. 108-405, Title I, § 101.

[9] DoDI 1030.2, para. 4.2, and DoDD 1030.1, para. 4.3, expressly state, "[t]his [Instruction/Directive] is not intended to, and does not, create any entitlement, cause of action, or defense in favor of any person arising out of the failure to accord to a victim or a witness the assistance outlined in this [Instruction/Directive]." Even though the DoD has adopted many of the rights provided by the CVRA, the DoD has expressly renounced that the

Accordingly, we are compelled to find that Petitioner's right to be heard through counsel is not derived from the CVRA without further action from the President or Congress. However, we are mindful of Congress' overwhelming support for the CVRA and the important rights it has created for crime victims, and, thus, we recommend that the Joint Service Committee on Military Justice strongly consider amending the MCM to incorporate appropriate rights into the UCMJ or the RCMs given the undeniable need to place victims' rights in the military on equal footing with the rights afforded to victims in the civilian justice system.

CONCLUSION

WHEREFORE, the Air Force Appellate Government Division respectfully requests that this Honorable Court reverse AFCCA's jurisdiction decision and remand this case for further review of the substantive issues raised by Petitioner's request for extraordinary relief. If this Court decides the substantive issues, Petitioner has demonstrated that the writ should issue for the limited purpose of providing her a right to be heard through counsel under Mil. R. Evid. 412 and 513.

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implementation of these rights creates an enforceable legal cause of action. This is in direct conflict with the CVRA and Petitioner's argument.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and counsel for Petitioner, Respondent, and the Real Party in Interest on 8 May 2013.

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COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Airman First Class (E-3) L.R.M., USAF *Petitioner*, v. Lieutenant Colonel (O-5) JOSHUA KASTENBERG, USAF, *Respondent* & Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party In Interest.*	)))))))))))))))))))	PROPOSED BRIEF OF *AMICUS CURIAE* NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF PETITIONER'S BRIEF USCA Dkt. No. 13-5006/AF App. Misc Dkt. No. 2013-05

PROPOSED BRIEF OF *AMICUS CURIAE*
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IN THE UNITED STATES COURT OF APPEALS
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Airman First Class (E-3) L.R.M., USAF *Petitioner*, v. Lieutenant Colonel (O-5) JOSHUA KASTENBERG, USAF, *Respondent* & Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party In Interest.*	)))))))))))))))))))	PROPOSED BRIEF OF *AMICUS CURIAE* NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF PETITIONER'S BRIEF USCA Dkt. No. 13-5006/AF App. Misc Dkt. No. 2013-05

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUES PRESENTED AND STATEMENTS OF STATUTORY JURISDICTION/CASE/FACTS

Amicus accepts the Issues Presented and Statements as articulated by Petitioner.

SUMMARY OF ARGUMENT

Military victims have independent standing to assert and to seek enforcement of their rights through counsel. Not only does the victim in this case meet the requirements for standing, but due process requires that the victim's standing to be heard includes the right to be heard through counsel. The independent nature of victims' rights renders "alignment" analysis irrelevant, and the military judge's discretionary powers do not

extend to excluding participants' views from consideration once standing is established. Such discrete moments of victim participation do not result in a per se violation of a defendants' fair trial rights, do not create a per se appearance of impartiality, and do not implicate defendants' confrontation rights.

ARGUMENT

The core issue raised by the victim, A1C L.R.M., in her petition is straightforward.[1] The military judge erred when he ruled to deny her the opportunity to be heard regarding the admissibility of her private information—whether through counsel or on her own behalf—at Military Rules of Evidence 412 and 513 hearings. This decision deprives the victim of her rights and, if allowed to stand, would thwart the very purpose of the relevant evidentiary rules, which is to "safeguard the . . . victim against the invasion of privacy." MCM, App. 22, Mil. R. Evid. 412. For the reasons set forth herein and in the victim's brief, this Honorable Court should reverse the decision of the

[1] The victim's brief before this Honorable Court presents three issues: (1) whether the Air Force Court of Criminal Appeals (AFCCA) erred by holding that it lacked jurisdiction to hear the victim's petition for a writ of mandamus; (2) whether the military judge erred by denying the victim the opportunity to be heard through counsel thereby denying her due process under the Military Rules of Evidence, the Crime Victims' Rights Act (CVRA) and the United States Constitution; and (3) whether this Honorable Court should issue a writ of mandamus. This amicus brief addresses issue (2), joining in the victim's briefing on issues (1) and (3).

AFCCA that it lacks jurisdiction and grant the victim the relief sought under the All Writs Act, 28 U.S.C. § 1651.

INTRODUCTION

It is undisputed that the preservation of defendants' constitutional rights is a fundamental duty of all courts. An equally fundamental duty is to ensure that once rights are granted, regardless of to whom they are granted, they are protected. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."). Thus, courts have an obligation to ensure the meaningful enforcement of victims' rights no less so than defendants' rights.

Practitioners and jurists, educated and acculturated in a system that has largely omitted victim participation in criminal justice proceedings, may fear that victims' independent participation to protect their rights necessarily violates defendants' constitutional rights. These fears stem, in part, from the mischaracterization of the criminal justice system as a "zero-sum" game, in which affording one participant rights necessarily diminishes the rights of other participants. But courts are commonly tasked with weighing competing rights and

interests in the just adjudication of a matter, and, as the practice of victim participation across the country has demonstrated, criminal courts are able to accommodate limited victim participation for the purpose of asserting and enforcing their rights without the feared negative repercussions.[2]

In this case, a rape victim's statutory, rule-based, and constitutional rights to be present, to be heard, to privacy, and to be treated with dignity, respect, and fairness are at stake. The victim has standing to assert these rights and yet is being prevented from doing so. The outcome eviscerates the protections afforded by victims' rights, violates the victim's

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[2] *See, e.g., Carter v. Bigelow,* No. 2:02-CV-326 TS, 2011 WL 6069214, at *4 (D. Utah Dec. 6, 2011) (granting the victim's motion to strike the petitioner's motion to amend his habeas petition in part because it concluded that "disallowing amendment is necessary to protect [the victim's] statutory right to a proceeding free from unreasonable delay and his right to be treated with fairness"); *United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 1868682, at *2 (D.N.H. July 22, 2005) (order) (balancing the right of defendant to adequately prepare for trial and the victim's right under the CVRA to proceedings free from unreasonable delay, and holding that a continuance would be granted over the victim's objection, but that because victims have statutory rights under the CVRA, and because the court has a statutory obligation to ensure those rights are afforded, "the parties are hereby put on notice that no further continuance will be granted in the absence of extraordinary circumstances"); *see also* Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-By-Clause Analysis*, 5 Phoenix L. Rev. 301, 315-16 (2012) ("Crime victims' rights do not stand in opposition to defendants' rights but rather parallel to them."); Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. Rev. 255, 339 (2005) ("[V]ictims' rights are artificially framed as rights conflicting with defendants' rights, even though victims' rights are centrally rights against the government.").

due process rights, and disregards the courts' obligation to ensure that all rights are protected.

I. MILITARY VICTIMS HAVE INDEPENDENT STANDING TO ASSERT AND TO SEEK ENFORCEMENT OF THEIR RIGHTS THROUGH COUNSEL.

A. The Victim Meets the Requirements for Standing.

At its most fundamental, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Standing need not be explicitly provided by Congressional mandate or by rule; rather, a determination of standing may be based on the satisfaction of the traditional three-part test. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (holding that an individual has standing to assert rights in court if three elements are met: (1) the litigant has suffered an "injury in fact"; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury is redressable by a favorable decision of the court). Military courts employ this same test for standing. *See, e.g., United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008) (citing *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003)). Nothing in Military Rules of Evidence 412 or 513 alters this traditional analysis. Consequently, the analysis of victim standing to assert rights is straightforward.

Under Military Rules of Evidence 412 and 513, victims have the explicit rights to attend the proceedings and to be heard. *See* Mil. R. Evid. 412(c)(2) ("The . . . victim *must* be afforded a reasonable opportunity to attend and be heard" on the issue of the admissibility of past sexual behavior and/or alleged sexual predisposition) (emphasis added); Mil. R. Evid. 513(e)(1) ("The patient *shall* be afforded a reasonable opportunity to attend the hearing and be heard" on the issue of the disclosure of patient records or communications that are covered by the psychotherapist-patient privilege) (emphasis added); *see also* 18 U.S.C. § 3771(a) (guaranteeing victims of crime, *inter alia*, the rights to not be excluded from proceedings and to be reasonably heard at proceedings).[3]

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[3] In addition to the victim's rights to attend the proceedings and be heard, the victim's rights to privacy, to be present, and to be treated with dignity, respect, and fairness are also implicated. *See, e.g.,* 18 U.S.C. § 3771(a)(8) (articulating a victim's right to "be treated with fairness and with respect for the victim's dignity and privacy"); *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (recognizing that the United States Constitution provides a right to personal privacy, which includes an "individual interest in avoiding disclosure of personal matters"); *Roe v. Wade*, 410 U.S. 113, 152 (1973) ("[A] right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."). The Supreme Court has recognized that "rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Michigan v. Lucas*, 500 U.S. 145, 150 (1991) (stating that Michigan's rape shield statute represents a valid determination that rape victims deserve these protections). The purposes underlying rape shield provisions include protecting victims' privacy and fostering victims' initiation of and participation in criminal proceedings. *See,*

The victim in this case asserted her right to be heard through counsel on the topics addressed by Military Rules of Evidence 412 and 513, and an injury occurred when she was denied her right to be heard through counsel. *Cf. Warth*, 422 U.S. at 500 (finding that "the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing" and observing that standing may also be granted by legislative action, "either expressly or by clear implication") (internal citations and quotations omitted). The victim's inability to assert her right to be heard meaningfully, through counsel, arises as a direct result of the military judge's adverse ruling. This injury is redressable by the reversal of that military judge's decision and by permitting the victim's counsel to appear and to be heard on her behalf in proceedings relating to Military Rules of Evidence 412 and 513. *See, e.g., Lujan*, 504 U.S. at 560-61;

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e.g., MCM, App. 22, Mil. R. Evid. 412 ("Rule 412 is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses. In so doing, it recognizes that the prior rule, which it replaces, often yields evidence of at best minimal probative value with great potential for distraction and incidentally discourages both the reporting and prosecution of many sexual assaults."); *United States v. Gaddis*, 70 M.J. 248, 253-54 (C.A.A.F. 2011) (citing the drafters' analysis); *United States v. Ramone*, 218 F.3d 1229, 1235 (10th Cir. 2000) (observing that the purpose of rape shield provisions is to "safeguard the victim against invasion of privacy, potential embarrassment, and stereotyping").

Wuterich, 67 M.J. at 69. The analysis in this case should end here.[4]

Notably, party status is not—nor has it ever been—a prerequisite to or substitute for engaging in this standing analysis. Indeed, it is not uncommon for victims to be granted standing for limited purposes in connection with criminal proceedings.[5] In the context of personal information and

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[4] Any reliance on the *dicta* in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), to mandate a different outcome is misplaced. Contrary to the posture of *Linda R.S.*, the victim here is not seeking to compel or prevent a criminal prosecution. Rather, the victim seeks merely to exercise rights explicitly afforded to her under the Military Rules of Evidence and 18 U.S.C. § 3771. In fact, as the Court in *Linda R.S.* observed, statutes may confer upon victims legal rights, "the invasion of which creates standing, even though no injury would exist without the statute." *Id.* at 617 n.3.

[5] *See, e.g.,* 18 U.S.C. § 3771(b)(1), (d)(1) (specifying that the "crime victim or the crime victim's lawful representative, and the attorney for the Government" may assert a crime victim's rights in district court); *In re Dean*, 527 F.3d 391, 393 (5th Cir. 2008) (observing that, in the lower court proceeding, "[a]ll victims who wished to be heard, personally or through counsel, were permitted to speak" and that "[t]he victims and their attorneys supplemented their appearances at the hearing with substantial post-hearing submissions"); *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (finding that although the federal rape shield provisions make no explicit reference to the standing of victims to appeal adverse rulings, "this remedy is implicit as a necessary corollary of the rule's explicit protection of the privacy interest Congress sought to safeguard," as "[n]o . . . party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of the victim's rights"); *United States v. Mahon*, No. CR 09-712-PHX-DGC, 2010 WL 94247 (D. Ariz. Jan. 5, 2010) (slip copy) (finding that filing a notice of appearance is a reasonable procedure for receiving copies of filings and ensuring the protection of a victim's rights); *Melissa J. v.*

privilege, specifically, it is well-accepted that an individual with rights and interests at stake—including a crime victim—has standing to challenge the production of materials.[6] In addition,

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Superior Ct., 190 Cal. App. 3d 476, 479 (Cal. Ct. App. 1987) ("The victim is not considered a party to a criminal proceeding. However, where the court has issued an order concerning [the victim's rights], the victim may assert his or her legitimate rights by the procedures available to parties."); *State of New Jersey in the Interest of K.P.*, 709 A.2d 315, 320 (N.J. Sup. Ct. 1997) ("It is difficult for the court to imagine that the Legislature intended to give victims these expansive rights, yet specifically intended that they should not be a factor for the court to consider . . . . The court finds that the legislative intent is more in line with considering the victim's position as opposed to ignoring it. The court finds a victim is a constructive equivalent to a party in the case."); *see also* Beloof, *supra* note 2, at 270 ("When victims are exercising either their broad or specific rights, they are no longer merely witnesses or third parties in the criminal process. Rather, victims are 'participants' in the criminal process. Being a participant means the 'crime victim [has] rights of intermittent participation in the criminal [trial] process.'") (citation omitted).

[6] *See, e.g.,* Fed. R. Crim. P. 17(c) ("After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object."); R.C.M. 703(f)(4)(C) (providing that a person in custody of records may request relief from production from a military judge); Mil. R. Evid. 501(b) ("A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to: (1) Refuse to be a witness; (2) Refuse to disclose any matter; (3) Refuse to produce any object or writing; or (4) Prevent another from being a witness or disclosing any matter or producing any object or writing."); *In re Grand Jury Subpoena Dated Dec. 17, 1996*, 148 F.3d 487, 490 (5th Cir. 1998) ("A third party has standing to challenge a grand jury subpoena where the third party has a

in the context of media challenges to court rulings, nonparties are routinely granted standing for the limited purpose of asserting and protecting specific rights.[7] There is no legitimate basis for differentiating between nonparty litigants such that one class (the media) has standing to assert rights in connection with criminal proceedings, but another class (crime victims) does not. Under any reasonable application of the standing analysis, the victim has standing to be heard in a meaningful manner at Military Rules of Evidence 412 and 513 proceedings.

B. Due Process Requires that the Victim's Standing to Be Heard Includes the Right to Be Heard Through Counsel.

The rights guaranteed to victims must be interpreted through the lens of due process; consequently, victims' rights implicated by Military Rules of Evidence 412 and 513 proceedings must be afforded in such a way that the rights are meaningful. *See, e.g., Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (observing that fundamental aspects of due process include the opportunity to be heard in a "meaningful manner" and to be

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claim of privilege respecting information or materials sought by the subpoena.").

[7] *See, e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 503 (1984) (accepting without analysis the media's standing to assert and protect First Amendment rights); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 598-600 (1982) (same); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 560-63 (1980) (same).

treated fairly). In this context, victims' standing to assert and seek enforcement of their rights must contemplate that victims may be represented by counsel.

As the Supreme Court has acknowledged in other contexts, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *see also Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970) (quoting *Powell* and observing that even in cases where an individual is not entitled to court-appointed counsel, he or she "must be allowed to retain an attorney if he [or she] so desires" and that the court did "not anticipate that this assistance will unduly prolong or otherwise encumber the hearing").[8]

The Supreme Court has also observed that, "[h]istorically and in practice, in our own country at least, [a hearing] has always included the right to the aid of counsel when desired and provided by the party asserting the right." *Chandler v. Fretag*, 348 U.S. 3, 9 (1954) (quoting *Powell*, 287 U.S. at 68). Importantly, this due process right to be heard through counsel

[8] *Cf.* ABA Formal Op. 95-396 (July 28, 1995) (observing that "[t]he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel."); ABA Formal Op. 91-359 (Mar. 22, 1991) ("The profession has traditionally considered that the presumptively superior skills of the trained advocate should not be matched against those of one not trained in the law.").

is not limited to counsel for criminal defendants: "If *in any case, civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Id.* at 10 (quoting *Powell*, 287 U.S. at 69) (emphasis added); *see also Guajardo-Palma v. Martinson*, 622 F.3d 801, 803 (7th Cir. 2010) (observing that even when a prisoner is not entitled to appointed counsel at public expense, a judge may not refuse to accept filings from a lawyer who represents that prisoner, as prisoners are entitled to the fundamental right to access the courts);[9] *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980) (finding that in both civil and criminal cases, "the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement").

The assistance of counsel is particularly critical in the context of this case, as the legal issues raised in military rape shield and privilege proceedings require the military judge

[9] All individuals, including crime victims, have a fundamental right to access the courts. *See, e.g., Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir. 2003) ("Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment."); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (noting that access to courts is a fundamental right).

and the interested participants to engage in complex legal analysis. *See, e.g., Gaddis* 70 M.J. at 253-56 (requiring several pages to examine the legal test that is employed as part of the Military Rule of Evidence 412 analysis); *United States v. Jenkins*, 63 M.J. 426, 428-30 (C.A.A.F. 2006) (discussing over the course of a number of pages the analysis pursuant to Military Rule of Evidence 513). Victims' privacy rights, among others, are inherently intertwined with this legal analysis; thus, anything victims choose to convey to the military judge in the course of exercising their right to be heard will implicate that analysis.

Nothing in Military Rules of Evidence 412 or 513 limits a victim's right to be heard to "factual matters" or "testimony on [the victim's] privacy interests," Gov. Resp. to Special Victims' Counsel's Mot. for Recons. at 7 ¶¶ 41-42, or to communicating with the court only "in laypersons terms," Jan. 29, 2013 Judicial Ruling at 3, as opposed to providing "legal argument," Feb. 9, 2013 Judicial Ruling at 3 ¶ 9. In fact, the structure of the rules itself conceives of the victim's right to be heard as something separate from any evidence the victim may provide if called as a witness to testify during the hearing. *See, e.g.,* Mil. R. Evid. 412(c)(2) (distinguishing the victim's role as a potential witness who may offer "relevant evidence" from the victim's right to "a reasonable opportunity to attend

and be heard" in connection with rape shield proceedings); Mil. R. Evid. 513(e)(2) (distinguishing the victim's role as a patient who is called as a witness from the victim's right to attend and be heard at the hearing).

The victim in this case has the explicit right to be heard with respect to the pretrial production of her private information and the admissibility of evidence that also implicates other rights, including her privacy rights, and these rights exist in the context of complex pretrial legal arguments. Due process requires that victims who have secured the assistance of counsel have the benefit of the attorney's knowledge and skills in asserting the victims' legal rights; to conclude otherwise is to deny the victims access to the very tools that are necessary to ensure that their rights are meaningful.

C. The Independent Nature of Victims' Rights Renders "Alignment" Analysis Irrelevant.

Victims of sexual assault have privacy rights and interests that are individually held. Indeed, these rights and interests cannot be said to be shared by any other participant in the criminal justice system. *See, e.g.,* Beloof, *supra* note 2, at 270-74 (observing that "[v]ictims . . . possess independent rights to participate at certain stages of the criminal

process").[10] In fact, it is well-established that the government does not represent the victim in a criminal case; to the contrary, prosecutors have a duty to represent the interests of the government. *See, e.g.,* Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 Lewis & Clark L. Rev. 559 (2005) (discussing prosecutorial neutrality in the context of ethical obligations, conflicting duties, and victims' rights); *see also Romley*, 891 P.2d at 250 (recognizing that at times "the wishes of the victim may be adverse to those of the prosecution," and reiterating that a prosecutor does not "represent" the victim in a criminal trial). As such, alignment or non-alignment of the position advanced by the parties with the victim's position is irrelevant to standing analysis.

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[10] *See also State ex rel. Romley v. Superior Court*, 891 P.2d 246, 249 (Ariz. Ct. App. 1995) (finding that the state cannot waive victims' restitution rights); *People v. Brown*, 54 Cal. Rptr. 3d 887, 896 (Cal. Ct. App. 2007) ("Victim restitution may not be bargained away by the People."); *Wilson v. Commonwealth*, 839 S.W.2d 17, 21 (Ky. Ct. App. 1992) (holding that the rights guaranteed to crime victims in Kentucky "belong to the victim independent of the Commonwealth, and cannot be plea bargained away without the crime victim's actual approval"); *People v. Meconi*, 746 N.W.2d 881, 885 (Mich. Ct. App. 2008) (Sawyer, J. concurring) (finding that the prosecutor's express agreement to a sequestration order could not waive the victim's constitutional right to be present at trial because, *inter alia*, "[t]he right of the victim to attend the trial belongs to the victim, not the prosecutor").

Indeed, as trial counsel for the government acknowledges, victims' interests in the suppression of rape shield-protected information may not always align with the interests of the parties in the case. Gov. Resp. to Special Victims' Counsel's Mot. for Recons. at 6 ¶ 39 (acknowledging that the government could choose not to oppose defense efforts "for a myriad of reasons"). For these reasons, victims cannot rely on the government or the defense to advance their interests, as neither party "shares these interests to the extent that they might be viewed as a champion of the victim's rights." *Doe*, 666 F.2d at 46. To deny victims the ability to advance their rights—and to instead force them to rely on the unsure prospect that a party to the criminal proceeding will happen to align with and vigorously advocate a position that mirrors their own—eviscerates their rights and protections. Such an outcome transforms the victims' rights, and the rape shield provision itself, from a shield intended to protect victims into merely a sword to be wielded at the whim of the parties.

D. The Military Judge's Discretionary Powers Do Not Extend to Excluding Participants' Views From Consideration Once Standing Is Established.

The military judge relied in the alternative on what seems to be an assertion of broad discretionary power to refuse to allow a participant to assert and protect a legally cognizable right, even after standing has been established. The military

judge did not provide any authority in support of such a broad discretionary power.[11] Indeed, such a broad exception to the principle that violations of rights must have a remedy would effectively raze the standing analysis, as well as the constitutional guarantee of access to the courts. *See, e.g.*, *Marbury*, 5 U.S. (1 Cranch) at 163; *Chappell*, 340 F.3d at 1282 ("Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment."); *Ryland*, 708 F.2d at 971 (noting that access to courts is a fundamental right).

II. AFFORDING VICTIMS STANDING TO ASSERT RIGHTS THROUGH COUNSEL IN MILITARY RULES OF EVIDENCE 412 AND 513 HEARINGS DOES NOT VIOLATE DEFENDANTS' RIGHTS.

Affording crime victims their rights in proceedings pursuant to Military Rules of Evidence 412 and 513 does not

[11] Only in one narrow circumstance involving the separation of powers doctrine does it seem that courts have exercised their discretion to refuse to hear from a participant who has established standing. *See, e.g.*, *Melcher v. Federal Open Market Committee*, 836 F.2d 561, 565 (D.C. Cir. 1987) (holding that "if a legislator could obtain substantial relief from his fellow legislators through the legislative process itself, then it is an abuse of discretion for a court to entertain the legislator's action"). *But see Chenoweth v. Clinton*, 181 F.3d 112, 114-15 (D.C. Cir. 1999) (questioning the propriety of the doctrine of equitable discretion as applied in *Melcher* and elsewhere, as the circuit's precedent allowed trial courts to find that plaintiffs had standing, which "got them into court just long enough to have their case dismissed [through the exercise of the court's equitable discretion] because of the separation of powers problems it created").

violate defendants' constitutional rights. As noted above, the Military Rules of Evidence provide that victims have the right to attend and be heard at hearings relating to privileged material and at hearings on the admissibility of evidence of their sexual behavior or predisposition; these provisions reflect the inherently prejudicial nature of such evidence with respect to the victims' privacy interests. *See* Mil. R. Evid. 513; Mil. R. Evid. 412(c)(2), (c)(3). These rights may be exercised by victims in the court martial process—and the victims' privacy interests protected—without impinging upon the defendants' constitutional rights.

A. Such Discrete Moments of Victim Participation Do Not Result in a Per Se Violation of a Defendant's Fair Trial Rights.

As the United States Supreme Court has explained, "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Federal appellate court decisions have clarified that in the context of reviewing a defendant's petition for habeas corpus, a colorable claim of prejudice to a defendant's fair trial right must allege the denial of a specific constitutional right; general references to "fair trial" or "due process" will not suffice to place a trial court on notice of the nature of the alleged constitutional infirmity. *See, e.g.*,

Slaughter v. Parker, 450 F.3d 224, 236 (6th Cir. 2006) (finding that "[w]hile a petitioner need not cite 'chapter and verse' of constitutional law, 'general allegations of the denial of rights to a fair trial and due process do not fairly present claims that specific constitutional rights were violated'"); *Casey v. Moore*, 386 F.3d 896, 913 (9th Cir. 2004) (explaining that "[e]ven where a petitioner argues that an error deprived him of a 'fair trial' or the 'right to present a defense,' unless the petitioner clearly alerts the court that he is alleging a specific federal constitutional violation, the petitioner has not fairly presented the claim").[12]

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[12] The Second Circuit has expounded on the requirement that a defendant present the denial of a specific constitutional right, and not rely on broad claims of "denial of a 'fair trial'" as follows:

> The concept of fairness embraces many concrete notions, ranging from such fundamental matters as the right of the defendant to know the charges against him, to such lesser interests as his right to have each count of the indictment charge him with no more than one criminal violation, *United States v. Gibson,* 310 F.2d 79, 80 n. 1 (2d Cir. 1962); Fed. R. Crim. P. 8(a); or the right to have access to reports by informant witnesses to law enforcement officials, *United States v. Sanchez,* 635 F.2d 47, 65-66 (2d Cir. 1980) ; or the right to present information in mitigation of punishment before being sentenced after conviction, Fed. R. Crim. P. 32(a). Obviously not every event in a criminal proceeding that might be described as 'unfair' would be a violation of the defendant's rights under the Constitution.

Within the rubric of the right to a "fair trial," the only specific constitutional rights of the defendant identified by the military judge (or any party) in the proceedings below or that could possibly be implicated by affording the victim her right to be heard through counsel at Military Rules of Evidence 412 or 513 hearings are the right to the appearance of an impartial tribunal and the right of confrontation. Neither of these rights would in fact be threatened if the victim is afforded her due process right to be heard in a meaningful manner.

B. Affording Victims Standing to Assert Their Rights in Pretrial Evidentiary Hearings Does Not Create a Per Se Appearance of Partiality.

One court has described the relationship between a defendant's fair trial right and impartiality as follows:

> There are two ways in which a plaintiff may establish that he has been denied his constitutional right to a fair hearing before an impartial tribunal. In some cases, the proceedings and surrounding circumstances may demonstrate *actual bias* on the part of the adjudicator. In other cases, the adjudicator's pecuniary or personal interest in the outcome of the proceedings may create an *appearance of partiality* that violates due process, even without any showing of actual bias.

Stivers v. Pierce, 71 F.3d 732, 741 (9th Cir. 1995) (citations omitted) (emphasis in original). *See also Wilkens v. Lafler*,

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Daye v. Attorney General of State of N.Y., 696 F.2d 186, 193 (2d Cir. 1982).

No. 10-1089, 2012 WL 2686101, at *5 (6th Cir. July 6, 2012) (citation omitted) ("A petitioner may show that a procedure violated his right to a fair trial either by identifying an inherently prejudicial practice or by demonstrating actual prejudice."); *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999) ("An accused has a constitutional right to an impartial judge.").

With respect to the *appearance* of judicial partiality or bias, the Supreme Court has identified three circumstances that implicate defendants' due process right to a fair trial and mandate recusal.[13] *Crater v. Galaza*, 491 F.3d 1119, 1131 (9th Cir. 2007). There is no evidence to suggest the first two—in which "a judge 'has a direct, personal, substantial pecuniary interest in reaching a conclusion against [one of the litigants],'"[14] or in which "a judge becomes 'embroiled in a

[13] *See also* R.C.M. 902(a) (addressing the appearance of bias and requiring disqualification of a judge when "that military judge's impartiality might reasonably be questioned"); Canon 2.11(A) of the ABA Model Code of Judicial Conduct (2011) (providing that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned"). Further: "RCM 902(a) . . . has language virtually identical to that found in 28 U.S.C. § 455(a), which calls for Federal judges . . . to disqualify themselves 'in any proceeding in which [their] impartiality might reasonably be questioned.' The exhortation of the statute is designed to foster the appearance of justice within the judicial system." *Wright*, 52 M.J. at 140-41.

[14] *Crater*, 491 F.3d at 1131 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

running, bitter controversy' with one of the litigants"[15]—are at issue in this case. The third circumstance, in which the judge must recuse himself if he "acts as 'part of the accusatory process[,]'" appears to be the one that concerned the military judge. *Id.* (quoting *In re Murchison,* 349 U.S. at 137).

In *Murchison*, the Court reversed convictions of defendants in cases in which the judge had acted not only as a grand jury to bring contempt charges against the petitioners, but also then proceeded to try, convict, and sentence them. 349 U.S. at 135. The Court explained that: "[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.* at 136. But whether the Supreme Court's concern in *Murchison* was solely with the judge's appearance of interest in the outcome of the prosecution, or also with the circumstances that served to align him with the prosecution, no such concerns are implicated in this case. The only issue before the military judge is whether the victim has standing to assert her rights, including her explicit right to be heard, through counsel, at hearings that directly implicate her rights. The military judge

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[15] *Id.* (quoting *Mayberry v. Pennsylvania,* 400 U.S. 455, 465 (1971)).

affording the victim her rights no more aligns him with the prosecution or the victim, than the military judge affording the defendant his rights aligns the judge with the defendant.[16]

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[16] *See United States v. Gallion*, No. 07-39, 2008 WL 1904669, at *6 (E.D. Ky. Apr. 29, 2008) (denying motion to recuse in a case in which defendants alleged, *inter alia*, that the judge's order requiring the addition of the victim's attorney to the service list in the case was a "bizarre practice" that revealed the judge's bias against them, and explaining that the order was issued pursuant to the "clear provisions" of the CVRA, including the victim's right to notice).

The cases cited by the military judge do not support a contrary conclusion. For example, in *United States v. Martinez*, the court explained that the test for recusal under R.C.M. 902(a) is "whether," applying an objective standard and, "taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions." 70 M.J. 157, 158 (C.A.A.F. 2011). The court then applied that standard and concluded that defendant's fair trial rights were not prejudiced by the conduct of the supervising judge in privately conferring with the prosecutor and then accompanying the presiding judge into his chambers during recess and deliberations. *Id.* at 155-56, 159-60. *See also United States v. Butcher*, 56 M.J. 87, 89-92 (C.A.A.F. 2001) (assuming, arguendo, that the military judge should have recused himself for attending a party hosted by the prosecutor and playing tennis with the prosecutor the next day, failure to do so did not require reversal, where any risk of injustice was considerably diminished because incidents occurred near the end of trial, well after the military judge had completed his essential rulings); *United States v. Kincheloe*, 14 M.J. 40 (C.M.A. 1982) (concluding that appellate judge was not subject to disqualification because of his participation as trial counsel in a special court-martial which had convicted defendant of unauthorized absences six years earlier).

The courts' holdings in the other two cases cited by the military judge, in which the courts determined that the military judges erred to the prejudice of the defendants, are factually distinguishable and do not lend support to the military judge's determination that affording the victim's right to be heard through counsel will violate defendant's rights. In both *United*

Rather, it is the very nature of the judicial function to preserve and protect rights, regardless of to whom they attach.

C. Affording Victims Standing to Assert Their Rights in Pretrial Evidentiary Hearings Does Not Implicate Defendants' Confrontation Rights.

The military judge in his decision states in a footnote that defendant's Confrontation Clause rights may be implicated if he were to "permit[] a third party, whether an SVC or other non-enumerated party to speak on behalf of a victim[,]" as "the right to be heard equates to the right to testify." Jan. 29, 2013 Judicial Ruling at 3 ¶ 5, n.7. But the military judge misconstrues the reach of the Confrontation Clause right as interpreted by the Supreme Court and the nature of a victim's right to be heard at a pretrial hearing of this nature.

"The Confrontation Clause of the Sixth Amendment provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Williams v. Illinois*, 132 S.Ct. 2221, 2232 (2012).

States v. Taylor, 47 C.M.R. 445, 452 (A.C.M.R. 1973), and *United States v. Conley*, 4 M.J. 327 (C.M.A. 1978), the military judges' conduct was concluded to have involved "assum[ing] the role of the advocate" by taking on, in one case, critical aspects of the prosecutor's role—including questioning witnesses and obtaining defense stipulations—and in the other, by assuming the role of a government witness. Affording the victim her right to be heard through counsel at Military Rules of Evidence 412 and 513 hearings neither places the military judge in the position of acting as an advocate for one of the parties nor has him assume the role of a government witness.

Notably, the United States Supreme Court has described the confrontation right as a *trial right*. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (plurality opinion) (emphasizing that the right to confront is a trial right and that the Court has never held that a defendant has a right to pretrial discovery under the Confrontation Clause); *accord Coleman v. Calderon,* 150 F.3d 1105, 1112 (9th Cir.), *reversed on other grounds,* 525 U.S. 141, 145 (1998) (per curiam); *People v. Hammon,* 938 P.2d 986, 989-93 (Cal. 1997) (discussing *Ritchie*, declining to conclude that defendant has a Sixth Amendment confrontation right to pretrial discovery of the victim's privileged records, and disapproving of a line of cases concluding otherwise).

Further, the issue of the victim's right to be heard at the hearings regarding Military Rules of Evidence 412 and 513 is separate and distinct from the issue of whether she offers testimony at the hearing. As the military judge himself concedes, the Supreme Court has not "coupled" the right to be heard with the right to confront. Jan. 29, 2013 Judicial Ruling at 3 ¶ 5, n.7. And, as noted above, the structure of the rules conceives of the victim's right to be heard as something separate from any evidence the victim may provide if she is called to testify as a witness during the hearing. *See, e.g.,* Mil. R. Evid. 412(c)(2) (distinguishing the victim's role as a

potential witness who may offer "relevant evidence" from the victim's right to "a reasonable opportunity to attend and be heard" in connection with rape shield proceedings); Mil. R. Evid. 513(e)(2) (distinguishing the victim's role as a patient who is called as a witness from the victim's right to attend and be heard at the hearing). As a result, defendant's Confrontation Clause rights are not implicated by the victim's exercise of her right to be heard, through counsel, in connection with these proceedings; the only rights at risk of being violated by the military judge in this case are those of the victim.

CONCLUSION

Rights, once afforded—regardless of to whom they are afforded—must be protected. It is undisputed that the victim in this case has rights. Based on a straightforward legal analysis, she has standing to assert those rights. Well-established law and policy make clear that for rights to be meaningful they may, at times, require the assistance of counsel. Merely hearing from counsel for a participant with legally protected rights when those rights are at risk does not inject prejudice or bias into a tribunal. As the Supreme Court has noted, "justice, 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."

Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) (Cardozo, J.); *see also 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"). Justice in this case requires recognizing victim standing to assert her rights through counsel.

Date: 10 May 2013 Respectfully submitted,

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/s/ Margaret Garvin

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Dated: 10 May 2013

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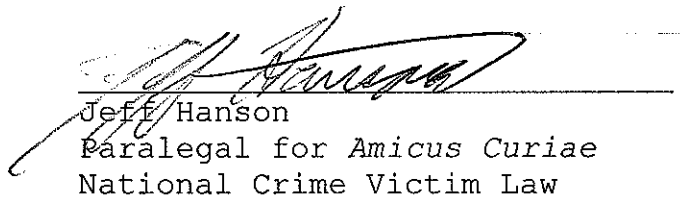
I certify that a copy of the foregoing was delivered to the Court and counsel for Petitioner, Respondent, and the Real Party in Interest on 10 May 2013.



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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Appellant*	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, Military Judge, *Appellee*	)	Crim. App. No. 2013-05 USCA Dkt. No. 13-5006/AF
and	)	
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party in Interest*	)	

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MISCELLANEOUS

United States Court of Appeals for the Armed Forces,
Rules of Practice and Procedure, Rule 4(c) 19

United States Court of Appeals for the Armed Forces,
Rules of Practice and Procedure, Rule 26(a) 10

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Appellant*	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, Military Judge, *Appellee*	)	Crim. App. No. 2013-05 USCA Dkt. No. 13-5006/AF
and	)	
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party in Interest*	)	

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issues Presented

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS

II.

WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION

III.

WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS

STATEMENT OF STATUTORY JURISDICTION

This Honorable Court has jurisdiction to review the decision of the Air Force Court of Criminal Appeals under Article 67(a)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(2). This Honorable Court also has authority to grant relief under the All Writs Act, 28 U.S.C. § 1651.

STATEMENT OF THE CASE

Appellant's statement of the case is accepted with the following exceptions. A1C LRM's Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Petition for Stay of Proceedings was filed with the Air Force Court of Criminal Appeals on 14 February 2013. (J.A. at 4.) Exception is also taken with the characterization that the military judge's ruling was "erroneous."

STATEMENT OF FACTS

Appellant's statement of facts is accepted with the following exceptions. Capt Seth Dilworth, 27 SOW/JA, Cannon AFB, New Mexico, was detailed to be A1C LRM's Special Victims' Counsel on 22 January 2013. (J.A. at 21.) Additionally, to the extent that Appellant's statement of facts implies that A1C LRM's allegation or appointment of a Special Victims' Counsel transforms her into a "victim" as opposed to an "alleged victim" or "complaining witness", Appellee would disagree given the

preliminary stage of the court-martial and A1C Daniels' fundamental right of innocence until the Government proves his guilt by legal and competent evidence beyond a reasonable doubt.

Summary of Argument[1]

Fourteen days prior to this Honorable Court's opinion in Center for Constitutional Rights v. United States, 72 M.J. 126 (C.A.A.F. 2013), the Air Force Court of Criminal Appeals correctly determined it did not have jurisdiction to consider the Appellant's extraordinary writ. Assuming, *arguendo*, that the Air Force Court of Criminal Appeals was in error regarding its jurisdictional limits, in the absence of clear statutory language or case law, the military judge correctly ruled no right existed for A1C LRM to be heard through a third party. Finally, the drastic instrument of a writ of mandamus is unwarranted in this case where there has been no judicial usurpation of power and no characteristic of an erroneous practice which is likely to recur.

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[1] Appellee notes this Honorable Court's docketing notice in the case *sub judice* directed that "the Judge Advocate General of the Air Force shall appoint counsel for Appellee" and that the Appellee "shall file" an answer on or before May 13, 2013. In accordance with that direction, Appellee hereby complies with that order by filing this brief. Compare Center for Constitution Rights v. United States, 72 M.J. 126 (C.A.A.F. 2013) (Government filed brief on behalf of military judge); Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2013) (Government filed brief on behalf of military judge).

ARGUMENT

I.

THIS HONORABLE COURT LACKS JURISDICTION TO GRANT APPELLANT'S REQUESTED RELIEF.

Standard of Review

Jurisdiction is a question of law that is reviewed de novo. United States v. Daly, 69 M.J. 485, 486 (C.A.A.F. 2010) (citing United States v. Davis, 63 MJ 171, 173 (C.A.A.F. 2006)).

Analysis

Appellant argues the Air Force Court of Criminal Appeals "abdicated its supervisory responsibility under Article 66 and the All Writs Act" by declining jurisdiction. (Appellant's Brief at 9.) Appellant further argues that the alleged victim, A1C LRM, is not "a stranger to the court." (Id.) Whether one characterizes A1C LRM as a "stranger", "alleged victim"[2], or simply a "witness", the fact remains that she is not a "party" to A1C Daniels' court-martial.[3] Moreover, A1C Daniels has not

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[2] Pursuant to Military Rule of Evidence 412, the most appropriate term appears to be "alleged victim."

[3] Rule for Courts-Martial (RCM) 103(16) defines "party" as follows:

(A) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial in question; and

(B) Any trial or assistant trial counsel representing the United States, and agents of the trial counsel when acting on behalf of the trial counsel with respect to the court-martial in question.

joined in the litigation to vindicate his rights; rather, at the trial level and on appeal he has opposed Appellant's attempts to intervene into his court-martial.

Federal courts, as courts of limited jurisdiction, "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)(citations omitted). There is a presumption "that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting the jurisdiction." Id. "On every writ of error or appeal, the first and fundamental question is that of jurisdiction." Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 453 (1900).

A court's power to issue any form of relief under the All Writs Act "is contingent on that court's subject matter jurisdiction over the case and controversy." United States v. Denedo, 556 U.S. 904, 911 (2009). As Clinton v. Goldsmith helped clarify, the All Writs Act is not a jurisdiction granting statute. 526 U.S. 529, 534 (1999). Nor does the All Writs Act grant authority to military appellate courts "to oversee all matters arguably related to military justice." Id. at 536.

As correctly noted in the lower court's order, the jurisdictional boundary of the Air Force Court of Criminal Appeals is set out in four separate Articles of the UCMJ. (J.A.

at 6-7.) First, under Article 62, UCMJ, 10 U.S.C. § 862, the court is authorized review of certain kinds of interlocutory Government appeals. (Id. at 6.) Second, under Article 66, UCMJ, 10 U.S.C. § 866, the court can act with respect to the findings and sentence as approved by the convening authority in cases which the sentence, as approved, includes death, a punitive discharge, or confinement for at least one year. (Id. at 6-7.) Third, under Article 69, UCMJ, 10 U.S.C. § 869, the court is authorized to review under Article 66 cases in which The Judge Advocate General has taken certain actions. (Id. at 7.) Finally, under Article 73, UCMJ, 10 U.S.C. § 873, the court is authorized to consider petitions for new trials based upon newly discovered evidence or fraud on the court. (Id.)

The jurisdictional limit of this Honorable Court is found in Article 67, UCMJ. In this regard, this Honorable Court "may act only with respect to findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. Article 67(c), UCMJ, 10 U.S.C. § 867(c). The All Writs Act "does not increase the areas of this Court's jurisdiction beyond the limitations set out in [Article 67], UCMJ." Center for Constitutional Rights v. United States, 72 M.J. 126, ___, slip op. at 7.

While the Air Force Court of Criminal Appeals did not have the benefit of this Honorable Court's decision in Center for Constitutional Rights v. United States, the legal correctness of the Air Force Court's order is all the more sound when considered in light of that decision issued fourteen days later. In Center for Constitutional Rights v. United States this Honorable Court held the appellants, journalists seeking access to documents in an on-going court-martial, failed to meet their burden of establishing that this Court or the Army Court of Criminal Appeals had jurisdiction to grant appellants relief in the form of writs of mandamus and prohibition. Id. at 2, 10.

This Court found it vital to distinguish Center for Constitutional Rights v. United States from other cases interpreting this Court's jurisdictional limits. Id. at 7-8. Of note, in each of the cases discussed the accused played a leading role in the proceeding. First, this Court noted the case was unlike United States v. Lopez de Victoria, 66 M.J. 67 (C.A.A.F. 2008), where, in a case involving a Government appeal of a military judge's decision to find the accused's convictions for indecent acts and liberties were barred by the statute of limitations, this Court held it had statutory authority to exercise jurisdiction over decisions of the courts of criminal appeals rendered pursuant to Article 62, UCMJ, 10 U.S.C. § 862. Center for Constitutional Rights v. United States, 72 M.J. 126,

___, slip op. at 7-8. Next, this Court distinguished Denedo v. United States, 66 M.J. 114 (C.A.A.F. 2008), aff'd., 556 U.S. 904 (2009), wherein an accused sought collateral review of his court-martial for alleged ineffective assistance of counsel and issuance of a writ of error coram nobis. Center for Constitutional Rights v. United States, 72 M.J. 126, ___, slip op. at 8. Thereafter, this Court distinguished Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012), wherein the harm raised by the accused regarding the bias of the military judge had the potential to directly affect the findings and sentence. Center for Constitutional Rights v. United States, 72 M.J. 126, ___, slip op. at 8. Finally, this Court distinguished ABC, Inc. v. Powell, 47 M.J. 363 (C.A.A.F. 1997), where an accused joined in the proceedings brought by various news agencies "in order to vindicate ***his*** right to a public trial." Center for Constitutional Rights v. United States, 72 M.J. 126, ___, slip op. at 8 (double emphasis added).

In the case *sub judice*, as the Appellant concedes, "A1C LRM is not a party to the court-martial." (Appellant's Brief at 13.)[4] Moreover, the Accused has not joined Appellant's petition to vindicate his rights. Instead, at the trial level and on appeal he has opposed Appellant's attempts to intervene into his

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[4] See also Rule for Courts-Martial 103 (16) (definition of "party").

court-martial. A court-martial where he alone faces two specifications in violation of Article 120, UCMJ, that, if convicted as charged, carries the potential punishments of a reprimand, reduction in grade, monetary penalties, restraint, and/or a punitive discharge.[5]

Appellant incorrectly overgeneralizes that this Court "recently held that jurisdiction is appropriate when the harm alleged by the petitioner has 'the **potential** to directly affect the findings or sentence.'" (Appellant's Brief at 13.) Appellant simply conflates the petitioner in Hasan v. Gross, the accused, with themselves in this case, a non-party witness.[6] Appellant goes on to cite Carlson and Ryan-Jones v. Smith, 43 M.J. 401 (C.A.A.F. 1995)(summary disposition), for the notion that this Court has exercised its supervisory jurisdiction to benefit "limited trial participants." (Appellant's Brief at

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[5] These authorized punishments are, of course, distinctly separate and apart from the potential lifelong collateral consequences of a federal conviction and sex offender registration requirements.

[6] Appellant's reliance on Hasan v. Gross is ironic. In that case this Court determined a military judge's actions could lead an objective observer to conclude that he was not impartial to the accused. Certainly if the military judge in the case *sub judice* had permitted a counsel for the complaining witness to provide both factual evidence and legal arguments against the accused, his impartiality would similarly be in question. Moreover, any such potential to directly affect the findings or sentence in this case is directly at the expense of the accused.

15.) Yet Carlson and Ryan-Jones v. Smith[7] predates Goldsmith by over three and a half years. Importantly in Goldsmith, the Supreme Court took this Court very much to task on its expansive overreaching in the jurisdictional area.[8] Appellant encourages this Court to make the same error it did in Goldsmith.

II.

IN THE ABSENCE OF CLEAR STATUTORY LANGUAGE OR CASE LAW, THE MILITARY JUDGE CORRECTLY RULED NO RIGHT EXISTED FOR A1C LRM TO BE HEARD THROUGH A THIRD PARTY.[9]

Standard of Review

Construction of a military rule of evidence, as well as the interpretation of statutes, the UCMJ, and Rules for Courts-

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[7] In addition, the amicus curiae brief of the Air Force's Appellate Government Division, filed without a motion for leave to file under Rule 26(a) of this Court's Rules of Practice and Procedure, relies on this case to support its position that the President has provided victims in military courts-martial a limited right to be heard under Military Rules of Evidence 412 and 513 and that such a right reasonably includes a right to be heard through counsel to present facts and legal argument. (Amicus Curiae Brief of Air Force Appellate Government Division at 21.) Such argument fails given Goldsmith.

[8] Should this Court find it has jurisdiction, as a court established under Article III of the Constitution prohibited from issuing advisory opinions, it must also find the issue ripe for consideration. See United States v. Chisholm, 59 M.J. 151, 153 (C.A.A.F. 2003)(holding in the absence of a challenge by a party to a concrete ruling by a military judge in an adversarial setting it would be premature to decide an issue certified by The Judge Advocate General of the Army)

[9] The military judge's rulings speak for themselves. (J.A. at 177-187, 215-218.) As this Court must consider the record before it, to include the military judge's rulings as contained therein, argument on Issue II is offered to emphasize the more pertinent points made by the military judge.

Martial, are questions of law reviewed de novo. United States v. Matthews, 68 M.J. 29, 35 (C.A.A.F. 2008); Lopez de Victoria, 66 M.J. at 73.

Analysis

The military judge never denied A1C LRM "the right to be heard at any hearing under the applicable Military Rules of Evidence." (J.A. at 217.) He specifically ruled that she had the right to be personally heard in pretrial hearings conducted pursuant to Military Rules of Evidence 412 and 513. (J.A. at 216.) He noted that she had the right to be personally heard in such hearing through trial counsel. (Id.) Similarly he acknowledged if A1C LRM was determined incompetent for reasons of minority of age or invalidity, that she would have the right to be heard through a guardian, representative, or conservator. (Id.) In sum, he simply ruled that, in the absence of clear statutory language or case law, A1C LRM's first-person singular right to be heard did not include the right to be heard at an evidentiary hearing through some other third party.

Non-constitutional privileges are to be narrowly construed. See United States v. Curtis, 65 M.J. 366, 369 (C.A.A.F. 2005)(citing Trammel v. United States, 445 U.S. 40, 50-51 (1980)); In re Grand Jury Subpoena, 662 F.3d 65 (1st Cir. 2011); United States v. Banks, 556 F.3d 967 (9th Cir. 2009). Neither Military Rules of Evidence 412 nor 513 provide that the "right

to be heard" includes the right to be heard through third parties, or by legal counsel. As noted by the military judge, "[i]t 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." (J.A. at 180.)[10]

The Appellant's reliance on the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, as authority for her to be heard through counsel is unfounded. (Appellant's Brief at 32-44.) While no military court of appeal has considered the application of the CVRA to courts-martial[11], the CVRA "does not explicitly provide a victim the right to be represented by counsel at any pretrial hearing." (J.A. at 180, 217.) Even assuming the CVRA applies beyond the district courts, it provides the victim the

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[10] Appellant's attempt to read Military Rules of Evidence 412(c)(2) and 513(e)(2) as proof Congress and the President intended counsel for a patient or alleged victim to be permitted to present evidence and legal arguments through counsel is misguided. (Appellant's Brief at 23-25.) With both rules, a party, either the Government or the accused, may offer relevant evidence by calling witnesses, to include the patient or alleged victim. Affording the patient or alleged victim a reasonable opportunity to attend and be heard, simply acknowledges that neither party may choose to call the patient or alleged victim. In such an instance, the patient or alleged victim is simply authorized by the applicable rules to present "relevant evidence" of their own choosing without the necessity that a party be the proponent.

[11] Additionally, only in Walsh v. Hagee, ___ F.Supp.2d ___, 2012 WL 5285133 (D. D.C. 2012), has a United States District Court even inferred that the CVRA applies to the military. (J.A. at 180.)

"right to be reasonably heard at any public proceeding…involving release, plea, sentencing, or any parole proceeding." (Id.) Appellant selectively cites portions of the CVRA to this Court when it states the rights afforded crime victims apply in "any court proceeding involving an offense against a crime victim." (Appellant's Brief at 36.) The full sentence found in section (b)(1) of the CVRA is "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).*" 18 U.S.C. § 3771(b)(1)(emphasis added). The applicable right to this issue is that found in subsection (a)(4), which was cited by the military judge and concerns a crime victim's right "to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." (J.A. at 180, 217.) Plainly a pretrial motion hearing does not fall within the public proceedings in which the CVRA contemplates a crime victim's right to be reasonably heard, whether in person or through counsel.

While the military judge noted A1C LRM possessed privacy rights, he further noted "when necessary to ensure a fair trial, those rights must give way to the accused's right to a trial which complies with the rights enumerated" in United States v. Romano, 46 M.J. 269, 274 (C.A.A.F. 1997), which include "the Constitution, followed by the Uniform Code of Military Justice,

the Manual for Courts-Martial, departmental regulations, service regulations, and the common law." (J.A. at 178, 217.)[12] The Accused's right to a fair trial is enumerated in the Sixth Amendment[13] which reads:

> 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.

(J.A. at 178.)[14]

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[12] This Court has held that the "'alleged victim's privacy' interests cannot preclude the admission of evidence 'the exclusion of which would violate the constitutional rights of the accused." United States v. Gaddis, 70 M.J. 248, 250 (C.A.A.F. 2011).

[13] Of note, Appellant cites to the Sixth Amendment only twice in her brief. (Appellant's Brief at 21, 45.) Neither time Appellant cites to the Sixth Amendment, does she do so to discuss how the rights she seeks do not infringe on the Accused's constitutionally protected right to a fair trial.

[14] Several federal courts have expressed concern that rape shield laws may result in a denial of due process under the Sixth Amendment. See, e.g., Barbe v. McBride, 521 F.3d 443, 458 (4th Cir. 2008); White v. Coplan, 399 F.3d 18, 24 (1st Cir. 2005). Although not directly addressed by the military judge, if A1C LRM were to prevail on the jurisdictional issue before this Court, then this Court should consider that the ability for a complaining witness to shield information from the Court through an attorney not subject to the full array of discovery rules or rules of professional responsibility, under the aegis "right to be heard" in either Military Rule of Evidence 412 or 513, could constitute a denial of the full right to confrontation.

Similarly, as in the cases of United States v. Martinez, 70 M.J. 154, 157 (C.A.A.F. 2011) and United States v. Butcher, 56 M.J. 87, 90 (C.A.A.F. 2001), the military judge identified his concerns about the right to an impartial military judge, both in appearance and actuality. (J.A. at 179.)[15] As generally expressed in United States v. Conley, 4 M.J. 327 (C.M.A. 1978), judges cannot exist as advocates "for the prosecution, a victim,

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[15] The military judge's discussion of the necessity of impartiality on the part of a military judge echoes the following:

> A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions. Its judges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.
>
> The dependence of society upon an unswerved judiciary is such a commonplace in the history of freedom that the means by which it is maintained are too frequently taken for granted without heed to the conditions which alone make it possible. The role of courts of justice in our society has been the theme of statesmen and historians and constitution makers. It is perhaps best expressed in the Massachusetts Declaration of Rights: 'It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.'

Bridges v. State of California, 314 U.S. 252, 283 (1941)(Frankfurter, J., dissenting).

an accused, or a policy." (J.A. at 179.)[16] Moreover, the potential for an accused to face prosecutor(s) and counsel for an alleged victim representing similar interests is "sufficiently antithetical to courts-martial jurisprudence" which, if permitted, would "cause a significant erosion in the right to an impartial judge in appearance or a fair trial." (J.A. at 186, 217-18.)[17]

The military judge recognized the important goal of ensuring and protecting the rights and dignity of victims of sexual assault, especially those perpetrated by uniformed service-members and Departmental personnel. (J.A. at 186.) The

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[16] Appellee notes the irony of filing an advocacy brief, as directed, before this Honorable Court. However, this brief is not advocating on behalf of "the prosecution, a victim, an accused, or a policy", rather it advocates for the correctness of the trial level ruling and the order subsequently issued by the military judge's immediate superior court.

[17] Such a potential "stacking of the deck" against an accused, is all the more troubling when the Special Victims' Counsel Rules of Practice and Procedure and the Air Force Special Victims' Counsel Charter create no apparent duty for Special Victims' Counsel to provide exculpatory evidence to the Government or an accused's counsel and exempts them from the most basic and fundamental duties of doing justice. (J.A. at 49-79.) Moreover, at least in appearance alone, there are fundamental fairness questions raised by the number of counsel representing each party and A1C LRM. A1C LRM has received the benefit of one counsel at trial and four counsel on appeal. (J.A. at 17-21; Appellant's Brief at 53-54.) The Government has enjoyed the benefit of two counsel at trial and three counsel on appeal. (J.A. at 90-91; Amicus Curiae Brief of Air Force Appellate Government Division at 33.) Meanwhile, against the backdrop of those ten counsel presumptively aligned against him, the Accused has had the assistance of two counsel at trial and two counsel currently on appeal. (J.A. at Cover Page, 93.)

Air Force Court likewise acknowledged the important objectives of the Special Victims' Counsel Program. (J.A. at 9.) Regardless of how unpopular a decision it might be for a military judge to find no standing for a Special Victims' Counsel at a court-martial, especially given the near daily bad press, increased Congressional oversight on sexual assaults within the military, and the Department of Defense's leaders' focus on sexual assault prevention and response, the aforementioned goals and objectives remain "subject to the legal limits on third-party standing." (J.A. at 186.)[18]

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[18] The difficulty a military judge faces in attempting to balance the competing interests of this novel issue is evident from this court-martial when it was unclear where the Special Victims' Counsel should sit. (J.A. at 131.) Additionally, the Government's positions are reminiscent of Justice Jackson's comment of parties changing positions "as nimbly as if dancing a quadrille." Orloff v. Willoughby, 345 U.S. 83, 87 (1953). For example, the Government asserted to the military judge at trial that it held no objection to A1C LRM and her Special Victims' Counsel being heard during hearings on Military Rules of Evidence 412, 513, and 514 "if such hearing is limited to factual matters bearing on the admissibility of evidence and a statement of [A1C LRM]'s wishes, so long as it does not encompass an opportunity to present legal argument on admissibility of evidence." (J.A. at 212.) Now on appeal, the Government asserts to this Court that A1C LRM's right to be heard under Military Rules of Evidence 412 and 513 "reasonably included the right to be heard through counsel to present facts *and legal argument*." (Amicus Curiae Brief of Air Force Appellate Government Division at 21 (emphasis added).) Similarly, Appellant essentially argued before the military judge and the Air Force Court of Criminal Appeals, that there was no possibility of affecting the findings and sentence and the only harm, if any, from the participation of the Special Victims' Counsel was the possibility of the judge spending more time on evidentiary issues. (J.A. at 202-03; Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, LRM v. Kastenberg, Misc. Dkt. No. 2013-05 (A.F. Ct. Crim. App. 2013).) Now Appellant argues the Special Victims' Counsel should be given "the opportunity to influence the admissibility of evidence that would have a direct bearing 'on any finding and sentence that may

III.

THE DRASTIC INSTRUMENT OF A WRIT OF MANDAMUS IS UNWARRANTED IN THIS CASE WHERE THERE HAS BEEN NO JUDICIAL USURPATION OF POWER AND NO CHARACTERISTIC OF AN ERRONEOUS PRACTICE WHICH IS LIKELY TO RECUR.

Standard of Review

"The writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations." United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983); see also Denedo, 556 U.S. at 917 (quoting Nken v. Holder, 556 U.S. 418, 437 (2009)). Appellant "must establish a clear and indisputable right to the requested relief." Denedo, 66 M.J. at 126 (citing Cheney v. United States District Court, 542 U.S. 367, 381 (2004)).

Analysis

While there should be no need for this Court to reach Issue III, or Issue II for that matter, should it do so, the drastic instrument of a writ of mandamus is unwarranted.[19] Appellant

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eventually be adjudged.'" (Appellant's Brief at 9.) Although this Court may find that the Appellant is not bound to arguments raised below, there is an incongruity to their two positions. Moreover, in no law does a witness (victim or otherwise) possess a right to influence the outcome of a trial.

[19] The Government states this Honorable Court's "review cannot extend beyond the jurisdictional question and the remaining substantive issues must be remanded back to [the Air Force Court of Criminal Appeals] for a decision on the matters of law raised by [Appellant]." (Amicus Curiae Brief of Air Force Appellate Government Division at 10-11.) Any facts necessary to the resolution of the substantive issues have been sufficiently salted down in the Air Force Court's order.

encourages this Court to use the Army Court of Criminal Appeals framework for issuance of a writ of mandamus announced in Dew v. United States, 48 M.J. 639, 648-49 (A. Ct. Crim. App. 1998). (Appellant's Brief at 49-51.) Even if this Court were to conduct its analysis using a framework incorporating Bauman[20] factors, Appellant's request must fail.

First, A1C LRM is not a party, so whether or not she has any other adequate means to attain the relief desired is not material. Second, A1C LRM's claim that denial of her "right" to be heard through counsel results in her damage and prejudice in a way not correctable on appeal invents an injury from a fictional "right", a "right" which has never been recognized in military courts. Third, for all of the reasons stated in Issue

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(J.A. at 1-9.) Only matters of law remain, which are certainly within the purview of this Court pursuant to Article 67(c), UCMJ. The Government's challenge to this Court proceeding is easily dismissed as "no requirement that a petition for extraordinary relief be filed in a Court of Military Review as a prerequisite to this Court's consideration of a matter." Gray v. Mahoney, 39 M.J. 299, 303 (C.M.A. 1994); see also McPhail v. United States, 1 M.J. 457 (C.M.A. 1976)(the Court granted relief in a case finally reviewed by the Judge Advocate General of the Air Force under Article 69, UCMJ). Rule 4(c) of this Court's Rules of Practice and Procedure provides that the rules "shall not be construed to extend or to limit the jurisdiction" of this Court. Should this Court reach the remaining substantive issues, deciding them now, as a purely discretionary matter, would be consistent with this Court's "considerable responsibility for maintaining the independence, integrity, and fairness of the military justice system." United States Navy Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328, 330 (C.M.A. 1988).

[20] Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977); See also In Re American Medical Systems, Inc., 75 F.3d 1069, 1078 (6th Cir. 1996).

II, the military judge's decision is not clearly erroneous as a matter of law. Fourth, there is no evidence in the record which suggests the military judge's ruling is an oft-repeated error. A trial level court's decision cannot create binding precedent on another trial level court. United States v. Pereira, 13 M.J. 632, 635 (A.F.C.M.R. 1982)(stating military judges are only bound by decisions of the applicable service Court of Criminal Appeals, this Court, and the United States Supreme Court). Lastly, the military judge's ruling does address new and important problems created by the Special Victims' Counsel pilot program[21] instituted by the Air Force and there is no precedent in military law addressing these issues. However, this factor resoundingly weighs against Appellant. If this Court were to issue the writ as requested it would not solve the problems the Special Victims' Counsel program has created in A1C Daniels' court-martial, problems the military judge's ruling has already resolved to ensure a fair trial for the Accused both in

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[21] A pilot program championed by The Judge Advocate General of the Air Force who exercised his unique Article 67(a)(2) power to certify this case to this Honorable Court. See Special Victims' Counsel Rules of Practice and Procedure and Air Force Special Victims' Counsel Charter (J.A. at 49-71, 73-79.) A program at least in intent, while perhaps not in practice, designed to "enhance the military justice system while neither causing unreasonable delays nor infringing upon the rights of an accused." Special Victims' Counsel Rules of Practice and Procedure (J.A. at 51.); see also Brief for Air Force Trial Defense Division as Amicus Curiae, LRM v. Kastenberg, Misc. Dkt. No. 2013-05 (A.F. Ct. Crim. App. 2013).

appearance and actuality. Rather, issuance of such a writ would revive fundamental fairness issues in A1C Daniels' court-martial and generate them in untold court-martials *ad infinitum*.

In order for issuance of a writ of mandamus on the military judge's discretionary decision, this Court's case law requires that decision to "amount to more than even 'gross error'; it must amount 'to a judicial usurpation of power,' or be 'characteristic of an erroneous practice which is likely to recur.'" Labella, 15 M.J. at 229 (citations omitted). The military judge's correct ruling that, in the absence of clear statutory language or case law, no right existed for A1C LRM to be heard through a third party can hardly be considered "gross error." Nor can one consider his decision a judicial usurpation of power especially given the Manual for Courts-Martial's emphasis on "the importance of an impartial judiciary, advising military judges that when carrying out their duties in a court-martial, they 'must avoid undue interference with the parties' presentations or the appearance of partiality.'" United States v. Quintanilla, 56 M.J. 37, 43 (C.A.A.F. 2001)(citing Rule for Courts-Martial 801(a)(3)(discussion)). As in this case, "[t]he military judge must exert his authority with care, so as not to give even the appearance of bias for or against either party." Id. Similarly, in a case where Appellant seeks recognition of an unheard of right for a non-party to have counsel appear on

her behalf in another's court-martial, there can be no "erroneous practice which is likely to recur", unless the writ of mandamus to grant that "right" is actually issued.

CONCLUSION

WHEREFORE, Appellee requests this Honorable Court hold, like the Air Force Court of Criminal Appeals correctly found, that it lacks jurisdiction to hear Appellant's petition for a writ of mandamus. If this Court determines the Air Force Court of Criminal Appeals erred regarding its jurisdictional limits, Appellee requests this Court uphold the military judge's ruling that A1C LRM held no right to be heard through a third party.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, Mr. Dwight Sullivan and Capt Christopher James (Counsel for Real Party in Interest), and Colonel Kenneth Theurer, Major Christopher Goewert, Major Matthew Talcott, and Major R. Davis Younts (Counsel for Appellant), on 13 May 2013.

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/s/
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Dated: 13 May 2013

13 May 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

L.R.M.
Airman First Class (E-3), USAF
Appellant,

v.

JOSHUA E. KASTENBERG
Lieutenant Colonel (O-5), USAF
Appellee.

and

NICHOLAS E. DANIELS
Airman First Class (E-3), USAF
Real party in Interest.

Crim. App. No. 2013-05
USCA Dkt. No. 13-5006/AF

REAL PARTY IN INTEREST'S ANSWER TO CERTIFIED QUESTION

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class **L.R.M.**, USAF, Appellant v. Lieutenant Colonel(O-5) **JOSHUA E. KASTENBERG,** USAF Appellee and Airman First Class **Nicholas E. Daniels,** USAF Real Party In Interest	)))))))))))))	**REAL PARTY IN INTEREST'S ANSWER** USCA Dkt. No. 13-5006/AF Crim. App. No. 2013-05

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

DECISIONAL ISSUES PRESENTED

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS CORRECTLY HELD IT LACKED JURISDICTION TO HEAR A1C L.R.M.'S PETITION FOR A WRIT OF MANDAMUS.

II.

WHETHER A WRIT OF MANDAMUS IS INAPPROPRIATE WHERE THERE IS NO CLEAR AND INDISPUTABLE RIGHT TO THE RELIEF SOUGHT AND WHERE ANY REQUEST FOR RELIEF IS NOT YET RIPE.

III.

WHETHER THE MILITARY JUDGE CORRECTLY HELD THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL WAS NOT A RIGHT GUARANTEED BY THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT OR THE UNITED STATES CONSTITUTION.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed A1C L.R.M.'s petition pursuant to the All Writs Act and

determined it does not have jurisdiction to issue A1C L.R.M.'s writ. Under Article 67(a)(2) Uniform Code of Military Justice (UCMJ), this Court has jurisdiction to determine whether it has jurisdiction. However, for the reasons discussed below, this Court does not have jurisdiction to issue the requested relief.

Summary of Proceedings

Arraignment in the case of *United States v. Daniels* was held on 29 January 2013. (J.A. at 96).

The military judge denied the Special Victim Counsel's (SVC) request to potentially be heard at an M.R.E. 412 and 513 hearing, on behalf of A1C L.R.M. and for informational copies of all M.R.E. 412 and 513 motions. (J.A. at 172). On 1 February 2013, the SVC filed a motion to reconsider Judge Kastenberg's ruling. (J.A. at 195). The trial counsel filed a response to the motion to reconsider stating, "[T]he Government objects to Special Victim Counsel presenting legal or factual argument or moving the court for the admission or suppression of evidence." (J.A. at 205). Judge Kastenberg reconsidered the motion, but denied relief on 9 February 2013. (J.A. at 215).

On 14 February 2013, A1C L.R.M. filed a petition with AFCCA for a writ of mandamus. (J.A. at 4). On 20 February 2013, AFCCA issued an order to the government to show cause why the writ should not be issued. On 22 February 2013, the government filed a response, taking a different position than it took at

trial. (J.A. at 5). On 11 March 2013 oral argument was held at AFCCA, during which AFCCA heard argument from the SVC's "appellate counsel," and government and defense appellate counsel. On 13 March 2013, AFCCA stayed the proceedings in the case of *United States vs. Daniels. Id.* On 13 March 2013, A1C Daniels' counsel filed a petition for extraordinary relief, in the nature of a writ of prohibition requesting this Court deny AFCCA's stay. *Id.* This Court denied that petition on 19 March 2013. *Id.* On 2 April 2013, AFCCA issued an order denying A1C L.R.M.'s petition, based on lack of jurisdiction. (J.A. at 1). On 10 April 2013, A1C L.R.M. petitioned AFCCA for reconsideration *en banc.* AFCCA denied A1C L.R.M.'s petition and dissolved the stay on 18 April 2013. (J.A. at 11).

On 29 April 2013, the Judge Advocate General of the Air Force filed a certificate of review with this Court.

Statement of Facts

On 16 October 2012, Airman First Class (A1C) Daniels was charged with one charge and two specifications of violating Article 120, UCMJ. (J.A. at 13). The alleged victim of those offenses was A1C L.R.M.

On 29 January 2013, during a motions hearing, A1C L.R.M.'s counsel asked Judge Kastenberg to recognize A1C L.R.M.'s right to standing for informational copies of motions related to A1C L.R.M. and to reserve the right to make an argument for A1C

L.R.M. at an M.R.E. 412 hearing. (J.A. at 149). The SVC admitted his client's interests aligned with the government and he did not intend to make a statement for her or argue on her behalf. (J.A. at 103). The SVC later changed his position and asked to reserve the right to argue on A1C L.R.M.'s behalf. (J.A. at 149). In addition, he asked for permission to be present in the gallery during any closed hearing. *Id.* Judge Kastenberg granted counsel permission to be present, absent an objection from defense counsel persuading him otherwise. (J.A. at 151).

A1C L.R.M.'s counsel, during a motions hearing, said A1C L.R.M. has the right to be heard during an M.R.E. 412 hearing. (J.A. at 106). Specifically, her counsel said "her right to be heard can be placed in proper context if she receives informational copies." *Id.* Additionally, A1C L.R.M.'s counsel acknowledged that her request to receive the motions could be addressed through a Freedom of Information Act request. (J.A. at 107).

In addition, A1C L.R.M.'s counsel said during the motions hearing that only part of the Crime Victims' Rights Act (C.V.R.A.), 18 U.S.C. § 3771, applies to courts-martial. (J.A. at 111). He admitted that the reason the C.V.R.A. does not apply to military courts in full is because they are not district courts. (J.A. at 112). A1C L.R.M.'s counsel said

there are some similarities between the C.V.R.A. and a court-martial, specifically the complaining witness's ability to observe the entire trial, but only if the military judge granted that request. *Id.* A1C L.R.M.'s counsel indicated A1C L.R.M. did not want to observe the whole trial, but rather just the verdict and sentence, should the trial go that far. *Id.* After Judge Kastenberg observed that was the same thing any witness could do, A1C L.R.M.'s counsel said A1C L.R.M. may request to be present during the entire court-martial. (J.A. at 112-13). Judge Kastenberg subsequently denied A1C L.R.M.'s counsel the right to potentially be heard at an M.R.E. 412 or 513 hearing, on behalf of A1C L.R.M. (J.A. at 172).

When A1C L.R.M's counsel submitted his motion for reconsideration, he reversed his position and argued that the right to be heard meant through counsel. (J.A. at 200). In addition, he asserted that all the rights of crime victims in the C.V.R.A. applied in the military. (J.A. at 198). However, he maintained that "after reconsidering the briefs that were filed under M.R.E. 412, if given the opportunity to present argument, including legal arguments, to the court in an M.R.E. 412 hearing. A1C [L.R.M.] *may* make arguments that are different from the Government's brief as currently submitted." (J.A. at 196) (emphasis added). Judge Kastenberg denied A1C L.R.M.'s counsel's motion for reconsideration. (J.A. at 218).

Summary of Argument

AFCCA correctly held it did not have jurisdiction to grant the relief Appellant requests under the Uniform Code of Military Justice or the All Writs Act. (J.A. at 6-7).

Even if this Court were to hold that jurisdiction to issue a writ does exist, Appellant has failed to meet the stringent requirements to grant a writ of mandamus. Nor is any request for extraordinary relief even ripe, since A1C L.R.M.'s counsel has never indicated an actual intent to address the court-martial during a motions hearing.

Finally, even if it were appropriate to reach the merits of Appellant's claims, Judge Kastenberg correctly held that no legal authority provides Appellant with a right to address the court-martial through counsel and he did not abuse his discretion by declining to allow Appellant's counsel to do so.

Argument

I.

THE AIR FORCE COURT OF CRIMINAL APPEALS CORRECTLY HELD IT LACKED JURISDICTION TO HEAR A1C L.R.M.'S PETITION FOR A WRIT OF MANDAMUS.

Standard of Review

Jurisdiction is reviewed *de novo*. *United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012), *reconsideration denied,* 71 M.J. 389 (C.A.A.F. 2012), *cert. denied*, __ U.S. __, No. 12-805 (May 13, 2013).

Law and Analysis

A. Appellant's reliance on the All Writs Act is misplaced.

This Court, like AFCCA, has no jurisdiction to grant the Appellant's request for extraordinary relief. The Appellant seeks to rely on the All Writs Act, 28 U.S.C. § 1651, to establish this Court's jurisdiction. Appellant's brief at 9 (noting that "Airman LRM sought review under the All Writs Act, 28 U.S.C. § 1651, of the military judge's ruling that she lacked standing to assert her right to be heard through counsel during evidentiary hearings."). But as the Supreme Court has repeatedly held, the All Writs Act is not a jurisdiction-granting statute. *See*, *e.g.*, *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). Thus, it cannot provide a basis for this Court's jurisdiction.

As the Supreme Court observed in *United States v. Denedo*, 556 U.S. 904, 911 (2009), "a court's power to issue any form of relief" under the All Writs Act "is contingent on that court's subject-matter jurisdiction over the case or controversy." This Court does not have and will never have jurisdiction over any case or controversy involving A1C L.R.M., a non-party in the court-martial below. In *Goldsmith*, the Supreme Court observed:

> Since the Air Force's action to drop respondent from the rolls was an executive action, not a "findin[g]" or "sentence," § 867(c), that was (or could have been) imposed in a court-martial proceeding, the elimination of Goldsmith from the rolls appears straightforwardly

> to have been beyond the CAAF's jurisdiction to review and hence beyond the "aid" of the All Writs Act in reviewing it. Thus, this Court has no jurisdiction to issue the requested writ of mandamus.

526 U.S. at 535 (footnote omitted).

Here, the military judge's refusal to allow A1C L.R.M.'s counsel to participate in another servicemember's court-martial was not a finding or sentence that was (or could have been) imposed in a court-martial proceeding. Accordingly, this Court is without jurisdiction to grant the requested relief.

The conclusion that this Court has no jurisdiction is especially appropriate given this Court's status as an Article I tribunal. "[E]stablished principles of statutory construction mandate . . . a narrow interpretation of" an Article I court's jurisdiction-granting statute. *Bowen v. Massachusetts*, 487 U.S. 879, 908 n.46 (1988) (quoting *Delaware Div. of Health & Social Services v. Dep't of Health & Human Services*, 665 F. Supp. 1104, 1117-18 (D. Del. 1987)). An Article I court "is a court of limited jurisdiction, because its jurisdiction is statutorily granted and it is to be strictly construed." *Id*. (quoting *Delaware Div. of Health & Social Services*, 665 F. Supp. at 1118); *see also Goldsmith*, 526 U.S. at 535 ("the CAAF's independent statutory jurisdiction is narrowly circumscribed"); *Denedo*, 556 U.S. at 912 ("[I]t is for Congress to determine the subject-matter jurisdiction of federal courts. . . . This rule

applies with added force to Article I tribunals, such as the NMCCA and CAAF, which owe their existence to Congress' authority to enact legislation pursuant to Art. I, § 8 of the Constitution.").

B. Appellant incorrectly relies on *Center for Constitutional Rights et al. v. United States and Colonel Denise Lind, Military Judge* (*CCR*), 72 M.J. 126 (C.A.A.F. 2013), to create jurisdiction when that case actually demonstrates the absence of jurisdiction.

Recently, this Court in *CCR* held it did not have jurisdiction to grant a writ of mandamus and prohibition requested by a non-party. That decision both confirms the legal correctness of AFCCA's ruling and refutes many of the arguments advanced in A1C L.R.M.'s writ appeal.

A1C Daniels, like the accused in the court-martial case that was the subject of *CCR*, never sought to invoke this Court's jurisdiction. On the contrary, he has consistently stated that this Court and AFCCA lack jurisdiction to decide A1C L.R.M.'s petition.

Likewise, the other party to the underlying court-martial, the United States, has not invoked this Court's jurisdiction; nor could the United States, for two reasons. First, seeking relief from Judge Kastenberg's order below would be beyond the bounds of Article 62, through which Congress prescribed the government's ability to challenge a trial-level ruling. Any hypothetical petition for a writ of mandamus filed by the

government would, therefore, not be in aid of this Court's statutory jurisdiction which, for purposes of government appeals, is restricted by the boundaries of Article 62. Second, the government could not succeed on a hypothetical petition for extraordinary relief because at the trial level, it opposed the relief that A1C L.R.M. sought through her mandamus petition. (J.A. at 212). The doctrine of invited error would, therefore, preclude relief for the government. *See*, *e.g.*, *United States v. Dinges*, 55 M.J. 308 (C.A.A.F. 2001).

CCR refutes Appellant's argument that AFCCA's order "confused subject matter jurisdiction with standing." Appellant's brief at 17 (bold deleted). This Court based its ruling in *CCR* on a lack of jurisdiction to grant the relief requested by a non-party. *CCR* also refutes Appellant's argument that *Clinton v. Goldsmith* is not relevant to a non-party's petition for extraordinary relief arising from a court-martial. Appellant's brief at 11-12. In *CCR*, this Court emphasized *Goldsmith*'s limitations on its jurisdiction. 72 M.J. 126 (C.A.A.F. 2013), slip op. at 6-7. AFCCA's order is consistent with the jurisdictional limits as defined by this Court's interpretation of *Goldsmith* in *CCR*.

In addition, *CCR* refutes Appellant's argument that AFCCA somehow erred by tying its extraordinary writ jurisdiction to its Article 66 jurisdiction. Appellant's brief at 10-11. *CCR*

confirms that a military appellate court must assess whether it has jurisdiction to grant extraordinary relief by examining the limitations of its jurisdiction-granting statute. *See CCR*, 72 M.J. 126 (C.A.A.F. 2013), slip op. at 9, ("Ultimately, then, any potential jurisdiction we may have in this case must turn on the extent of our own statutory jurisdiction, which is to be found in Article 67, UCMJ, as interpreted by the Supreme Court.").

Appellant's argument for jurisdiction based on *Carlson and Ryan-Jones v. Smith,* 3 M.J. 401, 402 (C.A.A.F 1995) (summary disposition), fails as well. Appellant's brief at 15. As this Court aptly pointed out in *CCR*, pre-*Goldsmith* case law concerning this Court's extraordinary relief jurisdiction is of limited value. *Goldsmith* "clarified [this Court's] understanding of the limits of [this Court's] authority under the All Writs Act." *CCR,* 72 M.J. 126 (C.A.A.F. 2013), slip op. at 9. Additionally, as in the *Powell* decision discussed in *CCR*, in *Smith*, this Court merely "assumed jurisdiction . . . without considering the question." *Id*. (discussing *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997)). Moreover, *Smith* was decided by summary disposition. As this Court observed in *United States v. Diaz*, the precedential value of summary dispositions can be limited by their "abbreviated" "recitation of the facts and analysis." 40 M.J. 335, 339 (C.M.A. 1994). This Court continued, "If, in subsequent litigation in which a summary

disposition is urged as helpful, a party believes that fuller rumination following hard-hitting advocacy would lead to a different conclusion, then that party is free to urge such a belief in the context of arguing what weight should be accorded the summary disposition." *Id*. at 340. This is such a case. In light of both this Court's jurisdiction-granting statute and case law – including *Goldsmith* and *CCR* – concerning the limits of this Court's jurisdiction to grant extraordinary relief, *Smith* cannot control this case's outcome.

Finally, and most importantly, this Court lacks jurisdiction to grant Appellant's request under its jurisdiction-granting statute. "In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." Article 67(c), UCMJ, 10 U.S.C. § 867(c) (2006). Appellant's assertion that being denied a right will somehow affect a finding and sentence and therefore create jurisdiction is a fallacy. Appellant's brief at 9. As Appellant concedes, she is not a party to the court-martial. Appellant's brief at 13.

A1C L.R.M. will never have a right to seek review. In the case of *United v. Daniels*, A1C L.R.M. will never be sentenced. Therefore, her case will not be available for review by an

appellate court. Likewise, she will never be in position to seek relief from Judge Kastenberg's ruling under Article 66 or 67, UCMJ.

Because this Court has no jurisdiction to grant the requested relief, the petition must be denied.

WHEREFORE, A1C Daniels respectfully requests this Honorable Court find it lacks jurisdiction to grant Appellant's request and affirm AFCCA's order.

II.

A WRIT OF MANDAMUS IS INAPPROPRIATE WHERE THERE IS NO CLEAR AND INDISPUTABLE RIGHT TO THE RELIEF SOUGHT AND WHERE ANY REQUEST FOR RELIEF IS NOT YET RIPE.

Standard of Review

"To prevail on [a] writ of mandamus, Appellant must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (citing *Cheney v. United States Dist. Court for D.C.,* 542 U.S. 367, 380–81 (2004)).

Law and Analysis

A. Appellant does not have a clear and indisputable right to the relief requested.

Appellant has no indisputable right to the relief she seeks. In fact, at trial, even the government disputed

Appellant's right to the relief she seeks. When stating their position, trial counsel said in reference to A1C L.R.M., "[she] does not have a right to file motions or make motions for the court pursuant to 412, 513, or 514. Those MREs limit her activity in court to being heard, but nothing further." (J.A. at 134). Government did clarify that it believes A1C L.R.M. potentially has a right to be heard through counsel. *Id.* However, Government counsel further clarified that meant "so long as it does not encompass an opportunity to present legal argument on admissibility of evidence...or presenting legal or factual argument or moving the court for the admission or suppression of evidence" (J.A. at 212). Mandamus is an inappropriate vehicle to attempt to establish a new, disputed legal right.

No legal authority grants A1C L.R.M. the right to be heard through counsel at a court-martial. Instead, A1C L.R.M. relies on irrelevant third-party case law, the C.V.R.A. (which does not apply to the military justice system), and a misapplication of the Military Rules of Evidence.

The cases Appellant cites are distinguishable from the case on hand. For example, while *Powell v. Alabama*, 287 U.S. 45 (1932), is a seminal case for ensuring a *party* to a case has the right to counsel, as A1C L.R.M. pointed out:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear *a party* by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id. at 69 (emphasis added).

But Appellant is not a *party*. *Powell* therefore recognizes no rights that she possesses. The petitioners in *Powell* were three criminal defendants who had been sentenced to death. *Id*. at 50. A1C Daniels faces the possibility of confinement for life without eligibility for parole. But Appellant faces no risk to her life, liberty, or property. Hence, unlike the petitioners in *Powell*, she has no due process right or Sixth Amendment right to be represented by counsel. Appellant has failed to prove a clear and indisputable right to counsel and therefore failed to show why she has a clear and indisputable right to the requested writ.

B. Issuing a writ is not appropriate under these circumstances.

"The writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983); *see also Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384-85 (1953) ("Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies.").

"[N]ot every case is suitable for consideration upon a petition for extraordinary relief—whether by the *accused* or by *the Government*." *Murray v. Haldeman*, 16 M.J. 74, 76 (C.M.A. 1983) (emphasis added). "[M]ere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ…it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *United States v. DiStefano*, 464 F.2d 845, 850 (2d Cir. 1972).

The military judge's denial of Appellant's request was not an "extraordinary situation." In fact, it is the opposite. The course followed by Judge Kastenberg has been the norm for the entire history of the American military justice system. The Appellant still has the same rights as every other complaining witness at a court-martial. As such, mandamus is unavailable. Instead, what Appellant seeks to do is exactly what this Court said it cannot in *Dettinger v. United States*: control a military judge. 7 M.J. 216, 224 (C.M.A. 1979).

In *Dettinger*, this Court reversed the Air Force Court of Military Review (A.F.C.M.R.) after the A.F.C.M.R. granted a writ after a military judge dismissed the Government's case for violating its own rules. This Court concluded that the military judge in *Dettinger* did not violate a statute or decisional law.

Judge Kastenberg's ruling, like that of the military judge in *Dettinger*, did not violate a statue or decisional law and therefore Appellant does not have grounds for extraordinary relief. *Id.*

Finally, this issue is not ripe. A1C L.R.M.'s counsel, during the motions hearings, said he *may* ask to be heard at a subsequent motion hearing. (J.A. at 149). Even in the motion to reconsider,[1] A1C L.R.M.'s counsel still failed to state whether he would attempt to argue on behalf of A1C L.R.M. at a 412 or 513 hearing, but implied he would not. (J.A. at 196). As such, this issue is not ripe and issuing a writ would be, at best, premature.

Finally, litigation over the requested relief has already harmed A1C Daniels' clearly established right to a speedy trial. The Air Force Court of Criminal Appeals stayed the proceedings in A1C Daniels' case, resulting in a lengthy delay in his case. The Air Force Court did so despite ultimately concluding that it lacked jurisdiction to grant extraordinary relief. Therefore, A1C Daniels' actual speedy trial right has been compromised by Appellant's attempt to establish a previously unknown right for a witness to address the court-martial through counsel. The

[1] A1C Daniels disputes A1C L.R.M's authority to bring a motion, since she is not a party to the litigation. *See generally,* R.C.M. 905 (h) and (i) (the opposition party must have a chance to respond to a motion and written motions must be served on the other party).

prejudice to A1C Daniels' rights resulting from the protracted litigation over Appellant's claims further demonstrates the inappropriateness of extraordinary relief.

WHEREFORE, A1C Daniels respectfully requests this Honorable Court find Appellant has not met the strict requirements to issue the requested writ.

III.

THE MILITARY JUDGE CORRECTLY HELD THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL WAS NOT A RIGHT GUARANTEED BY THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT OR THE UNITED STATES CONSTITUTION.

Standard of Review

Mandamus relief is available only if the petitioner shows he or she "has a clear and indisputable right to the relief sought." *In re Braxton*, 258 F.3d 240, 261 (4th Cir. 2011) (quoting *United States ex rel. Rahman v. Oncology Assocs., P.C.,* 198 F.3d 502, 511 (4th Cir. 1999)).

Law and Argument

A. Under controlling Supreme Court case law, A1C L.R.M. has no due process right to address the court-martial through counsel.

Complaining witnesses at courts-martial have never had the due process right to be heard through counsel. If complaining witnesses are to be granted that right, it must be Congress or the President who does so. "Congress has primary responsibility for the delicate task of balancing the rights of servicemen

against the needs of the military." *Solorio v. United States,* 483 U.S. 435, 447 (1987). Before recognizing any purported due process right of a complaining witness to be heard through counsel at another servicemember's court-martial, this Court must apply the test set out in *Weiss v. United States*, 510 U.S. 163 (1994).

Weiss requires an extremely deferential review of any due process challenge to military justice procedures. In rejecting a due process challenge to the lack of fixed terms of office for military judges, the *Weiss* Court observed that courts-martial "have been conducted in this country for over 200 years without the presence of a tenured judge, and for over 150 years without the presence of any judge at all." *Id.* at 179. Similarly, courts-martial have been conducted for over 200 years without counsel for complaining witnesses being permitted to argue about what evidence is admissible or whether evidence is subject to discovery by the defense. Neither Congress nor the President has ever provided any such right to a complaining witness. As *Weiss* demonstrates, the courts may not use the Due Process Clause to impose such a requirement where the branch of government constitutionally tasked with regulating the land and naval forces has not done so. *See* U.S. Const. art. I, § 1, cl. 14.

Recently, this Court in *United States v. Vazquez*, 72 M.J. 13 (C.A.A.F. 2013), had the opportunity to once again set out the test for due process challenges to aspects of the military justice system. In doing so, this Court stressed the test set out in *Weiss* and denied a right that had not been previously recognized. Yet, in her writ appeal, A1C L.R.M. argues for a due process right to address the court-martial through counsel without even discussing *Weiss*, much less demonstrating how she can prevail under the standard that *Weiss* established for due process challenges to military justice procedures.

B. The C.V.R.A. does not apply to the military and even if it did, it would not grant the relief Appellant seeks.

AFCCA correctly held the C.V.R.A. does not apply to the military. (J.A. at 8). Citing *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000), AFCCA noted that "civilian and military justice are separate as a matter of law." *Id.* at 124. According to the C.V.R.A., "the rights described in subsection (a) shall be asserted in the *district court* in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the *district court* in the district in which the crime occurred." 18 U.S.C. § 3771(d)(3) (emphasis added). District court is defined as "each district court of the United States created by chapter 5 of title 28, the District Court of

the Virgin Islands, the District Court for the Northern Mariana Islands, and the District Court of Guam." 18 U.S.C. § 3006A(j).

Courts-martial are not included as district courts. Courts-martial are created by convening authorities acting under the authority granted to them by Congress in the exercise of its Article 1, § 8, clause 14 authority to prescribe rules for the government of land and naval forces. *Walsh v. Hagee*, __ F. Supp. 2d __, 2012 WL 5285133 (D.C. Cir. Oct. 26, 2012), *aff'd,* No. 12-5367, 2013 WL 1729762 (D.C. Cir. Apr. 10, 2013), does not support the proposition that the C.V.R.A. applies to courts-martial. Indeed, it indicates the opposite. In *Walsh*, the Court observed:

> The C.V.R.A. provides crime victims with several rights including "[t]he right to be reasonably protected from the accused." 18 U.S.C. § 3771(a)(1). Such protection must be sought in the district court where a defendant is being criminally prosecuted, or in the district court in the district where the crime occurred. 18 U.S.C. § 3771(d)(3).

Id. at *8. Because this case does not arise in a district court and because Appellant does not seek to invoke the C.V.R.A. in a district court, that statute is inapplicable.

Even if this case were being prosecuted in federal district court, the C.V.R.A. would not grant A1C L.R.M. the right to be heard through counsel during the findings stage of a contested criminal trial. The C.V.R.A. gives complaining witnesses the right to "be reasonably heard at any public proceeding in the

district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771 (a)(4). Appellant misinterprets § (d)(1) as implying a complaining witness is entitled to be heard though counsel since it talks about legal representatives; however, Appellant fails to consider § (e), which says:

> [i]n the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter.

C.V.R.A., 18 U.S.C. § 3771(e).

A1C L.R.M is over 18 years of age, competent, and alive; therefore, she would not be entitled to have a representative speak on her behalf even in a district court proceeding. And even if she were, a motions hearing is not a stage at which the C.V.R.A. provides an alleged victim with the right to be heard. Accordingly, the C.V.R.A. does not and cannot establish a right to the relief that A1C L.R.M. seeks. Mandamus, therefore, is unavailable.

Likewise, the C.V.R.A is a statute of general applicability and not applicable to courts-martial. As this Court stated in *United States v. Spann*, "we have emphasized the necessity of 'exercis[ing] great caution in overlaying a generally applicable statute specifically onto the military system.'" 51 M.J. 89, 92

(C.A.A.F. 1999) (citing *United States v. Dowty,* 48 M.J. 102, 106, 111 (C.A.A.F. 1998)). Just as this Court did in *Spann*, it should determine a generally applicable statue, such as the C.V.R.A., does not apply in courts-martial.

C. The Military Rules of Evidence do not give the relief Appellant seeks.

At an M.R.E. 412 and 513 hearing, "the *parties* may call witnesses, including the alleged victim...." M.R.E. 412 (emphasis added). Everyone, including Appellant, agrees that A1C L.R.M. is not a party to the court-martial. Appellant's brief at 13. In addition, M.R.E. 412 (c)(2) says "the alleged victim must be afforded a reasonable opportunity to attend and be heard."

M.R.E.s 412 and 513 do not authorize the relief Appellant seeks. Instead, these rules state that A1C L.R.M. has the opportunity to be heard. Judge Kastenberg in his order on reconsideration emphasized that, consistent with those rules' requirements, he would give A1C L.R.M. the right to be heard at an M.R.E. 412 or 513 hearing. (J.A. at 216).

Appellant confounds the opportunity to be heard as established by the *Manual for Courts-Martial* (*M.C.M*) with an opportunity to be heard through counsel. Appellant argues that the M.C.M. gives A1C L.R.M. the opportunity to be heard, but cites to portions of the M.C.M. stating that a *party* can be

heard through counsel. Appellant's brief at 31. The President issues the M.C.M.[2] and was very deliberate in his word choice. If the President chooses to change M.R.E. 412 and/or 513 to provide the relief Appellant seeks, he is free to do so. However, to date, he has not.

As this Court said in *Spann*, "if Government counsel ... believe that such rules should apply in courts-martial, the appropriate route is not through litigation involving statutes outside the UCMJ that are subject to interpretative uncertainties, but through amendments to the Manual for Courts–Martial or, if necessary, though legislative changes." 51 M.J at 93. If the President or Congress decide to change the M.C.M. or the UCMJ to accommodate Appellant's argument, then that is their right. However, under existing law, Appellant does not have a legal right to the relief she seeks.

WHEREFORE, A1C Daniels respectfully requests this Honorable Court find no merit in Appellant's argument that the Constitution, the C.V.R.A or the Military Rules of Evidence give the relief she seeks.

Conclusion

Appellant has failed to demonstrate that this Court has jurisdiction to issue her requested writ of mandamus. She has also failed to demonstrate that the right to be heard through

[2] *See* Article 36, UCMJ, 10 U.S.C. § 836.

counsel is afforded to a court-martial witness. Congress is free to change the UCMJ and the President is free to change the *Manual for Courts-Martial* if either wants to establish a previously unknown right for complaining witnesses to address the court-martial through counsel. But to date, neither has done so. Judge Kastenberg did not err by denying a right that does not exist.

WHEREFORE, A1C Daniels respectfully requests that this Honorable Court affirm AFCCA's order.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to Appellant and Appellee, on 13 May 2013.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Appellant*	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	USCA Dkt. No. 13-5006/AF Crim. App. Misc Dkt. No. 2013-05
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, *Appellee*	)	
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party In Interest*	)	Dated: 20 May 2013

REPLY BRIEF ON BEHALF OF APPELLANT AIRMAN FIRST CLASS LRM

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Appellant*	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, *Appellee*	)	USCA Dkt. No. 13-5006/AF Crim. App. Misc Dkt. No. 2013-05
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party In Interest*	)	Dated: 20 May 2013

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Argument

A. Subject-matter jurisdiction is not dependent on the identity of the individual seeking relief.

Both Appellee and the Real Party in Interest misread *Center for Constitution Rights et al. v. United States and Colonel Denise Lind, Military Judge (CCR),* 72 M.J 126 (C.A.A.F. 2013), for the proposition that subject-matter jurisdiction depends on the identity of the individual seeking relief. (*See* Real Party Br. at 10 ("This Court based its ruling in *CCR* on a lack of jurisdiction to grant the relief requested by a non-party").) This argument ignores the distinction between subject-matter jurisdiction and standing. This Court, after oral argument in

CCR specified three issues for the parties to brief: "(1) whether this Court and the CCA have subject-matter jurisdiction over Appellants' request for extraordinary relief; (2) whether Appellants, as non-parties, have standing to file a request for extraordinary relief in this Court or the CCA; and (3) assuming jurisdiction, which officials are lawfully authorized to direct release of the records and to what extent Appellants must first demonstrate that they requested release from an appropriate release official." *Id.* at 127. This Court then proceeded to decide CCR on jurisdictional grounds – whether the ruling of the military judge "had the potential to directly affect the findings or sentence." *Id*. at 129. This Court did not hold, or even address, whether a non-party participant has standing to file a request for extraordinary relief.

Both the Appellee and Real Party in Interest appear confused by the portion of the *CCR* opinion that attempts to distinguish *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997). In dicta, this Court noted that in *Powell* the accused "joined the media as a party in seeking a writ of mandamus to vindicate his constitutional right to a public trial — something which had immediate relevance to the potential findings and sentence of his court-martial." *CCR,* 72 M.J. at 129-30. This Court did not elaborate on why the accused's joining of the same issue would

make a difference.[1] Regardless, in the present case, how the military judge conducts a hearing to admit evidence under Military Rule of Evidence (MRE) 412 or MRE 513 necessarily must have the potential to affect the findings and sentence. If it does not have that potential, one must question whether the victim was given a reasonable "opportunity to be heard" at the very hearing designed to protect her privacy interests as a victim and patient.

Even if non-party status is germane to the analysis of subject-matter jurisdiction in *CCR* – it is only because it was indicative of how tangential and unrelated the media's claim was to the findings and sentence in Private Manning's court-martial. *CCR,* 72 M.J. at 129. *CCR*, like *Clinton v. Goldsmith,* stands only for the proposition that under the All Writs Act this Court is limited to issuing writs "in aid of" its existing jurisdiction under Article 67. *CCR,* 72 MJ at 128-29 (discussing *Clinton v. Goldsmith,* 526 U.S. 529 (1999)). The validity of this argument is borne out by the fact that the petitioner in *Goldsmith* was in fact a party, the accused, to the underlying court-martial. *See* 526 U.S. at 531-32. Both cases dictate that subject-matter jurisdiction limits the availability of extraordinary relief

[1] The accused's Sixth Amendment right to an open trial ensures a fair trial and therefore directly affects the findings and sentence, whereas the First Amendment right to an open trial enjoyed by the media is more generalized and cannot potentially affect the findings or sentence. *See Richmond Newspapers, inc. v. Virginia,* 448 U.S. 555, 580 (1980)(discussing both First and Sixth Amendment rights to an open trial).

under circumstances that have no potential to affect the findings or sentence. Neither case stands for the proposition that an individual who demonstrates subject-matter jurisdiction is precluded from seeking extraordinary relief by virtue of their party status.

Implicit in the *CCR* majority opinion, and explicit in the dissent, is that a non-party may have *standing* to seek relief when that individual's rights are threatened. *CCR,* 72 M.J. at 130 (dissent)("It is well settled that the media have standing to complain if access to courts has been denied or unconstitutionally restricted. *Press–Enterprise Co. v. Superior Court,* 478 U.S. 1, 7 (1986); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 603 (1982); *ABC, Inc. v. Powell,* 47 M.J. 363, 365 (C.A.A.F.1997); *see also Washington Post v. Robinson,* 935 F.2d 282, 288–290 (D.C.Cir.1991")(internal quotations omitted)). Standing in military courts, just as in Article III courts, depends upon three factors "an injury in fact, causation, and redressability." *See United States v. Wuterich,* 67 M.J. 63, 69 (C.A.A.F. 2008)(quoting *Sprint Communc'ns Co. v. APCC Servs., Inc.,* 554 U.S. 269, 128 (2008)). Nothing about *CCR*, or *Goldsmith,* limits a non-party's ability to seek relief provided that they demonstrate standing and subject-matter jurisdiction. Airman LRM has demonstrated standing and seeks review of a military judge's decision that goes to the very core

of subject-matter jurisdiction – the procedure for determining the admissibility of evidence.

Appellee, in a lengthy footnote, states that A1C LRM has previously argued to the military judge and Air Force Court of Criminal Appeals that granting standing could not possibly affect the findings or sentence. (App. Br. at fn. 18.) This is simply a misconstruction of A1C LRM's argument that the accused could not be impermissibly harmed by granting her an opportunity to be heard. Any harm to judicial economy from a military judge taking additional time to listen to argument or read a motion "is surely outweighed by the benefit of being more accurately briefed on the issues by the best qualified advocate." (J.A. at 202.) No participant, party or non-party, is harmed in a legal sense when a military judge is fully briefed by well-prepared advocates prior to making a decision that impacts their individual rights. Advocates arguing the positions of those whose rights are being impacted provide a judge with the tools to make an informed, well-reasoned ruling. It is the military judge's evidentiary ruling that will directly affect the findings or sentence. The military justice system presumes that it is the advocacy of attorneys that allows military judges to arrive at correct findings of fact and conclusions of law – especially in the context of the admissibility of evidence that will form the very basis of any finding or sentence.

B. Airman LRM's request for standing and the right to be heard through counsel at any hearing under MRE 412 or MRE 513 is ripe.

The Real Party in Interest claims that this Court should defer exercising jurisdiction in this case because the issue is not yet ripe.[2] (Real Party Br. at 17.) During the trial level Article 39(a) session, A1C LRM's counsel requested standing to make argument in any MRE 412 or 513 hearing. The request was treated by the military judge as a "motion in fact." (J.A. at 150.) Airman LRM's attorney did indicate that he did not yet know if he would need to argue. (J.A. at 196.) This caveat is not surprising; he could not know in advance what the arguments of the parties or evidence might show. This is especially so given the failure of the parties or the court to provide Airman LRM with any documents, discovery, or court filings with respect to any hearings under MRE 513. (J.A. at 196.) Further, A1C LRM asked the military judge to reconsider his first ruling which denied her standing and asked very specifically for the following relief:

[2] In his initial judicial ruling, the military judge concedes that the issue is ripe and even opines that the appellate courts have jurisdiction by inviting A1C LRM to seek a writ of mandamus if she believes that her rights have been violated. "Mandamus is a permissible writ in military law. Should A1C LRM seek relief through mandamus, this court will honor her right to do so." (citations omitted)(J.A. at 10-22.)

1. Order the Government and the Defense to produce and provide to A1C LRM through her counsel all documents, discovery materials, court filings and motions related to any proceedings, objections or rulings related to M.R.E. 412.
2. Order the Government and the Defense to produce and provide to A1C LRM through her counsel all documents, discovery materials, court filings and motions related to any proceedings, objections or rulings related to M.R.E. 513.
3. Grant A1C LRM limited standing to be heard through counsel of her choosing in hearings related to M.R.E. 412, M.R.E. 513, CVRA, and the United States Constitution."

(J.A. at 203(victim's name redacted).) The military judge reconsidered his ruling and held that the "the SVC motion for reconsideration is denied in full." (J.A. at 218.) The ruling of the military judge is both crystal clear and final, A1C LRM will not be permitted standing to present her views through counsel consistent with her "right to be heard" in any hearing in the upcoming trial of the accused. The issue is ripe.

C. The "opportunity to be heard" does not equate to the possibility of testifying.

Both Appellee and the Real Party in Interest pay no heed to the decisions of Congress and the President to provide victims and patients a "reasonable opportunity to be heard." Mil. R.

Evid. 412; Mil. R. Evid. 513. Although the Supreme Court, this Court, and the federal district courts have all uniformly interpreted that phrase in a myriad of decisions to allow a participant to make legal arguments through counsel, both Appellee and the Real Party in Interest urge a new definition. [3] (App. Br. at 11; Real Party Br. at 14-15.) The notion that a victim and patient may not vindicate her interests through her own attorney or even by making her own legal arguments is deeply troubling. The even worse suggestion advocated in the Appellee brief, is that the victim must hope for the possibility that the Government may call the victim as a witness and/or may advocate her position.[4] (App. Br. at 11.) Congress' and the President's decision – that a victim and patient have legally cognizable privacy interests and must be permitted a reasonable opportunity to be heard to defend those rights – is a decision that must be given extreme deference. *See United States v. Vazquez*, 72 M.J.

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[3] *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006); *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995); *See, e.g.,* R.C.M. 806(d); R.C.M. 917(c); R.C.M. 920(c); R.C.M. 920(f); R.C.M. 1005(c); R.C.M. 1102(b)(2); MIL. R. EVID. 201(e); *In re Dean*, 527 F.3d 391 (5th Cir. 2008); *Brandt v. Gooding,* 636 F.3d 124, 136 (4th Cir. 2011).

[4] Appellee argues that the victim has been offered an opportunity to be heard because she can be "personally heard through trial counsel." (App. Br. at 11). This is a curious position because as a member of the prosecution team the trial counsel is specifically not the victim's attorney and may even be ethically forbidden from advocating the interests of the victim. Air Force Standards of Criminal Justice, Standard 3-1.1; Standard 3-1.2. Congress and the President did not give victims and patients the "opportunity to be heard" only to have trial judges strip that right and reinterpret their plain language to limit victims and patients to the possibility of advocacy by someone ethically bound not to represent their interests.

13 (C.A.A.F. 2013)(citing *Weiss v. United States*, 510 U.S. 163 (1994)).

Without case law or citation both Appellee and Real Party in Interest claim that "reasonable opportunity to be heard" should be given a new, novel, and severely restricted interpretation by this Court. They urge that for victims and patients the "opportunity to be heard" is limited to permission to testify. (J.A. at 216-17.) To support this novel definition of a well-known legal term of art, both rely on sweeping and unsupported generalizations about the history of military law and criminal justice. This "alleged" history is at odds with this Court's precedent.[5] This Court has previously ordered that

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[5] Appellee claims that it will 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." (App. Br. at 12). *c.f. United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006)(victim's doctor permitted to advance legal argument against accused); *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995)(victims and patients permitted through counsel to advance legal argument against accused); *United States v. Klemick,* 65 M.J. 576 (N.M. Ct. Crim. App. 2006)(patient represented by counsel in MRE 513 hearing); *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981)(rape victim permitted to advance legal argument against accused) (Appellant's Brief at 30)(summarizing federal cases where non-party participants were permitted to advance legal arguments against the accused or defendant).

Appellee goes on to claim that the right to the advocacy of counsel is a "right which has never been recognized in military courts." (Appellee Brief at 19). C.f. *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995)(permitted advocacy of counsel to advance legal argument); *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008)(permitted advocacy of legal counsel); *ABC, Inc. v. Powell,* 47 M.J. 363 (C.A.A.F. 1997)(permitted advocacy of legal counsel); *Center for Constitutional Rights v. Lind,* 72 M.J 126 (C.A.A.F. 2013)(permitted advocacy of legal counsel); *San Antonio Express-News v. Morrow,* 44 M.J. 706 (A.F. Ct. Crim. App. 1996)(permitted advocacy of legal counsel).

Finally, Appellee claims that the "right of a non-party to have counsel appear on her behalf in another's court-martial" has not been "heard of." (App. Br. at 21-22). C.f. *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006)(non-party's counsel appeared at trial); *Carlson and Ryan-Jones v.*

victims and patients "will be given an opportunity, with the assistance of counsel if they so desire, to present evidence, arguments and legal authority to the military judge." *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995).[6] Far from being "previously unknown — A1C LRM's request is only that this Court order the military judge to comply with existing precedent.

Although Appellee and Real Party in Interest claim A1C LRM's request to use her attorney is novel, the only novelty is the military judge's holding. Indeed, in the last 200 years it has been unheard of and would be a significant departure from American jurisprudence for a trial judge to deprive a trial participant who can articulate standing the advocacy of their

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Smith, 43 M.J. 401, 402 (C.A.A.F. 1995)(non-party's counsel appeared at trial); *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008)(non party's counsel appeared at trial); *ABC, Inc. v. Powell,* 47 M.J. 363 (C.A.A.F. 1997)(non party's counsel appeared at trial); *Center for Constitutional Rights v. Lind,* 72 M.J 126 (C.A.A.F. 2013)(non-party's counsel appeared at trial); *San Antonio Express-News v. Morrow,* 44 M.J. 706 (A.F. Ct. Crim. App. 1996)(non party's counsel appeared at trial).

The Real Party in Interest makes similar sweeping historical claims such as "previously unknown right," "200 years without counsel for complaining witnesses permitted to argue," and "complaining witnesses . . . have never had the due process right to be heard through counsel." (Real Party Br. at 17-19). This version of history is confusing given the Real Party in Interest's own citation to *Carlson,* 43 M.J. at 403, in which this court ordered "victims and patients 'will be given an opportunity, with the assistance of counsel if they so desire, to present evidence, arguments and legal authority to the military judge.'" (Real Party Br. at 11).

[6] To the extent *Clinton v. Goldsmith*, 526 U.S. 529 (1999) limited *Carlson's*, precedential value on the issue of jurisdiction, it could not and did not affect the precedential value of *Carlson's* recognition of a victim's rights to privacy and advocacy of counsel. *Carlson,* 43 M.J. at 402. *Goldsmith*, 526 U.S. at 529, said nothing about victim's rights or the advocacy of counsel.

counsel.[7] Our research found no similar ruling by any judge in any jurisdiction. Quite to the contrary, this Court and others have repeatedly (and without known exception) permitted witnesses and limited participants the advocacy of their counsel.

D. Allowing A1C LRM the right to be heard does not affect the impartiality of the military judge in fact or appearance.

The Appellee urges this Court to find that allowing A1C LRM the right to be heard would transform the military judge into an advocate "for the prosecution, a victim, an accused, or a policy." (App. Br. at 15-16.) Airman LRM is not asking the military judge to advocate her position, merely to apply a correct rule of law. Appellee cites to a number of cases that stand for the proposition that a military judge must remain impartial. (App. Br. at 15 (citing *United States v. Martinez,* 70 M.J. 154, 157 (C.A.A.F, 2011); *United States v. Butcher,* 56 M.J. 87, 90 (C.A.A.F. 2010); *United States v. Conley,* 4 M.J. 327 (C.M.A. 1978)).) However, the requirement for judicial impartiality applies to the interests of all individuals directly affected by the rulings of a judge. After all, as the Supreme Court has stated "justice, though due to the accused, is

[7] *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *see also* (Appellant's Brief at 27-39)(discussing numerous examples in military courts and federal courts where standing permits advocacy by counsel).

due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament." *Snyder v. Massachusetts,* 291 U.S. 97, 122 (1934). Airman LRM shares the Appellee's concern that the military judge remains impartial to the prosecution, the accused, and the victim alike.

Appellee lacks a plausible argument concerning how allowing an attorney to advocate for the individual rights of a victim in a closed hearing, outside the presence of members, in any way affects the impartiality of a military judge. Military judges can, must, and do hear from attorneys arguing varying positions. Based on those arguments, military judges make rulings. Those rulings "almost never constitute a valid basis for a [judicial] bias or partiality motion." *Liteky v. United States,* 510 U.S. 540, 554 (1994). There is simply no legal basis for the argument that hearing from the victim of a crime, through an attorney, prior to depriving her of her right to privacy in an MRE 412 or MRE 513 hearing, renders a military judge impartial in fact or appearance. On the other hand, denying A1C LRM a reasonable "opportunity to be heard" certainly may create the perception that the military judge does not consider her right to privacy important – and thereby deter victim and patient participation in the very hearings designed to promote participation.

E. No prudential concerns are furthered by remanding issues II and III to the Air Force Court of Criminal Appeals.

This Court should resolve certified issues II and III for three reasons. First, the Air Force Court did address all three certified issues. Second, this Court necessarily must address certified issues II and III in order to resolve the certified application for extraordinary relief. Finally, any prudential concerns in this case are outweighed by the need for speedy resolution of these issues.

The Air Force Court has already erroneously addressed all three certified issues.[8] The Air Force Court purported to not address what it called the "substantive issues." (J.A. at 5.) However, as a result of the AFCCA's failure to distinguish standing and subject-matter jurisdiction the Court reached all three certified issues.

First, the AFCCA appears to believe that it is the constitutional nature of an allegation by a non-party that gives rise to jurisdiction. (*See* J.A. at 8.) Airman LRM has a constitutional due process right to be heard through counsel under MRE 412 and MRE 513 and she has a constitutional right to

[8] As noted by the Appellee, the factual issues have already been "salted" and all of the legal issues are "within the purview of this Court pursuant to Article 67(c), UCMJ." (App. Br. at 18-19, fn 19). There is "no requirement" the review be sought by a lower service court "'as a prerequisite to this Court's consideration of a matter.' *Gray v. Mahoney*, 39 M.J. 299, 303 (C.M.A. 1994)."*Id*.

privacy. Despite these arguments the AFCCA held that the military judge's "ruling did not implicate constitutionally based rights." (J.A. at 8.) They have in fact ruled that A1C LRM has no constitutionally based right to due process or privacy. This holding was in error.

After addressing the Military Rules of Evidence and the right to privacy, the Air Force Court addressed the CVRA.[9] A1C LRM has a right to "privacy" and "dignity" provided by the CVRA. The Air Force Court rejected this argument and held that the CVRA had no application in military courts: "the CVRA's provision that states it applies to 'any court proceeding'" does not include military courts. (J.A. at 8.) This holding was in error.

Finally, the Air Force Court analyzed A1C LRM's standing at trial. The Air Force Court's discussion of non-party versus party participation at trial is standing analysis not subject-matter jurisdiction analysis. (J.A. 8-9.) In this standing analysis, the Court held that finding jurisdiction "would, in effect, be granting a non-party to the court-martial judicially

[9] The Appellee, the Air Force Court of Criminal Appeals, and the Real Party suggest the CVRA, even if applicable to trial by court-martial, does not grant the victim a right to be heard in the circumstances suggested by A1C LRM. (*See* J.A. at 8, 217; Real Party Br. at 21-22.) The CVRA specifically states that the victim has a right to dignity and privacy. 18 U.S.C. § 3771(a)(7). The CVRA further directs that "the court shall ensure that the victim is afforded the rights described in subsection (a). 18 U.S.C. § 3771(b). It is the constitutional test for standing; "an injury in fact, causation, and redressability" which provide A1C LRM a "right to be heard." *See United States v. Wuterich,* 67 M.J. 63, 69 (C.A.A.F. 2008).

recognized rights equal to those of party participants." (J.A. at 8.) Courts lack jurisdiction "to entertain every challenge brought by interested entities." *Id.* As a limited participant who was injured, with causation, and redressabiliy, A1C LRM is not merely an "interested entity." Yet, the Air Force Court erroneously held that she was. (J.A. at 9.) This determination was in error; it can and should be reviewed.

The Air Force Court's holdings that A1C LRM does not have constitutional due process rights under the Military Rules of Evidence, that she does not have a constitutional right to privacy, that the CVRA does not apply in military courts, and that A1C LRM lacked standing were each made in error; those holdings can and should be reviewed.

If this Court concludes that the Air Force Court did not address the "substantive issues," there are prudential concerns in doing so now.[10] This Court has the discretion and authority to do so, and should in this case. CAAF's Rules of Practice and Procedure, Rule 4(b)(1). First, the case is scheduled to commence on 22 July 2013. (Appellant's Br. at 3.) This trial date is the result of several delays--arraignment occurred on 29 January 2013. (Appellant's Br. at 2.) All parties, to include

[10] To the extent this Court would ordinarily avoid issues out of deference for the Air Force or the Air Force justice system those concerns seem to be nullified by the fact that the Air Force's Judge Advocate General has explicitly requested resolution of all three issues.

the Accused, have an interest in the speedy resolution of these issues.[11] The virtue of a speedy resolution has previously been sufficient to overcome prudential concerns. ABC, Inc. v. Powell, 47 M.J. 363,364 (C.A.A.F. 1997).

CONCLUSION

WHEREFORE, Appellant respectfully requests that this Honorable Court find for the Appellant on the three certified issues and issue a writ of mandamus ordering the military judge to provide an opportunity for A1C LRM to be heard through counsel at hearings conducted pursuant to MRE 412 and MRE 513, and to receive any motions or accompanying papers reasonably related to her rights as those may be implicated in hearings under MRE 412 and MRE 513.

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[11] Both Appellee and the Real Party in Interest have indicated a desire for the speedy resolution of this extraordinary writ. (App. Br. at 18; Real Party Br. at 17.)

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CERTIFICATION OF FILING

I certify that a copy of the foregoing was delivered to the Court, Judge Kastenberg, Appellee's Counsel, Government Trial and Appellate Division, the Appellate Defense Division, counsel for amicus National Crime Victim Law Institute, and counsel for amicus Protect Our Defenders on May 20, 2013.

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CERTIFICATION OF COMPLIANCE WITH RULE 24(D)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains 4282 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief was prepared using Microsoft Word Version 2007 with Courier New 12-point font, a monospaced font.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In Re Airman First Class (E-3) LRM, USAF, Petitioner	*AMICUS CURIAE* BRIEF OF THE ARMY DEFENSE APPELLATE DIVISION
v.	Crim. App. No. 2013-05
Lieutenant Colonel **JOSHUA E. KASTENBURG,** Respondent	USCA Dkt. No. 13-5006/AF
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IN THE UNITED STATES COURT OF CRIMINAL APPEALS
FOR THE ARMED FORCES

In Re Airman First Class (E-3) LRM, USAF, Petitioner	*Amicus Curiae* Brief of the Army Defense Appellate Division
v.	Crim. Appellant. No. 2013-05
	USCA Dkt. No. 13-5006/AF
Lieutenant Colonel JOSHUA E. KASTENBURG, Respondent	
Airman First Class (E-3) NICHOLAS E. DANIELS, Real Party in Interest	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Certified Issues

I

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS.

II

WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION.

III

WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS.

Pursuant to Rule 26(a) of this Court's Rules of Practice and Procedure, United States Army Defense Appellate Division submits the following *amicus* brief.

Statement of Statutory Jurisdiction

This Honorable Court has jurisdiction to address the Certified Issues, pursuant to Article 67(a)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(2). However, as explained in the real party in interest's brief and in appellee's brief, this Honorable Court does not have jurisdiction to issue the requested relief.

Summary of Proceedings and Statement of Facts

Amicus adopts the Summary of Proceedings and Statement of Facts as presented in the real party in interest's brief. *Amicus* writes to establish that 18 U.S.C. § 3771 has no applicability to courts-martial, nor do the Military Rules of Evidence provide Petitioner the relief she seeks, nor does any amorphous claim to "due process."

Argument

THE CRIME VICTIMS' RIGHTS ACT, THE MILITARY RULES OF EVIDENCE, AND THE DUE PROCESS CLAUSE DO NOT AFFORD PETITIONER THE "RIGHTS" SHE SEEKS.

The Air Force Court of Criminal Appeals correctly determined it had no jurisdiction to issue a writ of mandamus on behalf of Airman First Class (E-3) LRM. Petitioner LRM seeks to

establish jurisdiction via a statute, 18 U.S.C. § 3771, that has no applicability to courts-martial. Even if this Court determines 18 U.S.C. § 3771 is in some way applicable, the statute does not afford Petitioner the remedy she seeks. Nor did the Air Force Court of Criminal Appeals deny LRM "due process," as LRM was afforded all those rights she was entitled pursuant to the Constitution, the UCMJ, and the Manual for Courts-Martial. *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013).

In criminal proceedings in United States district courts, 18 U.S.C. § 3771 affords a "crime victim" the following:

> (1) The right to be reasonably protected from the accused.
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
> (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.
> (6) The right to full and timely restitution as provided in law.
> (7) The right to proceedings free from unreasonable delay.
> (8) The right to be treated with fairness

> and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a)(1-8). If a crime victim is denied these enumerated rights in U.S. district court, the victim may petition a U.S. court of appeals for a writ of mandamus. *Id.* at (d)(3). Petitioner's claim of jurisdiction rests upon this statute in asserting a right to be represented and participate as a party-equivalent in Airman Daniels' court-martial.

Petitioner maintains courts-martial must comply with 18 U.S.C. § 3771. However, the statute, as was true with its predecessors, is a statute of general applicability, and thus, has no applicability to courts-martial.

In *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999), this Court examined whether 42 U.S.C. § 10606, a predecessor statute to the one at issue here, applied to courts-martial. That statute, in pertinent part, gave crime victims "the right to 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." *Id.* at (b)(4). The military judge in *Spann* determined the federal statute prohibited him from sequestering the victim and her mother from Spann's court-martial. 51 M.J. at 90. On appeal, Spann claimed 42 U.S.C. § 10606 should not apply to courts-martial. *Id.*

This Court agreed with Spann, expressing "great caution" in overlaying generally applicable statutes onto the military justice system. *Id.* at 92, quoting *United States v. Dowty*, 48 M.J. 102, 106 (C.A.A.F. 1998). This Court refused to apply 42 U.S.C. § 10606 to courts-martial for two reasons. First, this Court found the effect of application of the federal statute in U.S. district courts anything but clear, specifically in its effect on Federal Rule of Evidence (Fed.R.Evid.) 615. 51 M.J. at 92. Because of that ambiguity, this Court refused to apply the statute to courts-martial.

Second, this Court found significant the President had not amended Military Rule of Evidence 615 since passage of the two renditions of the applicable statute. *Id.* at 92-93. This Court identified two possible reasons for the President's inaction -- he was at yet undecided whether the federal statute should apply, and if so, whether it should be modified to fit military practice. *Id.* at 93. This Court emphasized Congress established a system by which the Manual for Courts-Martial would be amended through a deliberative process, and not through the application of statutes outside the UCMJ. *Id.* "If government counsel or others involved in the administration of military justice believe such rules should apply in courts-martial, the appropriate route is not through litigation involving statutes outside the UCMJ that are subject to

interpretive uncertainties, but through amendments to the Manual for Courts-Martial or, if necessary, through legislative changes." *Id.*

Similarly, this Court found the statute of limitations in the Victims of Child Abuse Act (VCAA), applicable in federal district courts, inapplicable to courts-martial. *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000). That statute of limitations stated:

> No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years.

54 M.J. at 125, quoting 18 U.S.C. § 3283. This Court noted the "military and civilian justice systems are separate as a matter of law." 54 M.J. at 124. This Court observed Congressional intent was to "separate military justice from the military justice system. 54 M.J. at 124, quoting *United States v. Dowty*, 48 M.J. 102, 111 (C.A.A.F. 1998).

This Court found the VCAA inapplicable in part because the text of the statute indicated it applied to federal courts, and not courts-martial. 54 M.J. at 125. The statute referred to the Department of Justice and used terms familiar to federal district courts, not courts-martial, such as "jury," "guardian *ad litem*, and "clerk of court." *Id.* "None of the foregoing

terms apply in the military justice system, where courts-martial are convened by military officers for the trial of a single case, the prosecution function is performed by judge advocates appointed as trial counsel, verdicts are rendered by the members of the court-martial, and the proceedings are governed by the Military Rules of Evidence." 54 M.J. at 126.

For the same reasons, 18 U.S.C. § 3771 does not apply to courts-martial. The terms employed in the statute indicate its application to federal district courts, and not courts-martial. A motion for relief must be filed "in the district court in the district in which the crime occurred," and the "district court" must decide the motion. *Id.* at (d)(3). Additionally, the "court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure." *Id.* This and other terms in the statute establish the statute applies in U.S. district courts, not courts-martial. *McElhaney*, 54 M.J. at 126.

Additionally, the applicability of the statute to federal district court cases is unclear (*see Spann*, 51 M.J. at 92), although it is clear none have afforded a victim the right to participate in the proceedings that Petitioner seeks. Additionally, the President has not amended procedural or evidentiary rules to allow the non-party participation Petitioner seeks. *Id.* at 93.

18 U.S.C. § 3771 has no applicability to courts-martial. Because that statute appears to be the thin reed on which Petitioner relies for the jurisdictional hook for her writ, *amicus* submit her Petition must be denied.

Even if 18 U.S.C. § 3771 had applicability to courts-martial, the rights afforded to crime victims by the statute do not entitle Petitioner to be accorded the equivalence of party status at Airman Daniels court-martial. The statute affords crime victims a number of rights, but these rights appear geared toward post-conviction and attendance, sentencing, protection, and restitution. The victim has a right to be "reasonably heard," but that right is limited to proceedings "involv[ing] release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(3). As the Second Circuit Court of Appeals determined, "the CVRA does not grant victims any rights against individuals who have not been convicted of a crime." *In re Huff*, 409 F.3d 555, 564 (2d Cir. 2005). Thus, Petitioner's attempt to intervene in appellant's court-martial before findings is simply not contemplated by 18 U.S.C. §3771.

Further, a victim has a right to notice of proceedings, but may be excluded if the trial court determines the victim's attendance would materially alter the victim's testimony. *Id.* at (a)(2) & (3). Additionally, a victim has a right to be "reasonably protected," and a "reasonable right to confer with

the attorney for the government." It is *amicus'* understanding none of these rights, if the statute were applied, have been violated in this case.

Nonetheless, Petitioner, cobbling together the victims' rights afforded by 18 U.S.C. § 3771 with certain phrases in Mil. R. Evid. 412 and 513, claims she has a right to be heard through counsel during appellant's court-martial. However, Petitioner presents no support from either the U.S. district courts hearing cases applying Fed. R. Evid. 412 or 513 for that proposition, nor has *amicus'* research revealed such support. Indeed, the Department of Defense Instruction (DoDI) 1030.01, *Victim and Witness* Assistance, ¶ 4.4 (23 April 2007) provides UCMJ victims approximately the same protections as those found in 18 U.S.C. § 3771(a)(1-8). However, the instruction explicitly limits exactly the type of cause of action Petitioner seeks. "This Directive is not intended to, and does not, create any entitlement, cause of action, or defense in favor of any person arising out of the failure to accord to a victim or a witness the assistance outlined in this Directive." *Id.* at ¶ 4.3. Furthermore, the language employed in those Rules of Evidence do not support Petitioner's claim.

Mil. Rule Evid. 412 provides that a party seeking to admit evidence pursuant to that rule must file a motion and serve the motion on the court and opposing party "and notify the alleged

victim or, when appropriate, the alleged victim's representative." Mil. R. Evid. 412(c)(1)(B). Thus, the purported victim is given notice, but has no "right" to service of the motion, but must be notified. *Id.* Additionally, the term "representative" is undefined, and is absent from the remainder of Rule 412. While the rule affords the purported victim "a reasonable opportunity to attend and be heard," the term representative is significantly absent. Thus, the plain language of the Rule does not contemplate legal representation for the purported victim at the hearing, and only contemplates notification to a legal representative in "appropriate" cases, most likely in the event of minority or disability. "Unless ambiguous, the plain language of a statute will control unless it leads to an absurd result." *U.S. v. King,* 71 M.J. 50, 52 (C.A.A.F. 2012), *citing* United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F.2007); *see* generally Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-75 (2012) (if possible every word and provision should be given effect).

Nor can Petitioner, despite her claim to the contrary, find solace in Mil. R. Evid. 513 or 514. Pursuant to Rule 513, the production or admission of a patient record or communication, if the patient is not the accused, requires service of a motion on the military judge and opposing party, "and, if practicable, notif[ication to] the patient or patient's guardian,

conservator, or representative and that the patient has an opportunity to be heard as set forth" by the Rule. Mil. R. Evid. 513(e)(1). And what is that opportunity to be heard? "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." *Id.* at (e)(2).

Similarly, Mil. R. Evid. 514, which directs a limited privilege for victim-victim advocates, requires, upon admission or production of victim-victim advocate communication, the same service on the opposing party and military judge, and "and, if practicable, notif[ication to] the victim or victim's guardian, conservator, or representative and that the victim has an opportunity to be heard as set forth" by the Rule. Mil. R. Evid. 514(e)1)(B). The victim is afforded the same right at the hearing, "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." *Id.* at (e)(2).

The plain language of the applicable Rules simply does not provide the "rights" Petitioner claims she is entitled to, and the DoDI 1030.01 specifically states Petitioner has no right to mandamus review. Petitioner is seeking a quasi-party status that no other United States court affords purported victims, nor

should this Court. Instead this Court should maintain traditional notions of party status and military justice. This Court can find support for that stand in the Manual. The Manual defines "Party" as:

> (A) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial in question; and
> (B) Any trial or assistant trial counsel representing the United States and agents of the trial counsel when acting on behalf of the trial counsel with respect to the court-martial in question.

Rule for Courts-Martial [hereinafter R.C.M.] 103(16).

Nor does Petitioner's claim she has some "due process" constitutional right make it so. Petitioner claims "due process" requires she be afforded a hearing, and as an extension, provided counsel to represent her at this constitutionally required hearing. However, in so asserting, Petitioner relies upon *Goldberg v. Kelly*, 397 U.S. 254 (1970), which found Kelly had a due process right pursuant to the Fourteenth Amendment, because an entitlement, a <u>property interest</u>, was at stake as a result of a governmental decision. In order to prevail in a due process claim, appellant must show "(1) a cognizable <u>liberty</u> or <u>property interest</u>; (2) the deprivation of that interest by some form of state action; and

(3) that the procedures employed were constitutionally inadequate." *Kendall v. Balcerzak,* 650 F.3d 515, 528 (4th Cir.2011) (emphasis added). Petitioner can make no such showing here. Her interests do not implicate constitutional due process, and Petitioner has only those rights provided by the UCMJ and the Manual for Courts-Martial, which, as established above and by the real-party-in-interest and appellee, do not violate due process. *See Vazquez*, 72 M.J. at 19. Indeed, the only person who can claim a risk to due process is the real-party-in-interest, Airman Daniels. "Due process" simply does not afford Petitioner relief.

Conclusion

WHEREFORE, the Air Force Court of Criminal Appeals correctly found that it lacked jurisdiction to hear Petitioner's petition for a writ of mandamus. Even if this Court determined the Air Force Court erred regarding its jurisdictional limitation, this Court should affirm the military judge's determination Petitioner had no right to intervene in appellant's court martial.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Kastenburg,* Crim.App.Dkt.No. 2013-05, USCA Dkt. No. 13-5006/AF, was electronically filed with both the Court and Government Appellate Division on May 23, 2013.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

L.R.M.
Airman First Class (E-3), USAF
Appellant,

v.

JOSHUA E. KASTENBERG
Lieutenant Colonel (O-5), USAF
Appellee,

and

NICHOLAS E. DANIELS
Airman First Class (E-3), USAF
Real Party in Interest.

Crim. App. No. 2013-05
USCA Dkt. No. 13-5006/AF

BRIEF OF AIR FORCE TRIAL DEFENSE DIVISION IN SUPPORT OF APPELLEE AND REAL PARTY IN INTEREST

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class **L.R.M.**, USAF Appellant v. Lieutenant Colonel **JOSHUA E. KASTENBERG,** USAF Appellee and Airman First Class **Nicholas E. Daniels,** USAF Real Party In Interest	))))))))))))))	**BRIEF OF AIR FORCE TRIAL DEFENSE DIVISION IN SUPPORT OF APPELLEE AND REAL PARTY IN INTEREST** USCA Dkt. No. 13-5006/AF Crim. App. No. 2013-05

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

COMES NOW the Air Force Trial Defense Division (JAJD), by and through its undersigned counsel, and pursuant to its contemporaneously filed motion for leave to appear as amicus curiae, files this brief as amicus curiae in support of A1C Nicholas E. Daniels and Lt Col Joshua E. Kastenberg.

Decisional Issues Presented

I.

WHETHER THIS HONORABLE COURT HAS THE AUTHORITY TO ISSUE THE REQUESTED RELIEF AND WHETHER A WRIT SHOULD BE ISSUED WHEN A1C L.R.M. WAS NOT DENIED ANY COGNIZABLE RIGHTS.

II.

WHETHER THE AIR FORCE SPECIAL VICTIMS' COUNSEL PROGRAM FUNDAMENTALLY ALTERS THE MILITARY JUSTICE SYSTEM AND PREJUDICES THE RIGHTS OF AIRMEN ACCUSED OF SEXUAL OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

Statement of Statutory Jurisdiction

JAJD agrees with the Real Party in Interest that while this Court has jurisdiction to determine its own jurisdiction, it does not have jurisdiction to grant the relief that Appellant seeks.

Summary of Proceedings

JAJD accepts the Real Party in Interest's Summary of Proceedings.

Statement of Facts

JAJD accepts the Real Party in Interest's Statement of Facts.

Summary of Argument

The purpose of this brief is to provide background information on the creation of the Air Force Special Victims' Counsel Program, to bring concrete examples from the field of how the program has disrupted the fair administration of justice around the world, and to put in context how this unprecedented effort fits into the erosion of Airmen's constitutional rights.

Argument

I.

THIS HONORABLE COURT SHOULD DENY THE WRIT APPEAL.

If this Honorable Court determines it has jurisdiction to grant the relief sought, an extraordinary writ is a drastic tool to be invoked only in truly extraordinary situations when there is a clear and indisputable right to the requested relief. Appellant fails to meet this standard, no additional legal arguments in that regard are required in light of the excellent brief filed on behalf of the Real Party in Interest, and her petition must be denied. As articulated by Lt Col Kastenberg, the military judge in the subject court-martial, Appellant simply has no standing as a third party and she has not been denied any rights. However, the issues at stake are far greater than the application of well-established law to a single case. The Air Force Special Victims' Counsel Program (AFSVCP) in only its first few months of existence has wreaked havoc across the military justice landscape and threatens to irrevocably disrupt the already precarious balance of our adversary system.

II.

THE AFSVCP FUNDAMENTALLY ALTERS THE MILITARY JUSTICE SYSTEM AND PREJUDICES THE CONSTITUTIONAL RIGHTS OF AIRMEN.

A. The AFSVCP is an ultra vires trial advocacy program born of political pressure that should be limited strictly to legal assistance.

As this Honorable Court considers the writ appeal, it is critical for each judge to be aware of how and why the AFSVCP came into being from JAJD's perspective. This unprecedented

trial advocacy program is not squarely rooted in statute, the MCM, or any lawful federal regulation—it is a legal fiction. The only authority cited to justify this seismic shift in our justice system is an advisory opinion from DoD/GC that vaguely references legal assistance sections of Title 10, United States Code, and which was then quickly transposed in an equally vague manner under the guise of an Air Force Guidance Memorandum even though there was no immediate risk to life, safety, property, or mission as required by AFI 33-360, *Publications and Forms Management*, 7 Feb 13, Table 4.1.

This hastily assembled concept of operations appears to be loosely based on one or two state programs that were presumably the product of careful debate and legislation, and which exist in a civilian world free of the inherently coercive environment of the military, where UCI treads precariously close at every turn in the process. The deck is already stacked in favor of the prosecution in courts-martial (e.g., convening authorities control the entire process from start to finish, to include referral of charges against the accused, hand selection of court members, total control of all defense witness travel, and total control of defense access to investigators and expert assistance) and this ultra vires program is a wild card that threatens to completely upend the entire system of justice.

JAJD first became aware of the AFSVCP in late 2012 when it was clear the idea had not been fully vetted but was already in the final stages of approval. Our military justice system is firmly rooted in the Anglo-American adversary tradition and until the advent of this program, the parties to a court-martial were well-defined and each knew their role. The fact that JAJD was completely cut out of the process until it was too late to provide meaningful input except, ironically, to protect the rights of complaining witnesses (CWs) suspected of misconduct, is a clear indicator special victims' counsel (SVCs) were never intended to be neutral players but rather they were created to align with prosecutors and secure convictions.

From what little JAJD was permitted to see of the program's creation, due process concerns about an accused having to face not only a prosecution team but also an SVC juggernaut were summarily dismissed. Similarly, every rational question raised, to include SVC standing in court, their participation in interviews, how they should appear at trial, and the potential impact on court delays and appeals were brushed aside without adequate resolution. A three-day training course was assembled in short order even while the SVC standards and rules were being changed on what seemed a daily basis. It was evident that having a program in place was more important than having a

program that worked fairly or coherently; it was an aircraft intended to be built in flight without a destination.

The timing and haste with which the AFSVCP was put together is evidence it is a reaction to intense political pressure from a very small, very vocal constituency who believe sexual assault is out of control in the military. It is a solution to a problem that does not exist anywhere near the levels repeated by senior leadership, and inflated estimates of sexual assault have greatly exacerbated this misperception. Sound problem-solving requires a dispassionate analysis of facts to determine the size and scope of the issue at hand. Determining how best to address sexual assault should not get a pass on this fundamental requirement simply because it is a highly emotional subject. To the contrary, its emotional nature demands the most dispassionate factual analysis possible.

This Honorable Court must not lose sight of the fact that the U.S. Air Force Academy underwent a similar frenzied pitch of scrutiny more than a decade ago. Yet when all of the cases were forensically dissected, only a mere handful had merit. For the past year and a half, senior leaders and the media have repeated the grossly unreliable estimate that 19,000 sexual assaults had been perpetrated against military members in 2011, which is far more than the approximately 3,000 reported violations. DoD recently released an even more questionable estimate that 26,000

sexual assaults occurred in 2012. These inaccurate numbers are the product of overly-broad, anonymous polls rather than from sound, impartial, dispassionate investigation.

The AFSVCP should be relegated to its proper place: advising CWs about their role in the process, educating them about the military justice system and the host of benefits the United States has authorized, and referring them to JAJD when they become suspected of misconduct or face adverse action so that we can protect their rights, just like we would for any Airman authorized to receive the benefit of our counsel. Denying Appellant's petition is the first step in restoring sanity and turning the tide of injustice that has washed over the judiciary in only a short period of time.

B. The AFSVCP has prejudiced the rights of the accused in courts-martial worldwide, and it will further subvert the course of justice over time.

As announced in the Air Force TJAG online news service (ONS) dated 9 Jan 13, and trumpeted in several national media outlets as well as by the Chief of Staff of the Air Force (CSAF) in his testimony before Congress two weeks later, the AFSVCP officially launched on 28 Jan 13. Subsequently, the ONS dated 27 Feb 13 assessed the program's inaugural month through some very rose-colored glasses. The signature piece gravely noted the SVCs were there to "protect [CWs] from questions the only purpose of which is to degrade, humiliate or intimidate." Such

an allusion to unethical conduct by defense counsel is completely unfounded. JAJD is not aware of any ethics complaints filed or pending against our personnel related to the treatment of these witnesses, whom we treat with dignity and respect as we uncover the truth. In this same ONS edition, TJAG stated SVCs had made a "profound and positive difference…without negatively impacting the rights of the accused." Contrary to what TJAG may have been told by his staff, JAJD's experience reveals a much different on-the-ground truth about the very real harm this program has wrought in short order. SVCs are slowing down the process, prejudicing the accused's access to full discovery, distracting the parties from their critical duties, throwing the serious business of trial work into a state of disarray, and turning courts into unpredictable carnivals. The following examples from only the program's inaugural month foreshadow the three-ring circuses headed the Air Force's way, and perhaps beyond, if Appellant's request is granted.

US v. Summerfield, a GCM convened at Peterson AFB on 26 Feb 13, illustrates the wide-ranging wreckage the SVC program can cause to the fair and effective administration of justice as it spawns unnecessary and time-consuming trials within trials that have nothing to do with the guilt or innocence of the accused. The judge in this case granted the SVC standing. The CW did not appear for any hearings but the SVC was present for the entire

trial, including closed sessions. The SVC was asked by the judge to address the court several times from the gallery, lending the proceedings a talk show atmosphere. One such instance was to invoke the spousal privilege for a witness who had taken the stand repeatedly. More concerning, during a 10 minute recess while the CW was still testifying and in the middle of cross-examination (she became flustered when confronted with an email from her government account that she had just denied ever sending), the trial counsel, assistant trial counsel, and special victims' counsel together met with the CW in the trial counsel's office, consoled the witness, asked her questions about the matter she was just cross-examined about, and then developed her redirect. The military judge denied any relief when the defense counsel found out about this improper contact and even allowed the attorney-client privilege to be invoked to prevent cross-examination of the matters discussed between the special victims' counsel and the CW during the break. Fortunately for the client and for justice, the CW's factual deviation about her email (the defense was able to find the person who the CW claimed had sent the email from her account) resulted in an acquittal when the members repudiated the CW's testimony after deliberating a mere 25 minutes.

In US v. Barker, a special court-martial convened at Nellis AFB on 6 Feb 13, an SVC moved for limited participant standing.

The defense moved to deny standing and the judge granted the oral motion. The case was continued yet the judge indicated he was going to reconsider his MRE 412 ruling and allow the SVC to speak on behalf of the CW, and there is an appearance the judge could have been influenced by the subject petition for extraordinary relief. Critically, the SVC did not start making requests or filing pleadings until the day of trial, and this type of last-minute chaos invites delay and causes unnecessary distractions from substantive matters, most notably our clients' due process rights.

In US v. Davis, a general court-marital convened at JBSA-Lackland on 28 Jan 13, the SVC requested to attend the defense interview of the CW. During the interview, the defense counsel asked the CW questions regarding victim impact evidence, to which the witness had a very minimal response. The SVC then interrupted the interview, reminding the CW of what they had previously discussed. The CW maintained that she had suffered little to no impact. The SVC then requested a break. Upon returning to the interview, the CW said she wanted to supplement her response to the question on victim impact and then provided a lengthy response. This caused the defense counsel to ask what prompted the drastic change. The SVC then disclosed that they had discussed what she should say in response to that question. After the interview concluded, the defense added the SVC to the

witness list, but the issue never became ripe because the accused was acquitted of the relevant charge. It is evident SVCs are stepping outside their role of advisor to one of coaching witnesses.

In US v. Soto, another general court-martial convened at JBSA-Lackland on 28 Jan 13, the SVC requested to attend the defense interview. The defense agreed with the SVC's attendance as long as the SVC agreed he wouldn't disclose any information obtained during the interview, similar to the restriction placed on victim advocates. He refused, indicating that he would disclose anything that he thought would help his client to the trial counsel or anyone else. The defense counsel then refused to conduct the interview and filed a motion for appropriate relief requesting that either the SVC not be allowed to attend or that he be precluded from disclosing the details. The judge denied the request. Due to the SVC's attendance, the defense counsel was forced to refrain from discussing several matters previously planned to be discussed with the CW in order to protect the defense's trial strategy from disclosure to trial counsel by the SVC. There should be no doubt in anyone's mind that with this type of SVC behavior, the program had morphed into the right hand of the prosecution in only its first official day of existence.

US v. O'Connor, a general court-martial convened at Grand Forks AFB on 25 Feb 13, involved an officer charged with aggravated sexual assault and fraternization. During a pretrial interview with the CW, the SVC aided the witness on how to respond to the defense counsel's questions and, at one point, held up his hand and said the CW would not answer any more questions despite a grant of immunity and order to testify the SVC had requested. During an Article 39(a) session on the matter, the judge made it clear the case would not go forward unless the CW consented to be interviewed. The CW was ultimately interviewed, but the SVC's antics caused the trial to be delayed by two full days. Once motions began, the SVC was "heard" at the MRE 412 and 513 motions hearing from the witness box about the CW's privacy in a case where OSI obtained the accused's mental health records, summarized them in the Report of Investigation, and attached them as exhibits. The judge ultimately ordered the release of the CW's mental health records, and her order said that the trial counsel could "show" the CW her mental health records. The trial counsel took this to mean they could make a copy for the CW to keep and in doing so, copied mental health records of the accused (different from what OSI had already improperly disclosed) and gave those to the CW, along with her own mental health records. A motion for

mistrial followed, but was denied. An additional day was spent on the record dealing with the mistrial motion.

Finally, trial began. The defense counsel made a motion to exclude the SVC from the gallery, which was denied. The SVC then filed a motion to have the judge reconsider her ruling even though she had denied the defense motion. The judge emphasized that the SVC had ethical obligations to follow and that she expected every attorney to exhibit integrity and follow the rules. The government's theory of the case was substantial incapacitation; the CW claimed she was drinking and couldn't remember being assaulted. As such, much of her testimony centered on the things she could remember versus the things she couldn't. The defense called witness A, who testified that the CW was in his room at one point in the night. The CW had previously testified she didn't remember anything, including being in witness A's room. After the witness testified, the defense rested. The government provided rebuttal witnesses and then rested again. The SVC then went to senior trial counsel and said the CW "now remembers being in witness A's room. She says that witness A grabbed her butt and said 'you deserved what happened.'" This statement had never come up in any interviews, at the Article 32, or at trial; witness A had just testified and now the CW suddenly recovered her memory. The CW wasn't present in the courtroom, so it is probable the SVC told her about the

testimony. The senior trial counsel asked when the SVC found out this information and the SVC said he knew before trial. This complete reversal came out after witness A testified and both parties had rested. Fortunately for the client, the CW's inconsistent testimony resulted in a not guilty verdict for sexual assault despite the SVC's best efforts.

In US v. Schwartz, a general court-martial convened at the Presidio of Monterey, the defense expended valuable time to crafting a motion to address why both the CW and her attorney should be excluded from the courtroom during findings and why the CW does not have standing to contest a ruling under MRE 615. The judge granted the defense's MRE 615 motion to exclude the CW and SVC. However, after the SVC petitioned for reconsideration and invoked the possibility of an appeal and stay in the proceedings, the judge requested briefs from trial and defense counsel on the issue, causing a delay. Additionally, the SVC was present for a pretrial interview and advised her client not to answer defense questions about the CW's history of past blackouts, even though that information is clearly discoverable, material, and relevant.

In US v. Jenkins, an Article 32 hearing was held at Aviano Air Base on 30 Jan 13. The SVC was present during defense counsel's interview of the CW and also attended the Article 32 hearing. At the conclusion of the CW's testimony, the

Investigating Officer (IO) took a break to finish summarizing the CW's testimony. The IO then had the CW review the summary. Without officially making an appearance, the SVC went straight to the IO and informed him that several changes had to be made to the summary. The IO made the changes, which were never announced to either the defense counsel or the trial counsel and which were only discovered after the fact. SVCs are doing more than protecting rights—they are shaping evidence, and that overreach is unacceptable.

US v. Jones involved another Article 32 hearing held at Aviano Air Base the following day, 31 Jan 13. Due to an SVC's schedule, the defense counsel was unable to interview a fact witness until two days before the hearing. (This particular fact witness is a CW in another sexual assault case that occurred on the same night and in the same room as the incident alleged against Amn Jones.) As a result of the delayed interview, the defense counsel had to make last-minute adjustments to various cross-examinations that had already been prepared. Ultimately, the SVC's refusal to allow her client to be interviewed prior to two days before the hearing did not result in a delay, but it certainly impacted the defense's preparation and it is clear such blocking tactics are going to have a profound impact as SVC delays become the rule.

Another case at the Article 32 stage, US v. White at Travis AFB, demonstrates how quickly the SVC mission has crept into the pretrial process. In response to a discovery request made to the government, the SVC detailed to assist the CW injected herself into the proceedings and filed a written objection to the IO regarding defense counsel's request for the CW's medical and mental health records. It is not unreasonable to believe SVCs will next demand to be part of charging decisions and to even be consulted on investigative steps. The AFSVCP has already bled into areas outside of its charter and there is no telling where SVCs will next venture or who will have the courage to heed the defense's warnings about this unchecked program.

In a case at Patrick AFB where the investigation is still pending, JAJD's worst nightmare about the denial of defense services is becoming reality. A CW was read her rights under Article 31 for misconduct directly related to the sexual assault allegation. She obtained the assistance of an area defense counsel (ADC), who requested immunity on her behalf. After the launch of the SVC program, the CW elected to also have an SVC detailed to assist her because the government was still prosecuting the male accused. The strategic interests and experience levels between the ADC and the SVC are vastly different, and JAJD has tremendous concerns in this case and

others involving suspected CW misconduct that clients risk following the legal advice of SVCs who know absolutely nothing about defending clients and who wish only to assist the prosecution in sexual assault cases. As a result, these CWs greatly risk suffering adverse consequences. SVCs are not defenders and they should never have been permitted to practice in JAJD's area of expertise.

Finally and most important, the accused in the case at bar, A1C Daniels, may be forced to wait many more months to get to trial if the SVC is given license to interfere further with his right to a speedy and fair trial. A1C Daniels' day in court had already been delayed by several weeks due to the inability of trial counsel to provide discovery in the possession of OSI, and JAJD has every reason to believe further delays are on the horizon if Appellant is successful. We have been given a glimpse into the future of what the military justice system will look like in the Air Force and beyond if CWs and their SVCs are given free rein to act as third parties in courts-martial, and it is a charred landscape littered with the remnants of the accused's constitutional rights. It is a future that does not have to be, but unless this Honorable Court takes a stand to stop it, this inversion of justice will become the new normal.

C. The AFSVCP is the latest and boldest step in the continuing erosion of the constitutional rights of America's Airmen.

When considering the full context the AFSVCP, it is first necessary to pause and question how the actions and statements of senior Air Force officials, to include CSAF and TJAG, will impact this petition if it is returned to AFCCA for further adjudication. There is at the very least the appearance TJAG is overly invested in the success this program and that A1C Daniels' constitutional rights will suffer as a result.

For example, the ample resources of the Air Force Judge Advocate General's School (AFJAGS) have been brought to bear to represent Appellant while Appellee, who ruled against her, received just one O-4 as his counsel. AFJAGS is supposed to be the neutral center for education and training of the entire Air Force JAG Corps, and it should not take an advocacy role in any pending trial by court-martial, yet the AFJAGS Commandant himself is acting as "Chief, Appellate Special Victims' Counsel" on Appellant's brief. Like the AFSVCP itself, AFJAGS is working at the behest of TJAG, who personally certified this appeal and then detailed Appellee a lone David to face his platoon of Goliaths.

If this Honorable Court were to find AFCCA possessed jurisdiction, it would not be appropriate to remand because to do so would be to place the issue with a court whose judges are administratively supervised by TJAG under Article 6, UCMJ, and

subject to his evaluation on their performance reports. It may be that the judges will be impartial and independently analyze the merits of the appeal, but in the face of the many public statements TJAG has made about the program and his perceived need for it to succeed, the pressure to side with the program is palpable even if it is not directly stated.

As noted in the previous section of this brief, TJAG opined in the 27 Feb 13 ONS that SVCs had made a "profound and positive difference…without negatively impacting the rights of the accused." After AFCCA issued its ruling on Appellant's petition, TJAG warned in the 10 Apr 13 ONS that Congress would take matters into its own hands if the military could not adequately address the problem of sexual assault. He then went on to say, "Earlier this year we implemented a significant change in how we respond to sexual assault allegations with the [AFSVCP]…we have had over 250 requests for representation and seen tremendous, positive impacts in the lives of victims…But SVCs will not be successful in a vacuum…they must work in concert with a wide range of internal and external stakeholders to address this threat to good order and discipline within the Air Force - and that includes every single one of us."

It is clear TJAG wants this program to succeed, that he believes it will serve as an important feature in courts-martial, and that the SVCs are there to protect victims from

"degrading questions." This implies that the constitutional obligations of defense counsel are to be minimized, and that the prosecution and military judges are not fully capable of doing their duties. One of the issues before AFCCA was whether the military judge's ruling regarding the right to an impartial judiciary, or the appearance thereof, would be eroded if the military judge were to have permitted the SVC to argue points of law in a case where the interests of the CW and the government were sufficiently aligned. TJAG's statements about the AFSVCP in concert with his detailing actions related to this petition raise legitimate concerns about the appearance of unlawful command influence (UCI).

A1C Daniels has had to face the full weight of the United States, to include OSI investigators, senior trial counsel, assistant trial counsel, the legal office staff, the Number Air Force legal office staff, the MAJCOM legal office staff, a team of appellate counsel from AFJAGS, the SVC, the SARC, a victim advocate, and now TJAG, all in an environment charged with political pressures that appear immune to fact. We can only brace ourselves for what additional changes are headed our way and the unintended consequences that will follow. The AFSVCP, however, is only the latest iteration of the slow but steady dissolution of our Airmen's rights, which began in earnest in only the last decade.

As this Honorable Court is well aware, the Code has been amended numerous times in recent years in what appears to be the result of a political effort to make convictions easier to obtain in a manner that would offend our Founding Fathers. Rape, as defined by Article 120, UCMJ, prior to 1 Oct 2007 was clearly understood by trial practitioners and well-developed by case law. The wholesale changes enacted since then have thrown the military justice system into a state of turmoil and have done nothing to "establish justice." On top of changes to the law, the Air Force at the same time completely restructured the well-rooted balance of our military justice system by dismantling the judicial circuits that were the envy of our sister services. Circuit defense counsel, now known as senior defense counsel, in particular were tasked with additional administrative responsibilities that detracted from their in-court representation of clients. Similarly, chief circuit defense counsel, today called chief senior defense counsel, were reduced from five down to only three positions for worldwide coverage. These concurrent changes, however, were only the tip of the iceberg.

Over the past few years, the prevalence of sexual assault in the military became vastly overinflated, culminating in the latest unsubstantiated annual figure of 26,000 offenses becoming "fact." Congress became energized as a result of the misplaced

reliance on these numbers, which in turn put senior military leaders in a defensive position to display they were doing everything within their power to stop all sexual assaults, real or imagined. UCI is the mortal enemy of military justice and it is an easy line to cross. CSAF, SECDEF, and POTUS have all made public statements that risk veering into the realm of UCI, and JAJD is unaware of any such remarks being tempered with the importance of looking at the facts of each case individually, the right to a fair trial, and the presumption of innocence. There is a very real danger that commanders at every level will be influenced to make decisions divorced from fact. For example, the Air Force routinely takes cases to trial despite Article 32, UCMJ, investigating officer recommendations to the contrary. The Catch-22 that results is that more cases without merit bring about a greater number of acquittals, which in turn makes it appear the Air Force cannot properly prosecute cases, which leads to more pressure to take any accusation, no matter how lacking in credible evidence, to court. Building the AFSVCP on top of this imbalanced publicity campaign greatly increases the risk of UCI seeping into the deliberative process.

The AFSVCP is also part of the larger, ill-conceived effort to incentivize victimhood, which in turn harms real victims of crime. Rather than fostering an environment that protects victims of sexual assault, the Air Force's approach to the issue

has created powerful incentives for individuals who consented to sexual activity to later claim to have been victims. Subordinates who use sex to advance their careers and get caught can now easily claim they felt compelled to participate in trysts. Airmen in technical training who violate restrictions against drinking alcohol can now say they don't remember sex to escape disciplinary action. Troops who are unsure of what they did the night before are convinced to believe that because they cannot remember, they must have been raped without any factual basis. Airmen who do not like being stationed at a particular base need only claim they were assaulted to be moved, and they may then join one of several lawsuits aimed at the world's deepest pockets, the Department of Defense. This is on top of the longstanding motives of regret, revenge, and infidelity which are oftentimes present in sexual assault cases. Overall, these incentives both increase the number of false claims and hurt real victims.

Compounding the problem even further, the Air Force has fallen behind the Army, Navy, and Marine Corps' defense services. We are the only service without a Defense Counsel Assistance Program (DCAP), and JAJD is the only division within the Air Force Judiciary that does not have a senior civilian position, who would be perfectly suited for the important DCAP function. Furthermore, JAJD does not have the proper number of

O-5 chief senior defense counsel positions to lead and mentor defense attorneys and paralegals in the field, and the division needs two more of these authorizations to pull even with the other services in that regard. Finally, although our 19 senior defense counsel positions are supposed to be pinned-on majors, nearly half of them are still captains. JAJD has made these deficiencies known without success and we are now at a point where the Air Force's defense capabilities are in danger of being permanently degraded. JAJD, which is tasked with defending the constitutional rights of America's Airmen, has been relegated to the role of neglected red-headed stepchild. Giving the AFSVCP and its new legion of SVCs standing in court would irrevocably tip the scales in favor of the prosecution. This Honorable Court is the only bulwark against preventing such a colossal adverse change to our military justice system.

It is not too late to close this Pandora's Box.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This amicus brief complies with the type-volume limitation of Rule 26(d) because it contains 5,640 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been prepared using Microsoft Word Version 2010 with 12-point Courier New font.

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CERTIFICATE OF FILING AND SERVICE

I certify that copies of the foregoing was sent via email to the Court, Appellant's counsel, Judge Kastenberg, Appellee's Counsel, the Appellate Defense Division, the Appellate Government Division, counsel for the National Crime Victim Law Institute, and counsel for Protect Our Defenders on 23 May 2013.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ARMED FORCES

Airman First Class (E-3) **LRM,** USAF Appellant, v. Lieutenant Colonel (O-5) **JOSHUA L. KASTENBERG,** USAF Appellee, Airman First Class (E-3) **NICHOLAS E. DANIELS,** USAF Real Party in Interest	BRIEF ON BEHALF OF AMICUS CURIAE UNITED STATES MARINE CORPS DEFENSE SERVICES ORGANIZATION Crim.App. Dkt.No. 13-5006/AF USCA Dkt. No. 2013-05

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS.

II.

WHETHER THE MILITARY JUDGE EERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION.

III.

WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS.

STATEMENT OF STATUTORY JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to Article 67(a)(2), UCMJ. The Judge Advocate General of the Air Force has certified three issues (above) to this court for review, after the Air Force Court of Criminal Appeals found it lacked jurisdiction to hear (or grant) an extraordinary writ from a non-party complaining witness of the court-martial below.

STATEMENT OF THE CASE

The Real Party in Interest Appellee is charged with two specifications of a violation of Article 120, UCMJ, preferred against him on 16 October 2012 and thereafter referred to trial by General Court-Martial on 28 November 2012. His accuser is Airman First Class (A1C) LRM, the complaining witness. A1C LRM was appointed a Special Victims' Counsel, pursuant to the rules propagated by the Air Force's new Special Victims' Counsel ("SVC") program, launched in January 2013. This program detailed counsel to represent the interests of alleged victims of sexual assault within the United States Air Force.

In accordance with the program, Captain Seth Dilworth, 27 SOW/JA, Cannon AFB, New Mexico, was detailed as LRM's SVC. Captain Dilworth provided notice of representation on 23 January 2013 to the trial court via email. The military judge, the appellee here (LtCol Kastenberg) requested that the SVC provide

formal notice of his appearance along with any information supporting his detailing. Capt Dilworth provided formal notice on 24 January 2013, including a request to the military judge ‘to direct the trial counsel to provide him with informational copies of all motions and responses to motions where A1C [LRM] has an interest[.]’ (A.F.C.C.A. slip Op., at 1). Captain Dilworth’s request explicitly stated that A1C LRM did not have the status of a “party” as defined by Rule for Courts-Martial (R.C.M.) 103. The SVC’s request was opposed in part by the trial counsel and completely by defense counsel.

The accused was arraigned on 29 January 2013. Prior to the arraignment, defense counsel submitted a motion under Mil. R. Evid. 412 and Mil. R. Evid. 513 seeking to admit evidence involving A1C LRM. The trial counsel provided courtesy copies of the motion under Mil. R. Evid. 412 to the SVC, but did not provide copies of the motion under Mil. R. Evid. 513, pending approval from the military judge. At the hearing, the military judge took up the issue of Capt. Dilworth’s representation of A1C LRM (ROT, at 13). During oral argument, Capt. Dilworth initially indicated that he did not need to be heard on any pretrial motions under Mil. R. Evid. 412 (ROT, at 15), but eventually indicated to the court that his role would be to protect LRM’s privacy interests and asked the trial court to allow him to reserve the right to represent her under Mil. R.

Evid. 412 should the need arise. (ROT, at 61). The military judge treated his motion to reserve the right to be heard later under Mil. R. Evid. 412 as “a motion in fact,” that is, as a motion to represent A1C LRM before the court at any MRE 412 hearings, by making arguments on her behalf. (ROT, at 62). The military judge held that the complaining witness did not have a right to have her own counsel appear before the court and make arguments on her behalf, or otherwise appear and speak on behalf of A1C LRM in either MRE 412 or 513 hearings. The military judge ordered the case continued until 18 March 2013 because of failure by the government to provide timely discovery to the defense.

In the meantime, Capt Dilworth filed a motion to reconsider the military judge’s ruling. The military judge reconsidered the motion, but denied relief on 9 February 2013. Airman First Class LRM filed a petition for extraordinary relief in the form of a writ of mandamus before the Air Force Court of Criminal Appeals on 14 February 2013. That cause was heard at oral argument on 11 March 2013 and the AFCCA issued an opinion on 2 April 2013, holding that there was no basis for granting standing to a third-party complaining witness, and thus that the court did not have jurisdiction to hear the writ appeal of a non-party to a court-martial.

No other actions in this case have been filed or are pending in this or any other court.

SUMMARY OF THE ARGUMENT

I. While there is jurisdiction of this Court to review the decision of the Air Force Court of Criminal Appeals pursuant to the certification by the Judge Advocate General under Article 67, UCMJ, this Court has no authority, as an Article I court of specific and limited jurisdiction, to confer party standing on a non-party complaining witness. To do so would require rewriting portions of the Manual for Courts-Martial, contradicting existing legislation and precedent, and significantly changing the entire court-martial process for accused servicemembers.

II. Neither the complaining witness, nor any complainant, has a statutory right, regulatory right, nor a Constitutional right to have private counsel participate in the criminal justice process to vindicate their personal interests. The criminal process necessarily invades the privacy of everyone – members are asked sensitive questions, witnesses for both sides have their character called into question, and both the accused and complaining witness actions in connection with the alleged crime are dissected in the well of the court room for all to see. There is no “right” in the legal history of

western civilization to have a government-funded private counsel, in addition to the prosecutor, who stands in place for the interests of both the state, the potential victim, and even the accused. The prosecutor job is to see that justice is done; a private counsel's is to represent their client.

III. This Court can only issue a mandamus when there has been a "judicial usurpation of power", not when there is a difference of opinion as to what the trial judge has done. The trial judge in this case not only acted wisely in his evaluation of the law, he acted well within his discretion as the military trial judge to ensure the fairness of the proceedings. Even if there were standing or jurisdiction, there is nothing about that decision that was a usurpation of power by the trial judge.

ARGUMENT

I. There is no jurisdiction for this Court to entertain a non-party's writ.

"In particular, this Court, and courts-martial in general, being creatures of Congress created under the Article I power to regulate the armed forces, must exercise their jurisdiction in strict compliance with authorizing statutes." Center for Constitutional Rights et al. v. United States, 72 M.J. 126, 131 (C.A.A.F. 2013). The Uniform Code of Military Justice governs

the conduct of courts-martial in the armed services. This is pursuant to Congress' Constitutional mandate under Article I to "regulate the armed forces." There can be no question that A1C LRM is not a "party" to the proceedings, as that term is used in the Uniform Code of Military Justice, or the Manual for Courts-Martial. Under the UCMJ, the parties to a court-martial are the accused(s) – in multiple co-accused cases - and the government. The word party is used 15 times in the Code (not including the punitive articles). Twice it is used to refer to the United States as a "party" to a treaty (see 10 USC §802(a)(2) and (a)(3)). Once it is used to refer to the "political party" of a judge of this Court (Article 142). In every other instance, the use of the word refers to a participant in the court-martial or court of inquiry, whether it is the right of the judge to grant a continuance to "any party" under Article 40, the three references to the "party" who may take a deposition under Article 49, or the admissibility of records of prior Courts of Inquiry "if the accused was a party before the court of inquiry" under Article 50. There is no question that the only "parties" to a court-martial are the litigants in the court-martial.

The starting point for interpreting any statute is "the language of the statute" itself." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) (quoting Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992)). "[W]here the

statutory language provides a clear answer," the inquiry "ends there as well." Id. "One of the basic canons of statutory interpretation is that statutes should be interpreted to give meaning to each word." Lingle v. PSB Bancorp, Inc., 123 F. App'x 496, 502 (3d Cir. 2005)(citing United States v. Menasche, 348 U.S. 528, 538-39 (1955)); see also TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)(noting that a statute ought "'to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'" (quoting Duncan v. Walker, 533 U.S. 167 (2001))). There is no construction of 'party' in court-martial parlance that allows a complaining witness to insert their own counsel into criminal justice adjudication.

Additionally, the Manual for Courts-Martial is explicit about who is a "party" and who is not. R.C.M. 103 is clear that a

> Party, in the context of parties to a court-martial, means:
> (A) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial in question; and
> (B) Any trial or assistant trial counsel representing the United States, and agents of the trial counsel when acting on behalf of the trial counsel with respect to the court-martial in question.

R.C.M. 103(16), Manual for Courts-Martial (2012 ed.).

No witness, whether the complaining witness, or other fact or character witness, is entitled or has a "right" to party status before a court-martial. That is simply not how the system is set up and there is no way to construe the plain language of either the statute or the Manual to find the complaining witness to be a 'party' to the court-martial. Thus, the question comes down to whether a third party can assert some other right to have a writ heard through either the intermediate service courts or before this Court.

This Court has only had occasion to entertain a very small number of writs by non-parties. In ABC, Inc. v. Powell, this Court found that a third party, namely the media, could assert the Constitutional right to a public trial. See ABC, Inc. v. Powell, 47 M.J. 363 (C.A.A.F. 1997). This result was recently clarified in the wake of the PFC Bradley Manning Wikileaks case, where this Court held that "Powell was decided before Goldsmith clarified our understanding of the limits of our authority under the All Writs Act[.]" Center for Constitutional Rights et al. v. United States, 72 M.J. 126, 134 (C.A.A.F. 2013). The Supreme Court in Clinton v. Goldsmith confined this Court's jurisdiction to acting "only with respect to the findings and sentence as approved by the convening authority" and/or with respect to the CCAs actions on the same. Clinton v. Goldsmith, 526 U.S. 529, 533 (1999). As important in Powell was that the accused in that

case – a party to the proceedings - also asserted *his* Constitutional right to a public hearing co-extensive with the media's invocation of the right.

None of those facts are present in the instant case. A1C LRM is not a party to the court—martial of A1C Daniels – she is a witness, albeit the complaining witness, but nothing more – and nothing less. She may or may not consult an attorney of her own choosing, or even one detailed to her, but even in those instances, this would not elevate her to party status nor give her counsel the right to demand copies of motions, or the right to appear before the court and argue substantively on matters involving the parties.[1] In short, there is no jurisdiction for this court to entertain the writ and the court below, and the trial judge, were absolutely correct in their assessment of the law applied to the facts of this case.

II. <u>There is no "right" to have non-party counsel insert him/herself into the court-martial process.</u>

It has been argued below by both the government and political issue advocacy groups on behalf of LRM who by a lash-up of statutes, the rather vague Constitutional "right to

[1] There are circumstances where a witness may have need of counsel, either their own or detailed, if their testimony might implicate their own self-incrimination rights, but there is no circumstance in which a non-party's counsel would be making an appearance before the court.

privacy," and the Military Rules of Evidence somehow cohere to create both standing as a party to the court, but limited standing for the purpose of arguing and presenting on motions related to Mil. R. Evid. 412 and 513 and the Rules' reference to the "opportunity to be heard" before the court-martial by a complainant on those matters. Mil. R. Evid. 412. Even the language of this rule makes clear that there is no right for the alleged victim to have their own counsel insert themselves into the process. The "procedure to determine admissibility" of matters under Rule 412 specifically names the alleged victim as a "witness" in the case: "At this hearing, the **parties** may call witnesses, *including the alleged victim*…" There is simply no way in the English language to transport the "alleged victim" from the 'witness' column into the 'party' column, even if one is trying to rely upon this section, where the language states only that LRM "must be afforded a reasonable opportunity to attend and be heard." Mil. R. Evid. 412(c)(2). The plain language makes it clear only that the trial counsel – ad the military judge – have an obligation to ensure that the alleged victim has a "reasonable opportunity" to both appear and "be heard" on the question of what evidence from her past may be admitted. The Rule also (perhaps obviously) contemplates that the opportunity be "reasonable," not absolute. Trial practitioners who have held courts in deployed environments, such as Iraq, Afghanistan, or

Guam, to name just a few, are well-aware of the limits even on the accused's Constitutional right to Confrontation in these locations. The very nature of court-martial practice is that some of these realities will occasionally invade on even the most important rights in the trial process, including even the right to counsel. See, e.g., U.S. v. Garcia, 68 M.J. 561 (C.G.C.C.A. 2009)("We find good cause in the form of military exigency for the severing of the attorney-client relationship in this case.")

The military judge below conducted an exhaustive and thorough review of the relevant statutes, including both the Air Force's own rules in promulgating the SVC program (which also note there is no party status to LRM or any complaining witness), the Rules of Evidence, and even the Crime Victims' Rights Act, 18 U.S.C. § 3771 (2009) (CVRA), which has been relied upon almost exclusively by appellee in her briefs below. Notwithstanding, the military judge analyzed the statutes and correctly found, as did the Air Force Court of Criminal Appeals, that the CVRA simply does not apply to courts-martial and no reasonable reading of that statute can make it apply to courts-martial. Its remedies and enforcement mechanisms do not even exist in courts-martial.

> We also note that, even under the CVRA, A1C LRM would not be entitled to the relief she seeks from this court. *See* 18 U.S.C. §

> 3771(a)(2) and (4) (A crime victim has the right to receive reasonable notice and "to be reasonably heard at any *public proceeding . . .* involving the defendant's release, plea, sentencing, or any parole proceeding." (Emphasis added.)).

Slip Op., at 8.

More important, even, is that this Court has already decided this issue adversely to the appellee. This Court has been called upon to apply the predecessor statute to the CVRA to military courts-martial and specifically declined to do so. In United States v. Spann, 51 M.J. 89 (C.A.A.F. 1999), this Court undertook an analysis of whether 42 U.S.C. §10606 applied to courts-martial. That statute specifically granted (among other things) crime victims "the right to 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." 42 U.S.C. §10606(b)(4). The military judge applied the statute to Spann's court-martial in denying a request to sequester the alleged victim and her mother. Spann challenged the military judge's decision and this Court agreed, noting that

> [i]f Government counsel or others involved in the administration of military justice believe that such rules should apply in courts-martial, the appropriate route is not through litigation involving statutes outside the UCMJ that are subject to interpretative uncertainties, but through amendments to the Manual for Courts-Martial

> or, if necessary, though legislative changes.

Spann, 51 M.J., at 93.

As a final matter, Rules 412 and 513 are valid and worthy legislative enactments that attempt to strike the balance between the oftentimes uncomfortable probing into an accuser's past sexual history, and the right of an accused to present a defense, but nothing in those enactments can be read to fundamentally alter the essence of a criminal trial, which is, in Anglo-American jurisprudence, the process and venue by and at which the state asserts its right to adjudicate allegations of wrongdoing by one of its citizens. There is not, nor has there ever been, a private right of "appearance" represented by counsel, for an accuser, and it is fundamentally inconsonant with the traditions and values of western jurisprudence. "Although these cases arose in a somewhat different context, they demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).

III. The standards for a writ of mandamus have not been met.

This court has repeatedly held that in order for a writ of mandamus to issue, "the judicial decision must amount to more

than even ‘gross error’; it must amount ‘to a judicial “usurpation of power”’ or be ‘characteristic of an erroneous practice which is likely to recur.’” United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983)(internal citations omitted). See also, United States v. Denedo, 66 M.J. 114, 126 (C.A.A.F. 2008)(“The petitioner must establish a clear and indisputable right to the requested relief.”). In this case, the military judge not only considered the issue, he allowed the non-party counsel to petition for reconsideration and again ruled, even noting that if he were wrong on the matter, he was exercising his discretion as the military judge in order to ensure the appearance of fairness in the court-martial process. Thus, not only was the military judge correct on the law regarding the jurisdictional issue, he made it clear that he would even consider the possibility that such a right existed, but that he would not and could not in good conscience allow the accuser to have her own private counsel in the court-martial process.

None of this even addresses the violation all of this brings upon the rights of the accused in the court-martial process. As explained by the Air Force Trial Defense Division in their hard hitting amicus brief below, the SVC program already “has prejudiced the rights of the accused in courts-martial worldwide, and it will further subvert the course of justice over time.” Brief of Air Force TDS at p. 5. As

examples, the SVC rules do not address the obligations of the SVC to the court and what would happen if the SVC comes into possession of exculpatory evidence (*Brady* material) that the prosecutor doesn't have. What is the SVC's obligation to the court, the trial counsel, and the accused, when the alleged victim recants? Or states that she doesn't actually remember? Or reveals a relationship that existed at the time that would constitute a motive to fabricate?

CONCLUSION

Whatever the political benefits of the SVC program, it cannot usurp the judicial process of this country to serve a misguided and agenda-driven goal and grant private non-parties the right to intervene with their own counsel in the court-martial process. There is no jurisdiction for this Court to even consider the merits of the positions without ignoring or rewriting several statutes and executive orders and contravening its own case law, as well as the standards of review applicable to mandamus issuance.

It is worth adding as a final point that in the hue and cry surrounding sexual assault in the military, it is an unfortunate aspect of the historical synthesis that judicial restraint in the face of heated, and vociferous, calls for judicial activism

do not gain near the notoriety or significance that they deserve. Judicial restraint is what is required here.

WHEREFORE, the amicus respectfully requests that this Court affirm the military judge's ruling and affirm the ruling of the court below.

John G. Baker*
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Chief Defense Counsel
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* Pursuant to Rule 13, I will move to become a member of the Bar of this Court within 30 days of this filing

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered electronically to the Court, Appellant's counsel, Judge Kastenberg, Appellee's Counsel, the Appellate Defense Division, the Appellate Government Division, and counsel for the National Crime Victim Law Institute on 23 May 13.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Airman First Class (E-3) L.R.M., USAF, Appellant, v. Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, Military Judge, Appellee, & Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, Real Party in Interest	BRIEF OF *AMICUS CURIAE* OF APPELLATE DEFENSE DIVISION FOR THE NAVY-MARINE CORPS IN OPPOSITION TO L.R.M.'S PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS Crim. App. No. 2013-05 USCA Dkt. No. 13-5006/AF

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I. This Court lacks jurisdiction over Appellant's mandamus.....2

A. A courts-martial is a court of exceedingly narrow temporal jurisdiction whose sole purpose is to adjudicate violations of the Uniform Code of Military Justice. Here, the Appellant seeks review and enforcement of a third party civil/administrative claim. This Court has no jurisdiction to decide this matter. 3

B. In addition to this Court's lack of jurisdiction to decide this matter, a mandamus is not proper to decide the trial court's issue. 6

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ISSUES PRESENTED AND STATEMENTS OF STATUTORY JURISDICTION/CASE/FACTS

Amicus adopts the Issues Presented and Statements as filed by Respondent. This brief is submitted pursuant to this Court's Rule

INTRODUCTION

A courts-martial is a unique and incomparable forum of justice to any other federal district court proceeding. By design, the power and authority over issues, persons, and remedies of a court-martial are exceedingly limited when compared to the federal courts of general jurisdiction. Further, a court-martial's power and authority, even when exercised over proper issues and parties, is temporally limited in existence. These substantive differences are distinct when compared to federal courts but serves the purpose of good order and discipline as intended.

Here, the Air Force Special Victim's Counsel ("SVC") for Appellant (and the National Crime Victim Law Institute ("NCVLI")[1], *Amicus Curiae*, in support thereof) seeks an

[1] Of note, the same *Amicus Curiae* party in support of the filings in the underlying case also appear in their heavily cited *Kenna v. U.S. District Court for C.D.Cal.*, 435 F.3d 1011 (2006). *See* Docket #218, MOTION of Amicus Curiae, The National Crime Victim Law Institute for Leave to Participate as Amicus Curiae in support of Victim's Motion for Disclosure of Presentence Report, *United States v. Leichner*, No. 03-00568-cr (9th Cir. Apr. 25, 2006) (Appendix #1).

unprecedented alteration of the narrow courts-martial system. Moreover, Appellant *et al.*, seeks an unequalled full application of the Crime Victim's Rights Acts (CVRA) and a wholesale imputation of CVRA federal circuit case law to military courts that is simply inapplicable to the military system. Finally, the Appellant *et al.*, stretches further than their own cited cases in support of this unprecedented action and asks this Court to extend third party intervener status to crime victims to litigate motions on substantive issues related to the admission of *prima facie* evidence akin to a private prosecutor in a criminal court.

The Appellant seeks too much and this Court cannot indulge such a loose and selective patchwork application of the CVRA and relevant case law to her peculiar claim. Even beyond the military justice system, the Appellant seeks more than what has been allowed by the whole of American jurisprudence since the cessation of the private prosecutor system in favor of our current Government led system. This Court cannot be the first of the entirety of military or federal circuits to countenance a third party intervener in a criminal prosecution.

ARGUMENT

JURISDICTION

I. This Court lacks jurisdiction over Appellant's mandamus.

A. A courts-martial is a court of exceedingly narrow temporal jurisdiction whose sole purpose is to adjudicate violations of the Uniform Code of Military Justice. Here, the Appellant seeks review and enforcement of a third party civil/administrative claim. This Court has no jurisdiction to decide this matter.

> The current court-martial remains a temporary tribunal, convened by a commander to hear a specific case. It is not a part of the federal judiciary, nor is it subject to direct judicial review in that system. Instead, it is strictly a court of criminal jurisdiction, and its findings are binding on other federal courts.[2]
>
> Courts-martial are solely disciplinary, or penal, in nature. They may try only criminal cases and adjudge only criminal sentences. They have no authority to adjudge civil remedies such as the payment of damages or the collection of private debt . . . .
>
> The courts, in referring to the nature of the court-martial, often label it as a "creature of statute," a phrase that sets the appropriate tone for any discussion of court-martial jurisdiction. Practitioners working within the system of military justice must be ever cognizant that, only after a variety of jurisdictional prerequisites have been satisfied may a court-martial properly hear a case and render a valid judgment. The opportunities for jurisdictional defects are many, and the effect of any such defect is the same: the court-martial is void.[3]

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[2] David A. Schlueter, *Military Criminal Justice: Practice and Procedure* § 1-7 (8th ed. 2012) (citations omitted).

[3] *Military Criminal Justice: Practice and Procedure* § 4-2.

This narrow statutory tool of commanders stands in stark contrast to the Article III district courts of general jurisdiction.[4] It is this vital difference that confuses the parties in favor of this action.[5]

The nature of the claims contained in this mandamus, while arising from a criminal context, are civil/administrative in nature; the Appellant individually seeks enforcement of administrative[6] provisions contained within the DOD Instruction

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[4] *See* 18 U.S.C. § 1331 (1980); 18 U.S.C. § 3231 (1948).

[5] *See, e.g.*, *United States v. Quintanilla*, 56 M.J. 37, 41 (C.A.A.F. 2001) ("There are important distinctions, however, between a military judge and a federal civilian judge, aside from the absence of tenure discussed in *Weiss*, *supra*. A federal civilian judge typically has jurisdiction over all cases arising under applicable federal law, but a military judge does not exercise general jurisdiction over cases arising under the UCMJ. A military judge may exercise authority only over the specific case to which he or she has been detailed.") (citing Art. 26, UCMJ; *Weiss v. United States*, 510 U.S. 163, 172, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994)). *See also Lawrence v. McCarthy*, 344 F.3d 467, 471 (5th Cir. 2003) citing *United States v. Boudreaux*, 35 M.J. 291, 293 (C.M.A. 1992) ("Courts-martial come into existence only upon the referral of specific charges.").

[6] There is no textual support for the Appellant's, *et al.*, contention that the CVRA applies in total to the military courts. Especially considering there is a controlling DOD Directive on the matter incorporating much of the same provisions. *See* DOD Directive 1030.01, Victim and Witness Assistance, April 23, 2007. *Amicus* further reject the claim that Appellant is granted durable rights under this instruction vis-a-vis M.R.E. 412, 513 and 514. However, should this Court apply a rights theory to the DOD Instruction, it must agree that any enforcement thereof would be an action in civil or administrative realms as no other person but the accused is allowed to seek injunctive or legal remedy for infringing applications of DOD Instructions.

governing victims and witnesses.[7] While it may be counterintuitive, the Appellant's claim, though touching and concerning a court-martial, is not at its core a criminal claim (in this case, an action to determine breach and liability of the punitive articles of the UCMJ). The *res* of Appellant's action, as an individual party, is best described as seeking injunctive relief for a civil/administrative right. As a non-party[8] to the court-martial, the Appellant's claim must stand on its own merits and meet the jurisdictional requirements.[9] This claim is beyond the reach of a court-martial for even the most meritorious of civil or administrative claims, of which the claim at bar is not. While the pleadings give examples of an alleged victim filing for relief internal to a federal criminal trial, the divergent enabling jurisdictional details cannot be overlooked. As a court of general jurisdiction, the district court is fully empowered independently hear such a third party civil claim. The fact that the claim is organized

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[7] DOD Directive 1030.01 §4.4.

[8] Rules for Court-Martial Rule 103(16) (2012) (Defining court-martial parties as accused, trial and defense counsels and their agents).

[9] This is not to suggest that a proper party to the court-martial cannot advocate ideals found within the victim protection directives. In fact, the Government and court are charged with "doing all that is possible . . . without infringing on the constitutional rights of the accused" to uphold the ideals. DOD Directive 1030.01 §4.2.

administratively under the connected court-martial does not change the *res* of the claim. A claim that a court-martial cannot not answer.

The Appellant individually, and not through the trial counsel, seeks enforcement of certain provisions of the CVRA court-martial under the CVRA and the applicable DOD Directive. No matter the eventual merit of the CVRA claim, a court-martial has no authority to hear her argument as a third party. The Appellant is not alone in being denied a particular form of relief from a court-martial. For example, a court-martial may not order restitution as a proper sentence.[10] Or, by the temporal nature of the court-martial, even an accused cannot seek injunctive relief for unlawful confinement until referral of charges.

B. In addition to this Court's lack of jurisdiction to decide this matter, a mandamus *is not proper to decide the trial court's issue.*

The Service Courts have authority, as courts established by 10 U.S.C. § 866, to issue writs pursuant to 28 U.S.C. § 1651[11]:

> § 1651. Writs
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all

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[10] LtCol David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment Under Rule for Courts-Martial 1003(b)*, 52 Naval L. Rev. 1 (2005).

[11] *Dettinger v. United States*, 7 M.J. 216, 218 (C.M.A. 1979).

> writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.[12]

Although writs of mandamus to government officials, compelling them to perform ministerial functions, are almost as old as our Nation[13], the issue of such a writ to a presiding judicial officer is rare. "The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'"[14] "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy.[15] Furthermore, "the party seeking mandamus has 'the burden of showing that its right to issuance of the writ is 'clear and indisputable.'"[16] That a ruling of a trial judge is erroneous is insufficient basis for issue of the writ.

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[12] 28 U.S.C. § 1651 (2012).

[13] *See Marbury v. Madison*, 5 U.S. 137 (1803).

[14] *Will v. United States,* 389 U.S. 90, 95 (1967).

[15] *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945).

[16] *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953).

To justify issuance of mandamus, the ruling must be one that was outside the proper jurisdiction of the judge or court. "[T]he district judge's order upon the government to furnish names and addresses of witnesses to a defendant may be erroneous, a question we do not decide, but the ruling itself was within the court's jurisdiction."[17] As noted in the statute itself, a writ is only properly issued if it is "in aid of their respective jurisdictions and agreeable to the usages and principles of law."[18] The Air Force Court of Criminal Appeals has adopted this restrictive approach:

> The Supreme Court has said: The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. As we have observed, the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of "jurisdiction," the fact still remains that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."[19]

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[17] 389 U.S. at 95.

[18] 28 U.S.C. § 1651.

[19] *Schmidt v. Boone*, 59 M.J. 841, 843 (A.F. Ct. Crim. App. 2004), *rev'd. on other grounds sub nom.*, *United .States. v. Schmidt*, 60 M.J. 1 (C.A.A.F. 2004).

This petition cannot satisfy the high burden to justify such a writ. As previously discussed, the military system does not have jurisdiction over the Appellant's claim. Thus, any writ arising therefrom is not in aid of this Court's jurisdiction.

THIRD PARTY STANDING

II. If this Court should decide that there is jurisdiction over the Appellant's claim, the CVRA applies and that mandamus is the proper procedure, the Appellant is not entitled to the relief sought as a non-party intervener to the court-martial.

A. There is no such position as a third-party intervener action in federal criminal law.

The Appellant *et al.,* seeks an expansion of the rights of alleged victims in criminal courts heretofore unequalled in military or American jurisprudence.[20] In essence, the Appellant

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[20] While the arguments of Appellant and the Government have shifted and expanded through the process of litigation, looking at the record and filings as a whole, amicus' understands the Appellant and *amicus curiae* in favor of the mandamus to desire that this court establish:

1) Rights to discovery commensurate with an accused.

2) Rights to notice and service of all filings by either party.

3) A substantive right to privacy / due process right arising from M.R.E.s 412, 513, and 514.

4) The right for an SVC to represent the position of an alleged victim at her discretion before a court-martial no matter her adjudged level of competence or age.

5) Third party status for alleged victims in order to intervene in a court-martial and co-litigate with the Government hearings arising from M.R.E.s 412, 513, 514.

seeks admission to a court-martial as a third party intervener, a procedural action relegated to the civil courts. Much of this expansion is founded upon the concept that the M.R.E. rules of exclusion concerning victim-witness testimony somehow, through the blurred filter of the CVRA and other right to privacy cases, are the source of substantive rights (sometimes casted as due process rights) to be represented by an attorney in relevant hearings and testimony.[21]

While novel to this Court, this theory is not.[22] However, this theory of granting third party status is unsupportable by case law and the rules.[23] While the origin of this view cannot

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[21] *See* Government's Answer to Order to Show Cause Br. at 16; NCVLI's Proposed Brief of *Amicus Curiae* Br. at 3-18.

[22] "But if the feminist viewpoint does not demand special protection for female witnesses, it does suggest a different role for the trial judge. In the past, when witnesses were more closely identified with the party that called them, it was common to rely on that party to protect the witness from unfair cross-examination. But an examination of the realities of rape trials demonstrates that the interests of the victim-witness are not identical with the interests of the prosecutor. For this reason, it has been suggested that reform statutes **ought** to cast the exclusionary rule in the form of a privilege to refuse to disclose past sexual conduct and that the victim **ought** to have the assistance of appointed counsel to protect her interests when they conflict with the interests of the state. **Rule 412 did not incorporate these proposals; therefore, it is up to the judge to see that the rights of the victim are not sacrificed to the trial strategy of the prosecutor**." 23 Alan Wright & Kenneth W. Graham, Jr., Fed. Prac. & Proc. Evid. § 5382, *Policy of Rule 412*, (1st ed. current through December 2012) (emphasis added).

[23] "On the issue of non-party appeals, there is an important distinction between civil and criminal cases. Civil cases often

be definitively identified, at least one author on the topic points to one of the CVRA's drafter's misunderstanding of the difference between private and public prosecutors in the

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implicate the pecuniary rights of non-parties, such as the unnamed class member in *Devlin*. For instance, this court has allowed the children of a decedent to appeal from a wrongful death judgment obtained by the decedent's widow.

Criminal trials, on the other hand, place an individual citizen against the United States government. While non-parties may have an interest in aspects of the case, they do not have a tangible interest in the outcome. This distinction is evidenced by our procedural rules. The Federal Rules of Civil Procedure allow non-parties to intervene to assert their rights. The Federal Rules of Criminal Procedure contain no comparable provision. This distinction recognizes that non-parties often have a unique interest in civil cases. Because non-parties do not have a comparable unique interest in the outcome of criminal trials, we do not consider *Devlin* or *Plain* persuasive in this case . . . Congress neither explicitly nor implicitly provided in the VWPA a private right of action for victims." *United States v. Hunter*, 548 F.3d 1308, 1312-13 (10th Cir. 2008) (citations omitted). *See also United States v. Aguirre-Gonzalez*, 597 F.3d 46, 53 (1st Cir. 2010) ("[n]otwithstanding the rights reflected in the restitution statutes, crime victims are not parties to a criminal sentencing proceeding.") *See, e.g.*, *United States v. Palma*, 760 F.2d 475, 479 (3d Cir.1985) (under VWPA, "the victim . . . is not made a party to the sentencing proceeding"); *United States v. Brown*, 744 F.2d 905, 909-10 (2d Cir. 1984); *see also Ziskind*, 471 F.3d at 270. Thus, the baseline rule is that crime victims, as non-parties, may not appeal a defendant's criminal sentence. *See Hunter*, 548 F.3d at 1311; *United States v. Grundhoefer*, 916 F.2d 788, 793 (2d Cir. 1990) ("The victim as a non-party is accorded only a limited presence at a sentencing proceeding and has no right to appeal an inadequate remedy."); *United States v. Franklin*, 792 F.2d 998, 999-1000 (11th Cir. 1986) (dismissing appeal because "[a]ppellant cites no statute, including the [VWPA], and we find none, that would give us the authority to entertain an appeal by a victim . . . who was not a party to the sentencing proceeding in the district court."). *See also* 18 U.S.C. § 3742 (providing that the government and the defendant, under appropriate circumstances, may appeal a criminal sentence).

American Justice System.[24] No matter the origin, the Appellant's desires to have anything more than a factual voice in courts-martial hearings on M.R.E.s 412, 513, 514 is misplaced.[25] To allow such an entry and dual litigation against an accused would undoubtedly cast grave doubts upon the actual and perceived fairness of a court-martial.

This does not suggest that an attorney could not represent an alleged victim's factual disclosures should the victim be unable to do so herself. Furthermore, the cases cited in support of this contention are limited 1) to federal courts of

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[24] *See* Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 Duke L.J. 237, 246 n.48 (delineating and rebutting Senator Diane Feinstein's, co-author of the CVRA, unfounded perspective that she was somehow restoring rights of victims held during an era of law in United States where private prosecution was allowed. Rebutting with the fact that victims never had private prosecutorial duties in the federal system.).

[25] Much has been written on the CVRA and its application. Amicus' do not seek to fully regurgitate the scholarly work, but invite this Court to the publications to show that no court has allowed a victim as an intervener status as a co-litigant in a criminal court in order to oppose 412, 513, 514 motions. Rather, the rights enforced were right to be heard (personally), right to notice of proceedings, right to privacy in identification, qualified right to be present in courtroom, right to prevent undue delay. *See* Blondel, *supra* note 38; Fern L. Kletter, J.D., Annotation, Validity, Construction, and Application of Crime Victims' Rights Act (CVRA), 18 U.S.C. 3771, 26 A.L.R. Fed. 2d 451 (2008); Amy Baron-Evans*, Rights and Procedures Under the Crime Victims' Rights Act and New Federal Rules of Criminal Procedure*, (April 30, 2009), http://www.fd.org/docs/select-topics---rules/rights-and-procedures-under-the-crime-victims-rights-act-and-new-federal-rules-of-criminal-procedure-for-victims.pdf (Attached in Appendix 1).

general jurisdiction, and 2) to the enumerated rights to be heard at sentencing, given notice of proceedings, consult with the prosecution, to be treated fairly and respectfully (with no testimonial privilege attached to such right), to be present in courtroom (at appropriate times), and to be protected from undue delay. There is no direction in these cases that this Court should take the unprecedented step to expand them to include a right to intervention at this court-martial; the first time a court would have allowed such an option according to a survey of the cases and academia on the topic.

B. A finding that Appellant has standing, would significantly prejudice the Sixth Amendment fair trial rights of service members facing courts-martial.

Should this Court find that alleged victims have standing to assert themselves through their SVCs or other counsel in court-martial proceedings, a serious blow would be dealt to the fair trial rights of service members facing courts-martial. First, allowing an SVC to represent and assert the rights of an alleged victim at court-martial would effectively double the prosecutorial efforts against the accused. In this instant case, the military judge recognized that "the government and the SVC are at least impliedly aligned, particularly in the opposition to the use of evidence under M.R.E. 412."[26] The

[26] (Military judge's first ruling) p. 10.

alignment of interests between the prosecution and the alleged victim occurs routinely in the prosecution of sex offenses in the military, as the trial counsel litigates to exclude evidence under M.R.E. 412. The CVRA recognizes this alignment and specifically charges the prosecution with ensuring that an alleged victim is afforded the rights assured to them under that Act.[27] As such, the interests that Appellant argues should be advanced through the SVC are already adequately represented through the trial counsel. A decision by this Court that would allow the SVC to duplicate the efforts already put forth by the prosecution would serve to unfairly stack litigants against an accused within the court-martial.

Further, the alignment between trial counsel and SVC raises complicated issues regarding the prosecution's obligations to disclose all favorable evidence to an accused under *Brady v. Maryland*.[28] Not only would SVC's not be bound by the same *Brady* obligations as the government, they would be precluded from disclosing most *Brady* material to the government or defense. Disclosure of such favorable defense evidence would almost certainly be antithetical to the alleged victim's interest in the court-martial, which in most cases would include ensuring

[27] 18 U.S.C. § 3771(c)(1).

[28] 373 U.S. 83 (1963).

conviction and affirming their victimhood. Thus, the alignment between the government and the SVC creates the opportunity for this *de facto* prosecution team to skirt the government's *Brady* obligations by strategically controlling the flow of information regarding a case.[29] This type of double-team prosecution has the dangerous potential to undermine an accused's due process rights.

An alliance between the SVC and trial counsel further creates an appearance of impropriety that would undermine the public's perception of fairness in the military justice system. The perceived alliance between SVC and trial counsel is a result of their aligned interests in both immediate evidentiary issues and in the larger goal of convicting the accused. Their bases for achieving these goals, however, are divergent and create perilous issues regarding a proceeding's actual and perceived fairness. A trial counsel, as a representative of the government, is not primarily concerned with the conviction of any one accused, but in the service of justice.[30] An SVC,

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[29] *See* Jannice E. Joseph, *The New Russian Roulette: Brady Revisited*, 17 Cap. Def. J. 33, 54-58 (2004) (discussing complications arising under *Brady* between non-privileged communications between an alleged victim and his or her victim advocate, and suggesting that the way to avoid such conflicts is to separate the victim advocate program from the prosecution).

[30] *See* ABA Standards for Criminal Justice: Prosecution Function and Defense Function 3-1.2 (3rd ed. 1993) (describing the prosecutor as an "administrator of justice, an advocate, and an

however, as an attorney for alleged victim, is bound by a duty of loyalty to the client to protect her rights and lawfully assist her in her goal: the conviction of the alleged perpetrator. While both parties may align through their mutual interest in the conviction of the accused, their ethical bases for that position are divergent and cannot be reconciled. Therefore, the inevitable alignment of the government with the SVC would serve to impugn the quasi-judicial function of the prosecutor and undermine the actual and apparent fairness of the proceedings.[31]

The involvement of SVCs in the litigation of pre-trial motions is problematic even in scenarios in which their interests diverge from the prosecution's. For instance, one can envision a scenario in which both the trial counsel and defense counsel intend to introduce habit evidence of an alleged victim's sexual behavior when engaging in consensual sex to show conformity or non-conformity with that habit on a particular occasion. In such a scenario, an alleged victim "must be afforded a reasonable opportunity to attend [the pre-trial

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officer of the court," whose duty "it is to seek justice, not merely to convict").

[31] *See* Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/attorney Relationships*, 48 S. Tex. L. Rev. 695, 703-04 (2007) (distinguishing the prosecutor's ethical obligation to seek justice from the interests of an alleged sexual assault victim in criminal prosecutions).

hearing] and be heard."[32] However, the right for the alleged victim to attend and be heard regarding his or her privacy interest does not extend to advancing legal arguments regarding the admissibility of the evidence in question.

Further, allowing an SVC to advocate for the interests of an alleged victim at a pre-trial motions hearing opens the door to the SVC speaking on behalf of their client. In such a scenario, there is a serious danger that facts proffered by the SVC, rather than testified to by the alleged victim, may make their way into the military judge's findings of fact and ultimately become determinative as to the admissibility or availability of evidence M.R.E. 412 or M.R.E. 513.

The SVC-victim relationship also creates issues regarding an accused's Sixth Amendment right to confrontation. The inevitable alignment of the SVC with the prosecution in courts-martial has the potential to create an attorney-client relationship between the alleged victim and the prosecution, which would significantly diminish the amount of relevant impeachment testimony a defense counsel could elicit from an alleged victim during cross-examination. As an alleged victim is now represented by an attorney who is a quasi-member of the prosecution team, information that an accused may normally be

[32] Mil. R. Evid. 412(c)(2).

able to elicit on cross-examination, such as pre-trial witness preparation efforts, may be privileged. Otherwise relevant information learned by the alleged victim through pre-trial preparation with counsel may likewise potentially be privileged.

Further, an alleged victim's privacy interests would give standing to an SVC to argue the admissibility of evidence in pretrial motions hearings, or to object at trial to questions or evidence that would similarly pose a threat to the alleged victim's privacy interests. Such a scenario presents an erosion of an accused's right to confront the witnesses against him. It is also a scenario in which an SVC may be advocating for an alleged victim's legal interests in front of a members panel, effectively giving the victim an additional table in the courtroom. How would an SVC's role in a proceeding be explained to the member? Would they be referred to as the "Special Victim's Counsel"?

Allowing an SVC to advocate for an alleged victim's legal interests at court-martial presents a myriad of problems that create infringements up on a service member's constitutionally guaranteed rights to due process and a fair trial. SVC representation at courts-martial is not necessary to uphold the very clearly established rights of alleged victims to be present and heard in certain contexts. Those rights are currently recognized and upheld through the duties and responsibilities of

the trial counsel. The duplication of those efforts through an SVC would serve no other purpose than to open the veritable Pandora’s Box of issues discussed above.

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CONCLUSION

To support the Appellant, *et al.*, in this case would fundamentally alter the American criminal justice system as we know it. No longer would an accused be subject only to the constitutionally limited prosecution by the Government, but now an unregulated personal and private prosecution by an embittered party unbound by any such Constitutional limitations. The long reaching potential effect of this is almost impossible to see as it is diametrically foreign to the system emplaced by the Founders of our jurisprudence. There is no concrete legal support for this foundational shift of justice. This Court cannot be the first domino to this chaos. The Appellant must be denied.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered electronically to the Court on May 23, 2013, that a copy was delivered electronically to the U.S. Air Force Court of Criminal Appeals, and to the Air Force Appellate Division and NCVLI as *amicus curiae*.

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 26(d) and the type-volume limitation of Rule 24(c) because it contains 4,709 words. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a mono-spaced typeface using Microsoft Word version 2003 with 12-point-Courier-New font.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Airman First Class (E-3) L.R.M., USAF *Appellant,* v. Lieutenant Colonel (O-5) JOSHUA KASTENBERG, USAF, *Appellee,* & Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party In Interest.*	)	PROPOSED BRIEF OF *AMICUS CURIAE* PROTECT OUR DEFENDERS IN SUPPORT OF APPELLANT L.R.M.'s PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS USCA Dkt. No. 13-5006/AF Crim. App. Misc. Dkt. No. 2013-05 Dated 28 May 2013

PROPOSED BRIEF OF *AMICUS CURIAE* PROTECT OUR DEFENDERS

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

INTRODUCTION

Protect Our Defenders is filing this *amicus* brief to inform the Court on how commonplace representation of victims by an attorney is in all state and federal courts. Protect Our Defenders also offers victims' observations of the military justice system that are starkly different from the observations offered by the Defendant and his supporting *amici curiae* in their briefs in the court below. Protect Our Defenders

respectfully requests this Court to consider and understand the perspective of sexual assault victims.

At the outset, this Court should understand the nature of the proposed participation by victim's counsel in the military justice system. The victim is not seeking counsel to become a party to courts-martial proceedings. The victim is not seeking to have her counsel cross-examine witnesses or usurp any duty of trial counsel. The victim is seeking only limited participation through trial counsel to protect her privileged communications and her right to privacy. Victim counsel will only be a shield, and never a sword.

THIS HONORABLE COURT AND THE AIR FORCE COURT OF CRIMINAL APPEALS EACH HAS JURISDICTION TO REVIEW TRIAL JUDGES' RULINGS ON MILITARY RULES OF EVIDENCE

Amicus curiae Protect Our Defenders concurs with the jurisdiction analysis presented by Appellant A1C L.R.M. in her Brief at 8-19. Protect Our Defenders addresses jurisdiction separately only to offer additional case law and a hypothetical that may aid this Court in its analysis.

Appellant complains of the order issued by the Appellee military judge. The Air Force Court of Criminal Appeals has jurisdiction if the order involves a subject matter to which the court's "appellate jurisdiction could in some manner, at some

time, attach." *United States v. RMI Co.*, 599 F.2d 1183, 1186 (3rd Cir. 1979). Jurisdiction exists if the court can identify how the order in any way affects the court's present or future appellate jursidiction. *Id.* The All Writs Act, 28 U.S.C. §1651, authorizes a "supervisory" review of lower court actions. See, e. g., *United States v. Weinstein*, 511 F.2d 622, 626-27 (2d Cir.), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2655, 45 L.Ed.2d 693 (1975). *United States v. Lasker*, 481 F.2d 229, 235-36 & n.3 (2d Cir. 1973), *cert. denied*, 415 U.S. 975, 94 S.Ct. 1560, 39 L.Ed.2d 871 (1974); *United States v. Dooling*, 406 F.2d 192, 198-99 (2d Cir.), *cert. denied*, 395 U.S. 911, 89 S.Ct. 1744, 23 L.Ed.2d 224 (1969). See also, *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); and *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 25 (1943).

The subject matter of the order, whether the Appellant has the right to be heard through her counsel during Art. 39(a) proceedings under Mil. R. Evid. 412, 513 and 514, is without a doubt a matter to which the Air Force Court of Criminal Appeals' appellate jurisdiction could in some manner, at some time, attach. If the Appellee military judge had instead ruled that Appellant A1C L.R.M. could be heard through counsel and Defendant Daniels appealed this ruling after a conviction, the Air Force Court of Appeals would clearly have jurisdiction. The

subject matter is the same regardless of how the Appellee ruled on the issue. This Honorable Court and the Air Force Court of Criminal Appeals each have a duty to hear and decide A1C L.R.M.'s petition.

No appellate court has ever ruled that it does not have jurisdiction to review a lower court's rulings on its own rules of evidence. This Court has jurisdiction to review the Appellee's order concerning the Military Rules of Evidence.

VICTIM PARTICIPATION IN CRIMINAL TRIALS IS ORDINARY

The briefs opposing A1C L.R.M.'s appeal incorrectly allege that representation of a victim by counsel is "unheard of,"[1] that the denial of counsel for nonparties has been the "norm for the entire history of the American military justice system,"[2] that no military or federal court has ever allowed a nonparty to appear in a criminal prosecution and to do so would "fundamentally alter the American criminal justice system as we know it,"[3] and that "no other United States court affords purported victims" quasi-party status.[4] These briefs are

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[1] See Brief on behalf of Appellee at 21-22. The Appellee trial judge also stated in his trial order, "It would be a significant departure from courts-martial jurisprudence or, for that matter, American criminal law jurisprudence, to permit a third party" to make legal arguments at a criminal trial. (J.A. at 180).

[2] See Brief on behalf of Real Party in Interest at 16.

[3] See Brief filed by *amicus curiae* Appellate Defense Divisions of the Navy-Marine Corps at 2, 9 and 20 (Appellant seeks "an expansion of the rights of alleged victims in criminal courts heretofore unequalled in military or American jurisprudence.").

[4] See Brief filed by *amicus curiae* Army Defense Appellate Division at 11-12.

incorrect, and show that many in the military justice system are out of touch with the commonplace participation by victims and other nonparties in the federal, state and even military criminal justice systems.

Allowing victims and other witnesses to be heard through counsel, to make motions and to file interlocutory appeals is commonplace. *United States v. RMI Co.*, 599 F.2d 1186 (3rd Cir. 1979) ("[I]t is settled law that persons affected by the disclosure of allegedly privileged materials may intervene in pending criminal proceedings and seek protective orders, and if protection is denied, seek immediate appellate review."). See also, *United States v. Cuthbertson*, 651 F.2d 189, 195 (3rd Cir. 1981), *cert. denied,* 454 U.S. 1056 (1981).

An important case discussed at length by the Appellant in her brief and reply brief but completely ignored by all opposing briefs is *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981). *Amicus curiae* Protect Our Defenders fully supports the analysis of *Doe* by Appellant, and will only address incorrect assertions about *Doe* made by the Appellee trial judge.

The Appellee trial judge incorrectly dismissed *Doe*'s reasoning and application. The Appellee stated, "In *Doe*, the [trial court] had failed to ensure the victim had notice of the hearing, and the [appellate court] found that the court had

wholly ignored the provisions of Fed. R. Evid. 412." (J.A. at 217). While it is correct that the trial court *initially* failed to give notice to the victim, the trial court, on its own, reopened the Fed. R. Evid. 412 hearing. *Doe*, at 45. The appellate court did not find that the trial court "wholly" ignored Fed. R. Evid. 412 - it upheld the trial court on two of the seven items in dispute. The Appellee judge is simply incorrect in his analysis of *Doe*. Appellee does not address *Doe* in his brief before this Court.

Doe is a well-reasoned case often cited by military courts. See *United States v. Greaves*, 40 M.J. 432, 438 (C.M.A. 1994); *United States v. Sanchez*, 44 M.J. 174, 180 (C.A.A.F. 1996); *United States v. Black*, 42 M.J. 505, 515 (Army Ct. Crim. App. 1995); *United States v. Fox*, 24 M.J. 110, 112 (C.M.A. 1987); *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983); *United States v. Elvine*, 16 M.J. 14, 18 (C.M.A. 1983); *United States v. Colon-Angueira*, 16 M.J. 20,24 (C.M.A. 1983); *United States v. Hollimon*, 12 M.J. 791, 793 (A.C.M.R. 1982); and *United States v. Watt*, WL 803458 (N.M.Ct.Crim.App. 1997).

Federal courts have frequently and for a long time permitted nonparties, represented by counsel, to assert their interests in preventing disclosure of material sought in criminal proceedings. *United States v. Hubbard*, 650 F.2d 293

(D.C. Cir. 1980). In *Hubbard*, the Church of Scientology appealed a district court's order that made church documents publicly available. The Church was not a defendant, but sought to intervene in the criminal case against some of its leaders. The *Hubbard* court ruled that a federal trial court had ancillary jurisdiction to hear and decide claims closely related to and arising out of criminal proceedings brought before it, even if the claims are made by strangers to the criminal case. *Hubbard*, at 307. The court, in a footnote, thoroughly analyzed nonparty standing as of 1980, stating:

> "**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 materials already so disclosed. See, e. g., *United States v. Nixon*, 418 U.S. 683, 692, 94 S.Ct. 3090, 3099, 41 L.Ed.2d 1039 (1974) (President, a nondefendant, may appeal denial of motion to quash post-indictment subpoena duces tecum directed to him, compelling production of records of certain presidential meetings); *Gravel v. United States*, 408 U.S. 606, 608 n.1, 92 S.Ct. 2614, 2619, n.1, 33 L.Ed.2d 583 (1972) (noting that district court had permitted Senator to intervene in proceeding on legislative assistant's motion to quash grand jury subpoena and that circuit court had permitted Senator to appeal from denial of motion to quash); *Perlman v. United States*, 247 U.S. 7, 12, 38 S.Ct. 417, 419, 62 L.Ed. 950 (1918) (owner may intervene to assert property and constitutional interests in preventing release to government, for purposes of grand jury investigation, of exhibits introduced and impounded in civil case); *In re Grand Jury Applicants*, 619 F.2d 1022 (3d Cir. 1980) (employer may appeal denial of motion brought as intervenor to quash grand jury subpoenas *ad testificandum* served on employees); *United States v. RMI Co.*, 599 F.2d at 1186-87 (corporation may appeal denial of motion for protective order brought as *de facto* intervener to prevent

> pre-trial disclosure to defendants of corporate books and records previously disclosed by subpoena to grand jury which indicted defendants). See also *In re 1975-2 Grand Jury Investigation*, 566 F.2d 1293, 1294-95, 1296 & n.6, 1301 (5th Cir.), *cert. denied*, 437 U.S. 905, 98 S.Ct. 3092, 57 L.Ed.2d 1135 (1978) (dismissing as nonappealable district court's order permitting party with no apparent ownership interest in documents to intervene in proceedings begun with purpose to disclose to another district court documents used in terminated grand jury investigation); *Ill. v. Sarbaugh*, 552 F.2d 768, 772-73 (7th Cir.), *cert. denied*, 434 U.S. 889, 98 S.Ct. 262, 54 L.Ed.2d 174 (1977) (permitting defendants in terminated criminal proceeding to intervene in motion brought by state for disclosure to it of grand jury transcripts). These assertions of interest have sometimes been denominated "intervention," *Perlman v. United States, supra; Ill. v. Sarbaugh, supra;* see *In re Grand Jury Applicants, supra, United States v. RMI Co., supra*, and the intervention criteria of the Federal Rules of Civil Procedure have occasionally been applied. *Ill. v. Sarbaugh, supra*. See *In re 1975-2 Grand Jury Investigation, supra*."
>
> *United States v. Hubbard*, 650 F.2d 293, 313 (D.C. Cir. 1980) (emphasis added).

In the unrelated case, *Church of Scientology v. United States*, 506 U.S. 9 (1992), the Church again sought to intervene in a criminal investigation, asking the Supreme Court to order the Internal Revenue Service ("IRS") to return recordings of conversations between church officials and their attorneys. The IRS obtained the recordings by subpoenaing a California Superior Court clerk in an unrelated civil case. The unanimous Supreme Court stated that a "person's interest in maintaining the privacy of his 'papers and effect' is of sufficient importance

to merit constitutional protection." *Id.* at 13.[5] The Supreme Court held that an appellate court's jurisdiction to review a trial court's order "turns not on the subject matter of Congress' jurisdictional grant to the district courts, but on traditional principles of justiciability, ..." *Id.* at 15. In both Church cases, the Church was represented by counsel and was permitted to file interlocutory appeals relating to its privacy or privileges.

Nonparty news organizations, represented by counsel, have often appealed rulings denying them access to criminal trials in federal courts. See *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records,* 864 F.2d 1559, 1561 (11th Cir.1989); *United States v. Antar,* 38 F.3d 1348, 1355-56 (3d Cir.1994); and *United States v. Chagra,* 701 F.2d 354, 360 (5th Cir.1983). In *People v. Bryant*, 94 P.3d 624 (Col. 2004) (*en banc*), the attorneys for the Associated Press, CBS Broadcasting,

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[5] The Supreme Court recognized that the Church, which was not a defendant and did not have possession of the documents sought by the government, had a Constitutional right under the Fourth Amendment to be free from unreasonable searches. The Fourth Amendment provides:

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, ..."

Church of Scientology, 506 U.S. at 13.

Appellant A1C L.R.M. has a constitutional right to be free from unreasonable searches of her other sexual behavior and her communications with her psychotherapist or victim advocate.

Denver Post, ESPN, Fox News, Los Angeles Times, and Warner Brothers Television petitioned the Colorado Supreme Court to review a district court's order that prohibited the news organizations from revealing the contents of hearing transcripts. The limited participation by these news organizations in a criminal trial is similar to the recognition of nonparty news organizations by the military justice system. See *A.B.C., Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997) (appeal by ABC News, CNN, Fox News, NBC and The Washington Post); *Stars and Stripes v. United States*, Not Reported in M.J., WL 3591156 (N.M.Ct.Crim.App. 2005); and *Denver Post Corp. v. United States*, Not Reported in M.J., WL 6519929 (Army Ct.Crim.App. 2005).

In *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981), the court held that a nonparty whose telephone conversations were recorded without his knowledge had standing to object to the disclosure of the recordings. See also *United States v. Sandoval*, Not Reported in F.Supp.2d, WL 2757188 (S.D. Fla. 2010) (the theft victim Amazon.com, through its attorneys, filed a motion to quash a defendant's subpoena of its business records); *United States v. Seibel*, Not Reported in F.Supp.2d, WL 3489803 (D.S.D. 2011); *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (attorney, represented by an attorney, moved to quash grand jury subpoena because of attorney-client privilege); and

United States v. Nixon, 418 U.S. 683, 692, 94 S.Ct. 3090, 3099, 41 L.Ed.2d 1039 (1974).

Other cases where federal courts have allowed a nonparty represented by counsel appeal in a criminal case include *United States v. Yielding,* 657 F.3d 722, 726 n. 2 (8th Cir.2011) (holding the nonparty had "standing to appeal" because "it [was] bound or adversely affected by an injunction"); *In re Siler,* 571 F.3d 604, 608-09 (6th Cir.2009) (allowing nonparties to appeal the use of a presentencing report in a civil suit); *United States v. Perry,* 360 F.3d 519, 523-24 (6th Cir.2004) (allowing a non-party victim to appeal an order vacating a lien securing her restitution award); and *Kenna v. United States*, 435 F.3d 1011 (9th Cir. 2006).[6] The common thread in the criminal cases in which courts have permitted nonparty appeals is that each related to specific trial issues and did not disturb a final judgment. *United States v. Hunter*, 548 F.3d 1308, 1314 (10th Cir. 2008); and *United States v. Fast*, 709 F.3d 712, 717 - 718 (8th Cir. 2013). In all cases, the nonparties are represented by counsel.

[6] In *U.S. v. Mahon*, Not Reported in F.Supp.2d, 2010 WL 94247 (D. Ariz. 2010), the court denied defendant's motion to strike the victim's counsel's formal appearance because even though the victim was not a party, filing an appearance was a reasonable procedure for ensuring protection of the victim's rights.

Even where federal courts ultimately deny the relief the nonparties seek, they still permit nonparties, represented by counsel, to participate. See *United States v. Trustees of Boston College*, 831 F.Supp.2d 435 (D. Mass. 2011) (Boston College and individual intervener, each represented by separate counsel, moved to quash subpoena); *United States v. Hunter*, 548 F.3d 1308 (10th Cir. 2008) and *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008) (in these two related cases, the parents (represented by counsel) of a murder victim sought mandamus from the circuit court to order the district court to recognize their crime victim status); *In re Grand Jury*, 103 F.3d 1140 (3rd Cir. 1997) (nonparties, represented by counsel, appealed district courts' orders denying their claims of parent/child privilege); *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984) (nonparty attorney, represented by the attorney's counsel, appealed district court's order directing attorney to testify about privileged conversations); and *Matter of Grand Jury Impaneled January 21, 1975*, 716 F.2d 373 (3rd Cir. 1976) (nonparty attorney, represented by the attorney's counsel, moved to intervene and quash a subpoena issued to prothonotary).

A case that demonstrates the importance of allowing nonparties to be represented by counsel is *In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011). In *Amy Unknown*, a child depicted

in pornographic images sought restitution from a defendant convicted of possessing child pornography. The child, Amy, was represented by counsel. The district court denied Amy's request for restitution. Amy, through counsel, immediately filed a petition for a writ of mandamus and also filed a direct appeal of the district court's order. The circuit court panel assigned to hear the petition denied relief. Amy's counsel then sought both panel and *en banc* rehearing of her mandamus petition. The circuit court panel assigned initially to hear only the direct appeal was also assigned the rehearing of the mandamus petition. This second panel granted Amy's petition for a writ of mandamus. Amy would have never prevailed without the assistance of counsel filing both a petition and a direct appeal, and a request for rehearing.

Another case demonstrating the importance of victims' counsel is *United States v. Shrader*, 716 F.Supp.2d 464 (S.D.W.Va. 2010). In the 1970's, the defendant was convicted of murdering his former girlfriend's mother and a man he thought the former girlfriend was dating. The incarcerated defendant continued to harass his former girlfriend and her family over the ensuing decades. In 2009, the defendant was charged with two counts of stalking (18 U.S.C.A. §2261A(2)) when he sent a 32 page letter to his former girlfriend/victim. The defendant

filed an *ex parte* motion for a Fed. R. Crim. P. 17(c) subpoena to compel the victim's psychotherapist to produce records relating to the victim's emotional condition. The defendant argued the records were relevant because §2261A(2) required proof that the defendant's conduct caused the victim to experience substantial emotional distress. The clerk of the court issued the requested subpoena.

The psychotherapist opposed the subpoena, asserting the records were subject to privilege. The victim's counsel moved to quash the subpoena and submitted a memorandum of law. The magistrate quashed the subpoena.

The defendant filed objections to the magistrate's order, and the district court affirmed. During this ordeal, victim's counsel addressed numerous tedious legal issues raised by the defendant, including the applicability of *Brady v. Maryland*, 373 U.S. 83 (1963), arguing the psychologist was not a government agent and the government was not in possession of the records, the meaning of the word "reasonable" as used by the magistrate, whether §2261A(2) requires that the *actus reus* be established through medical records (using a civil case to argue in a criminal case), and the defendant's confrontation rights is only a trial right and not a discovery right. *Id.*, at 468-469. The victim's counsel also argued the records were privileged under

Pennsylvania v. Ritchie, 480 U.S. 39 (1987), and noted that the defendant's hypothetical arguments were not applicable and offered a more compelling hypothetical argument. The victim's attorney argued that the defendant's Sixth Amendment rights did not meet the requirements of *United States v. Caro*, 597 F.3d 608 (4th Cir. 2010) for Rule 17(c) subpoenas. Finally, the victim's attorney argued that the defendant was not unfairly prejudiced because the prosecutor did not have access to the records either. *Shrader*, at 468-469.

Shrader is an example of how a criminal justice system is supposed to work. The victim's attorney was focused on representing the victim, and only the victim. The prosecutor does not represent the victim. The judge may not look after the interests of the victim. *United States v. Taylor*, 47 C.M.R. 445 (A.C.M.R. 1973).

The mere existence of Fed. R. Crim. P. 17(c) exposes the falsity of the claim that allowing victims the right to be represented by an attorney or to participate by filing objections and motions is unprecedented in any American court. Rule 17(c)(3) states:

"Subpoena for Personal or Confidential Information About a Victim. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are

exceptional circumstances, the court must require giving notice to the victim so that the **victim can move to quash or modify the subpoena or otherwise object.**"

Fed. R. Crim. P. 17 (emphasis added).

Rule 17 explicitly allows victims to make motions and objections, which implicitly means they may be represented by counsel. Victims' participation throughout the federal criminal justice system is commonplace and ordinary. Many state court rules are patterned after the federal Rule 17. *People v. Spykstra*, 234 P.3d 662, 666 (Col. 2010); *Massachusetts v. Lampron*, 441 Mass. 265, 806 N.E.2d 72, 76 (2004) (Massachusetts' rule modeled after the federal rule); *Schreibvogel v. State*, 228 P.3d 874, 881 n.5 (Wyo. 2010) (Wyoming's rule is based upon the federal rule).

Aside from state rules patterned after Fed. R. Crim. P. 17(c), state courts, on other bases, allow nonparties and victims to be represented by counsel and to participate in criminal proceedings. Pennsylvania has numerous cases allowing counseling centers, represented by counsel, to file motions to quash subpoenas and appeal adverse orders in criminal cases. See *Pennsylvania v. Miller*, 406 Pa. Super. 206, 593 A.2d 1308 (1991); *Pennsylvania v. Wilson*, 529 Pa. 268, 602 A.2d 1290 (1992); *Pennsylvania v. Simmons*, 719 A.2d 336 (Pa. Super. 1998), and *Pennsylvania v. Makara*, 980 A.2d 138 (Pa. Super. 2009).

These Pennsylvania cases presented difficult legal challenges concerning the interpretation of various statutes, court rules and case law. But for the able assistance of counsel, these victims would have had their privacy rights violated.

Other states also recognize the rights of victims and other nonparties represented by counsel to appear, file motions and appeal orders affecting their privacy interests. *State v. Gomez*, 63 P.3d 72 (Ut. 2002) (Rape Crisis Center moved to quash subpoena); *In re Crisis Connection, Inc.*, 930 N.E.2d 1169 (Ind. Ct. App. 2010) (same); and *People v. Turner*, 109 P.3d 639 (Col. 2005) (same); and *People v. Sisneros*. 55 P.3d 797 (Col. 2002). In *People v. Bryant*, Not Reported in P.3d, WL 869618 (Colo. Dist. Ct. 2004), the sexual assault victim and her three medical treatment providers (represented by counsel) all moved to quash subpoenas served by the defendant.

The military justice system has also allowed victims and related nonparties to participate through counsel in courts-martial proceedings. In *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006), the military trial judge held an evidentiary hearing under Mil. R. Evid. 513(e)(2), and ordered the production of the victim's psychotherapy notes for an *in camera* review. The victim's psychotherapist, Jennifer Bier, refused to provide the documents, and through her attorney requested a

hearing before the military judge. Ms. Bier and her attorney appeared before the judge to make legal arguments.

In *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995), two sexual assault victims filed a petition for extraordinary relief to protect their privacy rights under Mil. R. Evid. 412, Article 31 of the U.C.M.J., generalized "invasions of privacy," and their "privileges." The Court of Appeals for the Armed Forces granted relief, and ordered that the victims would be given an "opportunity, **with the assistance of counsel if they so desire**, to present evidence, arguments and legal authority to the military judge . . . ." *Carlson* at 402 (emphasis added).

In *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008), CBS News filed a motion to quash a government subpoena seeking unaired video of 60 Minutes' interviews of the defendant. The military judge quashed the subpoena, but the Navy-Marine Corps Court of Criminal Appeals reversed and vacated. CBS News petitioned the Court of Appeals for the Armed Forces for extraordinary relief. This Court of Appeals vacated the orders of both the military judge and the Navy-Marine Corps Court of Criminal Appeals, and ordered the military judge to conduct an *in camera* review of the unaired video. CBS News' motion and petition were based upon an alleged "newsgathering privilege."

It is discordant to allow CBS News, through its many lawyers, the right to make motions and petitions during a court-martial to defend a privilege while denying a victim (or any patient, penitent, spouse or client) the rights to be represented by counsel and to make motions and petitions defending other privileges.

In addition to these reported military cases, the Rules for Courts-Martial and Military Rules of Evidence reference the right to be heard and recognize in at least one instance the role of a witness's counsel. The Appellant's Brief at 23 to 25 discusses numerous instances where the Rules for Courts-Martial provide an opportunity to be heard. Another instance is Rule for Courts-Martial 109, Professional Supervision of Military Judges and Counsel which gives military judges and counsel the "right to be heard." R.C.M. 109(a), (b), (c)(5)(C), and (c)(6)(D). It is unlikely the Judge Advocate General would prohibit a judge or counsel who is facing a misconduct complaint, from making legal arguments or retaining a lawyer. In fact, it is likely the Judge Advocate General would appoint an attorney if requested. Victims deserve nothing less than the

rights military judges and lawyers get under identical "right to be heard" language.[7]

Mil. R. Evid. 301(b) states, "**Counsel** for any party or **for any witness** may request the military judge to so advise a witness, . . ." (emphasis added). This is an explicit recognition that witnesses may be represented by counsel. Representation by counsel of witnesses, victims and other persons with an interest in military courts-martial proceedings are commonplace.

The cries of "unprecedented" ring hollow when there are so many federal, state and military courts that have recognized, for many years, the right of victims and other limited participants, represented by counsel, to file motions and appeals in criminal trials.[8] The development of the law has been greatly assisted by the attorneys for these limited participants. A military judge, like any federal or state

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[7] Courts tend to treat lawyers more favorably than non-lawyers. See Benjamin H. Barton, *Do Judges Systemically Favor the Interests of the Legal Profession?*, 59 Ala.L.Rev. 453 (2008). The Appellee trial judge has been appointed counsel to file a brief with the Court of Appeals for the Armed Forces in this case. While I recognize the Appellee is named as a party to the Petition, it is ironic that an attorney has been appointed to represent the Appellee (an experienced attorney and not a party to the court-martial) before this Court as this Court considers whether a victim has a right to an attorney.

[8] There are no reported cases in which any federal or state court denied a victim or other nonparty the right to be represented by counsel that has either been retained personally or been appointed. This Court would be making unprecedented new law if it were to deny Appellant this right.

judge, wants to make the correct ruling. To make correct rulings, judges need the perspective of the attorneys for victims and other limited participants who have a direct and tangible interest. The defendants do not have any right to keep persuasive legal authority and argument from military judges. Attorneys representing victims in criminal trials are ordinary and common.

VICTIMS' PERSPECTIVE OF COURTS-MARTIAL PROCEEDINGS

The military judge Appellee and the *amicus curiae* Brief of Air Force Trial Defense Division in the Air Force Court of Criminal Appeals each provided a defendant's perspective of the military justice system. The Appellee perceived an unconstitutional appearance of partiality if the Court permitted the "stacking of two parties to the trial, the Government and the SVC, to argue evidentiary matters against the accused's interest." (J.A. at 184-185). The Appellee's concern is that the Defendant is being unfairly attacked by two parties.[9] The *amicus curiae* Brief of Air Force Trial Defense Division provides a distorted view of a carnival-like atmosphere where unethical and lying trial counsel and Special Victim Counsel conspire with

[9] "[The] prospect of an accused having to face two attorneys representing two similar interests are [sic] sufficiently antithetical to courts-martial jurisprudence and would . . . cause a significant erosion in the right to an impartial judge in appearance or a fair trial." (J.A. at 185).

convening authorities to wrongfully deny defendants due process. See Brief by *amicus curiae* Air Force Trial Defense Division at 8 (stating the Special Victim Counsel are "turning courts into unpredictable carnivals" and predicting "three ring circuses").

These views are starkly different from the perspective of a victim. Only a small percentage of sexual assaults are ever reported and investigated.[10] Victims do not report rapes and assaults because they lack faith in and fear the military justice system and their chain of command.[11]

Of course sexual assault victims hear the President, Secretary of Defense and other senior leadership announce the

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[10] Based on the reporting done by the Department of Defense (the "DoD"), in fiscal year 2012 approximately 26,000 men and women defending our country were sexually assaulted. Department of Defense Fiscal Year 2012 Annual Report on Sexual Assault in the Military (the "2012 Annual Report"), at 12. The 2012 Annual Report may be found at http://www.sapr.mil/media/pdf/reports/FY12 DoD SAPRO Annual Report on Sexual Assault-VOLUME ONE.pdf
Of the 26,000 assaults, only 3,374 were reported to military authorities. *Id.* at 24. Only 2,558 reports of assault were able to be investigated because the victim filed restricted reports in 816 cases. *Id.* at 58. In fiscal year 2012, only 594 subjects had court-martial charges for sexual assault preferred against them, only 302 subjects proceeded to trial, and only 238 subjects were convicted. *Id.* at 68 and73. Convictions in fiscal year 2012 were less than 1% of the 26,000 sexual assaults that occurred in fiscal year 2012.

[11] Underreporting is widespread. The majority of sexual assault victims do not report the crime because they did not want anyone to know of it (67%), they felt uncomfortable making a report (65%), or they did not believe their report would be kept confidential (60%). More than half were afraid of retaliation or reprisals, and almost half had heard about the negative experiences other victims had endured. 2010 Workplace and Gender Relations Survey of Active Duty Members: Overview Report on Sexual Assault, DMDC Report No. 2010-025, March 2011(hereinafter "WGRA 2010"), at vi. The WGRA 2010 report can be found at http://www.sapr.mil/media/pdf/research/DMDC 2010 WGRA Overview Report of Sexual Assault.pdf

zero tolerance policy, but they see a convening authority dismiss - make disappear - a sexual assault conviction of a field grade officer.[12] They see a field grade officer responsible for preventing and responding to sexual assault be arrested for sexually assaulting a woman.[13] They see a unit sexual assault response coordinator arrested for pandering, abusive sexual assault, assault and maltreatment of subordinates.[14] They see a general officer on trial for sexual assault creating a website to attack the victim.[15] They see scandal after scandal.[16]

Sexual assault victims are not blind. They are not dumb.

Congress adopted Mil. R. Evid. 412 to protect victims from unnecessary and irrelevant exposure of their private sexual histories and lives; however, this protection is useless if the victim cannot enforce it. *Doe*, 666 F.2d at 46. Victims see this Court, albeit in *dicta*,[17] say that trial judges may not

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[12] American Forces Press Service, *Hagel Orders Review of Sex Assault Case, Convening* Authority, 12 March 2013, http://www.defense.gov/news/newsarticle.aspx?id=119504&buffer share=b5e40

[13] Rueters News service, *Head of Air Force's Anti-Sexual Assault Unit Arrested for Sexual Battery*, 6 May 2013, http://www.reuters.com/article/2013/05/07/us-usa-airforce-sexassault-idUSBRE9450YH20130507 .

[14] Stars and Stripes, *Fort Hood soldier's arrest is latest blow to DOD on sexual assault*, 15 May 2013, http://www.stripes.com/news/fort-hood-soldier-s-arrest-is-latest-blow-to-dod-on-sexual-assault-1.221001

[15] Stars and Stripes, *Accused Brig. Gen. Sinclair Also Fights the Court of Public Opinion Online*, 11 March 2013, http://www.stripes.com/news/army/accused-brig-gen-sinclair-also-fights-the-court-of-public-opinion-online-1.211290 .

[16] Tailhook, Aberdeen Proving Ground, Air Force Academy, and Lackland AFB.

[17] *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). Although this Court held that consideration of the victim's privacy was constitutional under

even consider victims' privacy despite the explicit direction in Mil. R. Evid. 412. Mil. R. Evid. 412, 513 and 514 also promise the opportunity to be heard. But victims see other brave victims left betrayed after they relied upon these promises. Victims see defense counsel use their sexual history as leverage to undermine their credibility, to intimidate them, to humiliate them, and to ultimately dissuade them from proceeding with the case.[18] Article 39(a) proceedings for Mil. R. Evid. 412 and 513 are conducted by skilled and aggressive attorneys against a defenseless victim.

The military justice system leaves victims feeling exposed and naked. This is why only 18 percent of the women who reported their sexual assault to the DoD would make the same decision to report if they could do it over.[19] It is fundamentally unfair to repeatedly expose the victim to attacks

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facts of that case, it needlessly warned trial judges that consideration of victims' privacy in other cases may be unconstitutional.

[18] In testimony before the United States Commission on Civil Rights on 11 January 2013, Air Force Judge Advocate General LTG Richard Harding stated that 29% of the Air Force's sexual assault victims, who had originally agreed to participate in the prosecution of their offender, changed their minds before trial and declined to cooperate with the prosecution. He believed that had these victims been represented by their own attorney, many of them would have continued to participate. See transcript of meeting at page 169. The transcript of meeting is at http://www.usccr.gov/calendar/trnscrpt/Transcript 01-11-13.pdf

[19] WGRA 2010, at iii – iv. Only 10% of men who reported sexual assault would make the same decision.

by skilled defense counsel when she is unrepresented and powerless to defend herself.[20]

Victims also believe that trial judges may be challenged on appeal only if they rule against the defendant, creating at least a subconscious motive to rule against the victim.[21]

Although victims understand and expect that defendants are entitled to zealous advocacy, victims do not see anyone fighting for their interests. It is not the trial counsel's duty to fight for the victim. Trial counsel's only client is the government, and the government's interests sometimes conflict with the victim's interest.[22] There is no attorney-client relationship between trial counsel and victim. *United States v.*

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[21] The defense counsel gets his first opportunity to aggressively cross-examine the victim at the Article 32 hearing. He may get additional opportunities at sequential Mil. R. Evid. 412 and 513 hearings, and then again at trial.

[21] This erroneous belief is held not only by victims. In his Real Party In Interest's Answer To Certified Question, Defendant Daniels argues, "A1C L.R.M. will never have a right to seek review." Brief at 12-13. A1C L.R.M. has the right to seek review.

[22] This was acknowledged by Defense Counsel at the 29 January 2013 Article 39(a) session. Defense Counsel stated that a victim's interest will not be aligned with the government's interest "in almost every case." (J.A. at 143). He further admitted that trial counsel do not usually prepare victims for Mil. R. Evid. 412, 513 and 514 motions "because that is not their focus. They are focused on prosecuting." (J.A. at 14-146). Defense Counsel contended that if SVC were allowed to argue privacy interests, his job would be "bifurcated" and he would have to have to take his focus off defending the Defendant. He stated he may need additional defense counsel to focus on researching privacy interests because that is not usually the defense counsel's focus. (J.A. at 142-143). Mil. R. Evid. 412, 513 and 514 are part of the Military Rules of Evidence, which certainly seem to be within the responsibilities of any attorney participating in a court-martial. This view indicates that in practice defense counsel do not need to focus on victims' privacy because trial counsel do not focus on it either. The message that no one cares about the victim or her rights is heard loud and clear throughout the services.

Whittaker, 201 F.R.D. 363, 367 (E.D. Pa. 2001). Trial Counsel stated in his 6 February 2013 Response to SVC Motion for Reconsideration that he "could choose not to oppose defense attempts to admit Mil. R. Evid. 412 evidence for a myriad of reasons" (such as tactical decisions, or his belief that defense attempts to "tar" the victim would backfire, or to avoid creating an appellate issue). (J.A. at 210).

The government's and the victim's interests often conflict. *Amicus* curiae Protect Our Defenders has seen trial counsel consent to the disclosure of the victim's psychotherapy notes because he believed the notes would help his case. He ignored the victim's pleas for her privacy. No attorney protected the victim from aggressive cross-examination and no attorney made any legal arguments on her behalf.

The Air Force's Special Victim Counsel Program has offered new hope for victims. After less than three months, the Program has represented over 260 victims. Victims in the Air Force are now provided someone who will advise them on the law and zealously fight for them. Congress through the National Defense Authorization Act for 2012 wanted victims to have counsel. The President, through his promulgation of the Military Rules of Evidence, promised victims the right to be heard. The Air Force Judge Advocate General created the Special Victim Counsel

Program to fulfill the promises made to sexual assault victims. In order for Special Victims' Counsels to have any real effect, they must be able to assert the victim's rights in courts martial. Protect Our Defenders is asking the Court to for allow victims' attorneys to protect their clients' privacy by making legal arguments on their behalf.

CONCLUSION

Protect Our Defenders respectfully requests this Honorable Court to give voice to victims of sexual assault, and to recognize the right of sexual assault victims to be represented by counsel in the military justice system.

Date: 28 May 2013 Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically mailed to the Court, Appellant, Appellee, Real Party in Interest, and *amici curiae* Air Force Appellate Government Division, Air Force Trial Defense Division, Marine Corps Defense Services Organization, Army Defense Appellate Division, and Appellate Defense Division for the Navy-Marine Corps on 28 May 2013.

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CERTIFICATE OF COMPLIANCE WITH RULES

I certify that this brief complies with the maximum length authorized by Rule 26(d) because this brief contains is 6,439 words. This brief complies with the typeface and type style requirements of Rule 37 because it was prepared using Microsoft Word with Courier New 12-point font, a monospaced font.

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class **L.R.M.,** USAF, Appellant v. Lieutenant Colonel **JOSHUA E. KASTENBERG,** USAF Appellee and Airman First Class **Nicholas E. Daniels,** USAF Real Party In Interest	)))))))))))))))	**REAL PARTY IN INTEREST'S OPPOSITION TO MOTION OF PROTECT OUR DEFENDERS FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF** USCA Dkt. No. 13-5006/AF Crim. App. No. 2013-05

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

COMES NOW Real Party in Interest Airman First Class Nicholas E. Daniels, by and through his undersigned counsel, and pursuant to Rule 30(b) of this Honorable Court's Rules of Practice and Procedure opposes Protect Our Defenders' motion for leave to file an amicus curiae brief.

Protect Our Defenders' amicus brief repeatedly mischaracterizes case law and impermissibly attempts to introduce purported facts (many of which are demonstrably erroneous) from outside the record in violation of Rule 30A. Consideration of Protect Our Defenders' inaccurate claims is not conducive to sound decision making. Nor should this case bog down in debates over irrelevant and erroneous factual claims

advanced by the amicus. Accordingly, this Court should deny Protect Our Defenders' motion to file its amicus brief.

I.

Protect Our Defenders' amicus brief makes numerous erroneous assertions.

Protect Our Defenders repeatedly offers erroneous characterizations of precedent.

For example, Protect Our Defenders describes *Carlson and Ryan-Jones v. Smith*, 43 M.J. 402 (C.A.A.F. 1995) (summary disposition), as a case involving "two sexual assault victims" who "filed a petition for extraordinary relief to protect their privacy rights under Mil. R. Evid. 412, Article 31 of the U.C.M.J., generalized 'invasions of privacy,' and their 'privileges.'" Amicus Brief at 18. That description is inaccurate in almost every respect. *Carlson and Ryan-Jones* involved a dispute over a subpoena duces tecum seeking "confidential EEO documents" for use in a special court-martial case. 43 M.J. at 402. No decision in the case suggests that either of the petitioners, CDR Carlson and Dr. Ryan-Jones, was a sexual assault victim. *See, e.g.*, *Carlson and Ryan-Jones v. Smith*, 43 M.J. 367 (C.A.A.F. 1995) (identifying petitioners as "Commander Erin Carlson and Rebecca Ryan-Jones, Ph.D."). Nothing in the opinion indicates that it was the petitioners'

Military Rule of Evidence 412 rights, privacy interests, or Article 31 rights that were at issue.

Protect Our Defenders also states, without citation to authority, that in *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006), the alleged victim's social worker to whom a subpoena for records had been directed requested a hearing before the military judge "through her attorney" and that her attorney appeared before the military judge to make legal arguments. R. at 17-18. Neither this Court's opinion in the case nor any other document of which the Real Party in Interest is aware establishes either that the social worker's counsel sought the hearing or that her counsel participated in it.

Protect Our Defenders also offers an inaccurate description of this Court's decision in *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). Amicus Brief at 23-24. According to Protect Our Defenders, *Gaddis* "say[s] that trial judges may not even consider victims' privacy despite the explicit direction in Mil. R. Evid. 412." *Id.* *Gaddis* says no such thing. Rather, *Gaddis* expressly recognizes that a Military Rule of Evidence 412 analysis includes a balancing of the danger of unfair prejudice to alleged victims' privacy rights except where the evidence is constitutionally required. *See*, *e.g.*, *Gaddis*, 70 M.J. at 253 ("There is no question that even considering the privacy interest of the victim will yield a constitutionally valid

result . . . when applied to evidence that is *not* constitutionally required and whose probative value does *not* outweigh the danger of unfair prejudice.”). The amicus brief’s mischaracterization of *Gaddis* signifies its lack of helpfulness to this Court’s resolution of the issues before it.

Nor is Protect Our Defenders’ mischaracterization of precedent limited to military case law. The amicus brief describes *Church of Scientology of California v. United States*, 506 U.S. 9 (1992), as a case involving the Church of Scientology seeking “to intervene in a criminal investigation.” Amicus Brief at 8. The Court’s opinion does not support that characterization. Rather, the case concerned evidence obtained pursuant to the Commissioner of Internal Revenue’s “broad authority to examine the accuracy of federal tax returns.” *Church of Scientology of California*, 506 U.S. at 448 n.2.

The amicus brief characterizes *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559 (11th Cir. 1989), as an example of an appeal by a nonparty news organization of a ruling denying “access to criminal trials in federal courts.” Amicus Brief at 9. That ruling was actually an affirmance of a district court’s “closure order restraining counsel and parties from disclosing the content of pleadings and memoranda filed in connection with a grand jury investigation.” 864 F.2d at 1561.

The amicus brief is also based, in part, on a misunderstanding of the source of the Military Rules of Evidence. At one point, the amicus brief states that "[n]o appellate court has ever held that it does not have jurisdiction to review a lower court's rulings on its own rules of evidence." Amicus Brief at 4. At another point, the amicus brief erroneously states that Congress adopted Military Rule of Evidence 412. Amicus Brief at 23. The Military Rules of Evidence, of course, were issued by the President, not by Congress. *See* Exec. Order No. 12,198, 45 Fed. Reg. 16932 (March 12, 1980). Arguments predicated, in part, on a misunderstanding of the source of relevant rules are not helpful to this Court's resolution of the issues before it.

Nor does the amicus brief note negative subsequent history of cases it cites. For example, Protect Our Defenders cites the Army Court of Military Review's decision in *United States v. Hollimon*, 12 M.J. 791 (A.C.M.R. 1982), without indicating that that decision was reversed, in part, by this Court, *United States v. Hollimon*, 16 M.J. 164 (C.M.A. 1983). Amicus Brief at 6. It similarly cites the Navy-Marine Corps Court of Criminal Appeals' unpublished decision in *United States v. Watt*, No. NMCM 96 01587, 1997 WL 803458 (N-M. Ct. Crim. App. Nov. 21, 1997) [Appendix], without either appending a copy of that decision to the brief or even providing a complete WESTLAW citation and

without indicating that that decision was reversed by this Court, *United States v. Watt*, 50 M.J. 102 (C.A.A.F. 1999). Amicus Brief at 6.

Given the many inaccuracies in Protect Our Defenders' discussion of case law, its amicus brief is not helpful and should not be accepted.

II.

Protect Our Defenders' amicus brief impermissibly attempts to offer purported facts from outside the record in violation of Rule 30A.

This Court's rules disfavor the presentation of "facts outside of the record established at the trial and the Court of Criminal Appeals." C.A.A.F. R. 30A(a). Where counsel seek an exception to that general approach, "[r]equests to consider factual material that is not contained in the record shall be presented by a motion to supplement the record filed pursuant to Rule 30." *Id*. In clear contravention of that rule, Protect Our Defenders offers pages of purported facts from outside the record. *See* Amicus Brief at 22-27. This recitation of purported facts points to the wisdom of Rule 30A, since consideration of Protect Our Defenders' extra-record factual assertions would invite a mini-trial over their accuracy.

For example, citing a Department of Defense report that is not included in the record, Protect Our Defenders states that

"in fiscal year 2012 approximately 26,000 men and women defending our country were sexually assaulted." Amicus Brief at 22 n.30. That is not even an accurate description of what the report purports to provide: an extrapolated estimate of the number of servicemembers subject to "unwanted sexual contact," not sexual assault. *See* Department of Defense Fiscal Year 2012 Annual Report on Sexual Assault in the Military, Volume I, at 12 [hereinafter 2012 Report Vol. I].[1] Moreover, there is good cause to question the accuracy of that extrapolation. The survey from which that number was extrapolated had a weighted response rate of just 24%. *See* Department of Defense Annual Report on Sexual Assault in the Military, Volume II, at 1.[2] Yet the 26,000 figure appears to have been derived from a gender-normed extrapolation of the results from those 24%. *See* 2012 Report Vol. I, *supra*, at 13. If, as common sense would suggest, the response rate for those who have been the victim of unwanted sexual contact is higher than that for those who have not, then the extrapolation would overstate the number of servicemembers subject to unwanted sexual contact. And if the response rate for those who have been subject to unwanted sexual contact is significantly higher, then the extrapolation would overstate the true figure by a substantial amount. That would, in turn, affect the disposition

[1] http://www.sapr.mil/media/pdf/reports/FY12_DOD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.
[2] http://www.sapr.mil/media/pdf/reports/FY12_DOD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_TWO.pdf.

calculations that Protect Our Defenders offers in footnote 10 of its amicus brief.

Protect Our Defenders also cites another survey from outside the record as part of a discussion of why some victims of unwanted sexual contact do not report the offense. While providing some statistics from the 2010 Workplace and Gender Relations Survey of Active Duty Members, *see* Amicus Brief at 22 n.11, Protect Our Defenders does not mention that 46% of both male and female survey respondents who had been the victims of unwanted sexual contact answered that they did not report the incident because it was "[n]ot important enough to report." 2010 Workplace and Gender Relations Survey of Active Duty Members at vi, 44 [hereinafter 2010 WGRA].[3] In the 2012 Workplace and Gender Relations Survey, that "not important enough to report" statistic rose to 48% for active duty women. 2012 Workplace and Gender Relations Survey of Active Duty Members at 106.[4]

Protect Our Defenders also seriously misreads the 2010 Workplace and Gender Relations Survey report's statistic regarding whether victims of unwanted sexual contact who

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[3] http://www.sapr.mil/media/pdf/research/DMDC_2010_WGRA_Overview_Report_of_Sexual_Assault.pdf.

[4] http://www.sapr.mil/media/pdf/research/2012_Workplace_and_Gender_Relations_Survey_of_Active_Duty_Members-Survey_Note_and_Briefing.pdf. The 2012 WGRA Survey does not provide a percentage for men who did not report unwanted sexual contact because it was not important enough to report. *Id.* at 109, 116.

reported the incident would do so again. According to Protect Our Defenders, "only 18 percent of the women who reported their sexual assault to the DoD would make the same decision to report if they could do it over." Amicus Brief at 24. They continue, "Only 10% of men who reported sexual assault would make the same decision." *Id.* at 24 n.19. But that is not what the survey results state. Not even close. Rather, the 18% statistic is the percentage of those who were the victims of unwanted sexual contact who *both* initially reported *and* would report again. 2010 WGRA, *supra*, at 35. That statistic appears to be relatively unhelpful for analytical purposes, but Protect Our Defenders grossly overstates those who initially reported but who would not do so again – which is only 11% of female victims of unwanted sexual contact and only 4% of male victims, according to the survey results. *Id.* at 35, 36. By introducing facts from outside the record and then misinterpreting those facts, Protect Our Defenders once again indicates that its amicus brief is not helpful to a resolution of this case.

Protect Our Defenders' amicus brief also cites and discusses news accounts of other military justice cases and possible military justice cases unrelated to this case and not included in this case's record. *See* Amicus Brief at 23 nn. 12-16 and accompanying text. Such news accounts are not a proper basis for deciding the issues before this Court.

This Court recently enforced Rule 30A by granting a government motion to strike portions of an appellant's supplement to a petition for grant of review relying on extra-record facts. *United States v. Abadia*, 72 M.J. 91 (C.A.A.F. 2013). This Court should similarly reject an amicus brief that advances pages of extra-record material.

Conclusion

For the foregoing reasons, this Honorable Court should deny Protect Our Defenders' motion to file an amicus brief.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that copies of the foregoing were sent via email to the Court, Appellant's counsel, Judge Kastenberg, Appellee's Counsel, the Air Force Government Trial and Appellate Counsel Division, counsel for amicus National Crime Victim Law Institute, counsel for amicus Protect Our Defenders, counsel for amicus Navy-Marine Corps Appellate Defense Division, counsel for amicus Marine Corps Defense Services Organization, and counsel for amicus Air Force Trial Defense Division, and the Army Defense Appellate Division, on May 29, 2013.

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APPENDIX

Only the Westlaw citation is currently available.

U.S. Navy–Marine Corps Court of Criminal Appeals.
UNITED STATES
v.
Kenneth R. **WATT**, XXX XX XXXX Private First Class (E–2), U.S. Marine Corps

No. NMCM 96 01587.
Nov. 21, 1997.

Sentence adjudged 9 February 1996. Military Judge: H.A. Hopson. Review pursuant to Article 66(c), UCMJ, of General Court–Martial convened by Commanding General, 3d Force Service Support Group, MarForPac, Unit 38401, FPO AP 96604–8401.
LT C.J. MCENTEE, JAGC, USNR, Appellate Defense Counsel

CDR JAMESG. WEINMEYER, JAGC, USNR, Appellate Government Counsel

LT J. RUSSELL MCFARLANE, JAGC, USNR, Appellate Government Counsel

Before WILLIAM J. LUCAS, JOHN T. OLIVER, DAVID W. PAULSON.

PER CURIAM.

***1** The appellant was tried by a general court-martial with members. Contrary to his pleas, he was found guilty of rape in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (1994)[hereinafter UCMJ]. He was sentenced to confinement for 8 years, forfeiture of all pay and allowances, reduction to pay grade E–1, and a dishonorable discharge. In his action, the convening authority approved only so much of the sentence as provided for confinement for 4 years, forfeiture of all pay and allowances, reduction to pay grade E–1, and a bad-conduct discharge. Further, exercising his powers of clemency, the convening authority suspended all confinement in excess of 2 years for a period of 1 year from the date of his action.

The appellant submitted five assignments of error,[FN1] asserting a denial of his constitutional right to present a defense, a challenge to the sufficiency of evidence, that the military judge improperly abandoned his impartial role, that trial counsel's arguments were improper, and that the military judge erred in instructing on the issue of consent.

We have carefully examined the record of trial, and we have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed.

I

The appellant's first assignment of error alleges that the appellant was denied his constitutional right to present a defense when the military judge prohibited him from giving testimony regarding his knowledge of the sexual reputation of the victim. A member had posed the question, “[a]t the time prior to intercourse, did you have reason to believe she would have had intercourse with you if she had known who you were?” Appellate Exhibit XXIV,

question 6. When asked his position at an Article 39(a), UCMJ, 10 U.S.C. § 839(a) session, the trial defense counsel specifically stated, "I don't have any objection to the question as it's phrased, sir." Record at 282. The military judge found the answer the appellant would give to the question improper under Military Rule of Evidence 412(b) and then decided not to allow the question. Record at 281–82. The military judge cautioned the appellant regarding his answers to questions posed by the members and to follow-up questions about to be posed by the military judge or counsel: "Nowhere in your response are you going to utter what you believe you have heard [the victim's] reputation to be around the barracks. Do we understand that?" Record at 282.

Thereafter, with the members again present, the military judge began asking questions of the appellant from the members. Record at 283–86. He also interspersed questions of his own. In light of the appellant's answers, questions were also posed by the trial counsel. Record at 286–88. The military judge asked further questions from the members, and additional questions were asked by the trial counsel. Record at 288–91.

***2** Significantly, no objection was raised to any of the numerous questions posed to the appellant by the military judge, trial counsel, and other members. Record at 283–90. Neither was there an objection to the instruction given by the military judge regarding the appellant's response that he "can't answer." Record at 289, 291. The gist of all of these questions, taken together, invited the appellant to explain why he believed the victim might accede to his sexual advances. He was given ample opportunity to explain in any manner except by stating his view of the victim's sexual reputation. Without an objection, and absent plain error, the appellant has failed to preserve the issue on appeal. MIL. R. EVID. 103(a)(1) & (d), MANUAL FOR COURTS–MARTIAL, UNITED STATES (1995 ed.).

Thus, we review application of the "plain-error doctrine" to the appellant's case. First, this court must determine that there was an error that was not voluntarily waived. We find no such error. The appellant is mistaken in his assertion that he was denied a constitutional right to present a defense. "[MIL. R. EVID.] 412 was premised on the precept that an accused does not have a constitutional right to present irrelevant evidence, and 'reputation and opinion concerning a victim's past sexual behavior are not relevant indicators of the likelihood of her consent to a specific sexual act or of her veracity.' " *United States v. Duncan*, 855 F.2d 1528, 1533 (11th Cir.1988) (quoting *Doe v. United States*, 666 F.2d 43, 47 (4th Cir.1981)). "The exclusion of irrelevant evidence cannot implicate constitutional concerns." *Allen v. Morris*, 845 F.2d 610, 614–15 (6th Cir.1988). As our superior court noted in *United States v. Greaves*, 40 M.J. 432, 439 (C.M.A.1994), "[a]ppellant was not denied his mistake-of-fact defense, but was allowed to present evidence of the circumstances surrounding the events of the night. The members obviously did not buy appellant's defense." In the case *sub judice*, the appellant was given ample opportunity to explain his actions. He was only prevented from stating his view of the victim's reputation. That he was unable to extricate himself from the box into which he had landed was a dilemma solely of his own making.

Even if we were to find that the military judge's ruling was error, it would appear from the record that such error was voluntarily waived by failure to object. On the other hand, if we were to assume that it was not waived, but rather was what the court in *United States v. Olano*, 507 U.S. 725, 733–34, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) referred to as "forfeited" error, we must still determine that it was "plain," "clear," or "obvious." We do not so find.

Ultimately, were we to find any error, we must consider whether it affected a substantial right of the accused. *Id.* at 735. *See also* *United States v. Toro*, 37 M.J. 313, 316 (C.M.A.1993) (citing *Olano*, 507 U.S. at 734, and applying it to military practice). The appellant must show unfair prejudice. Based on our review, we conclude that the miliary judge's ruling affected no substantial right and did not cause unfair prejudice. Therefore, the appellant's first assignment of error is without merit.

II

***3** In his second assignment of error, the appellant alleges that the record is both legally and factually insufficient to support the finding of guilty to the crime of rape. We find no such failure of proof.

Evidence is legally sufficient to support a conviction if any fact-finder could conclude beyond a reasonable doubt the existence of each element of the offense charged. *United States v. Bright*, 20 M.J. 661, 664 (N.M.C.M.R.1985). At trial, it is the responsibility of the trier of fact to determine the accuracy and weight of the testimony and the evidence, the relevant inferences to be drawn therefrom, the possible bias or lack thereof of the witnesses and, ultimately, the truth. *United States v. Doctor*, 7 C.M.A. 126, 137, 21 C.M.R. 252, 263, 1956 WL 4578 (1956). *See also* Art. 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Collier*, 1 M.J. 358, 366 (C.M.A.1976); *United States v. Frierson*, 20 C.M.A. 452, 454, 43 C.M.R. 292, 294, 1971 WL 12779 (1971). Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), this court has the duty to determine not only the legal sufficiency of the evidence but also its factual sufficiency. The test for legal sufficiency "is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324 (C.M.A.1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). When applying this test, we are " 'bound to draw every reasonable inference from the evidence of record in favor of the prosecution.' " *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A.1993)(quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A.1991)). The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, ... [we] are ... convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

We have reviewed the entire record *de novo* and conclude that the evidence is both legally and factually sufficient to prove the appellant's guilt beyond a reasonable doubt. The appellant's second assignment of error is without merit.

III

In his third assignment of error, the appellant argues that the military judge abandoned his impartial role and became an advocate for the prosecution when he questioned the appellant about why the appellant believed the victim might accept his sexual advances. We conclude that the military judge acted properly and that his questions did not materially prejudice the appellant's substantial rights.

***4** Public confidence in the military justice system mandates that judges must maintain an impartial and neutral role while presiding over a court-martial. *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A.1987). A military "judge may not abandon" his "impartial" role and "assist" the prosecution. *Id.* On the other hand, a military judge is not a "mere figurehead" or "simply an umpire in a contest between the Government and accused." *United States v. Kimble*, 23 C.M.A. 251, 253, 49 C.M.R. 384, 386, 1974 WL 14087 (1974). RULE FOR COURTS–MARTIAL 801(c), MANUAL FOR COURTS–MARTIAL, UNITED STATESS (1995 ed.)[hereinafter R.C.M.], permits the court-martial "to obtain evidence in addition to that presented by the parties." Likewise, the Military Rules of Evidence permit the military judge to "interrogate witnesses." MIL. R. EVID. 614(b).

The dilemma a trial judge must face is to assure that the court-martial members have the information they need while "scrupulously avoiding even the slightest appearance of partiality." *United States v. Shackelford*, 2 M.J. 17, 19 (C.M.A.1976). "Because 'jurors are ever watchful of the words that fall from him,' a military judge must be

circumspect in what he says to the parties and in how he examines witnesses." *United States v. Loving*, 41 M.J. 213, 253 (1994)(citing *United States v. Clower*, 23 C.M.A. 15, 18, 48 C.M.R. 307, 310, 1974 WL 13822 (1974)(quoting *Bollenbach v. United States*, 326 U.S. 607, 612, 66 S.Ct. 402, 90 L.Ed. 350 (1946)). In commenting on MIL. R. EVID. 614(b), experts in military jurisprudence have written: "Before the trial judge examines a witness ..., he should determine whether that witness's testimony needs clarification or completion. If the bench believes it does, questioning should be conducted with the greatest restraint. The military judge ... must continue to appear and must in fact be neutral[.]" STEPHEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL 709 (3d ed.1991).

Our superior court recently announced the standard for determining whether the military judge committed reversible error in situations such as this. The appropriate test "is whether, 'taken as a whole in context of this trial,' a court-martial's 'legality, fairness, and impartiality' were put into doubt by the military judge's questions." *United States v. Ramos*, 42 M.J. 392, 396 (1995)(quoting *Reynolds*, 24 M.J. at 265). This test is applied from the viewpoint of the reasonable person. *Ramos*, 42 M.J. at 396. As the court noted in *United States v. Dock*, 40 M.J. 112, 128–29 (C.M.A.1994), the clear intent of the military judge's questions was to elicit relevant facts for the edification of the members.

***5** On the basis of the entire record, we believe that a reasonable person would conclude that the military judge conducted this general court-martial fairly and impartially. *See Ramos*, 42 M.J. at 396. Likewise, we find no prejudice to the substantial rights of the appellant. Art. 59(a), UCMJ, 10 U.S.C. § 859(a).

Moreover, the appellant failed to preserve this error for appellate review. Absent plain error, which we do not find on these facts, the appellant's failure to object to the questions posed and raise these issues at trial forfeited them on appeal. *Olano*, 507 U.S. at 732–34. *See* MIL. R. EVID. 103(d). To prevail on appeal under the *Olano* "plain error" standard, the appellant "bears the burden of persuasion with respect to prejudice." *Olano*, 507 U.S. at 734. *See United States v. Young*, 470 U.S. 1, 16 n. 14, 105 S.Ct. 1038, 84 L.Ed.2d 1 ("[F]ederal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error ... had an unfair prejudicial impact on the jury's deliberations ... [which] undermined the fairness of the trial and contributed to a miscarriage of justice."). In this case, we can find no such prejudice. The appellant's third assignment of error is without merit.

IV

In his fourth assignment of error, the appellant alleges that trial counsel's argument was improperly inflammatory. The issue to be addressed is just how zealously the trial counsel may argue. After close of the evidence, the trial counsel is permitted to present argument, including reasonable comment on the evidence in the case and inferences to be drawn from it. The argument may include comments on the testimony, motives, and biases of witnesses, to the extent supported by the evidence. R.C.M. 919(b) and Discussion. Unless there is timely objection to improper argument, the objection is waived. R.C.M. 919(c), 801(g).

The appellant raised no objection at trial. Nonetheless, we will examine whether trial counsel's allegedly improper arguments materially prejudiced the appellant's substantial rights. We conclude that they did not.

Trial counsel's statement that the appellant was a "gutless rapist" and a "liar," Record at 307, was not an improper argument. On the contrary, her characterization of the appellant was merely fair comment on the evidence and, more specifically, on the appellant's own testimony.

Similarly, trial counsel's statement to the effect that "[m]embers, we know that's how people act when they know that they're telling a lie to someone who knows better ...," Record at 307, although hyperbole, was also fair comment on her apparent observations of the appellant's demeanor while testifying.

Clearly, trial counsel's argument did not constitute a situation in which we must intervene to avoid a "miscarriage of justice." *United States v. Fisher*, 21 M.J. 327, 329 (C.M.A.1986)(quoting *United States v. Frady*, 456 U.S. 152, 163 n. 14, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)). The appellant's fourth assignment of error is without merit.

V

***6** In his fifth and final assignment of error, the appellant argues that the military judge committed plain error by failing to specifically instruct that a person in an alcoholic black-out may still be capable of consenting to sexual intercourse. In support of his assertion, the appellant cites *United States v. Baran*, 22 M.J. 265 (C.M.A.1986). The now-sought-after instruction, however, was not requested by trial defense counsel, nor was a holding in support of the giving of such an instruction ever reached by the majority in *Baran.* Judge Everett, in his concurring opinion, noted that "later inability to recall what happened does not signify that at the time of intercourse she was unable to give consent." He also stated "alcohol may affect a person's memory and inhibitions without depriving him of volition; and proof of amnesia does not conclusively establish that someone was unconscious or lacked mental responsibility at the time of the events they have forgotten." *Id.* at 270.

Just as the majority in *Baran* referred to the determination of the military judge, we are similarly "persuaded, beyond a reasonable doubt, that appellant was not reasonably and honestly mistaken regarding the victim's consent." *Id.* at 267. The instructions given on the issue of the victim's ability to give consent were legally sufficient to ensure no prejudice to any substantial right of the appellant. His fifth assignment of error is without merit.

Accordingly, we affirm the findings of guilty and the sentence, as approved on review below.

FN1. I. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BECAUSE THE MILITARY JUDGE RULED THAT HE COULD NOT ANSWER THE JUDGE'S AND TRIAL COUNSEL'S REPEATED QUESTIONS ABOUT THE REASONING PROCESS THAT LED HIM TO MAKE SEXUAL ADVANCES ON THE ALLEGED VICTIM.

II. THE RECORD OF TRIAL IS LEGALLY INSUFFICIENT TO SUPPORT THE FINDING OF GUILTY TO RAPE.

III. APPELLANT WAS DENIED A FAIR TRIAL WHEN THE MILITARY JUDGE ABANDONED HIS ROLE AS AN IMPARTIAL AND NEUTRAL ARBITER AND ASSUMED THE ROLE OF A PARTISAN ADVOCATE FOR THE PROSECUTION BY BADGERING APPELLANT WITH A QUESTION HE KNEW APPELLANT COULD NOT ANSWER. (Citations omitted.)

IV. APPELLANT WAS DENIED A FAIR TRIAL BY TRIAL COUNSEL'S INFLAMMATORY ARGUMENTS ON FINDINGS WHERE SHE REFERRED TO APPELLANT AS A "GUTLESS RAPIST" AND A "LIAR" WHOSE WAY OF LOOKING AT HER DURING HIS TESTIMONY MADE HIS LIES SO OBVIOUS BECAUSE "MEMBERS, WE KNOW THAT'S HOW PEOPLE ACT

WHEN THEY KNOW THAT THEY'RE TELLING A LIE TO SOMEONE WHO KNOWS BETTER[.]" (Citations omitted.)

V. THE MILITARY JUDGE COMMITTED PLAIN ERROR BECAUSE HE FAILED TO SPECIFICALLY INSTRUCT THE MEMBERS THAT A PERSON IN AN ALCOHOLIC BLACK–OUT MAY STILL BE CAPABLE OF CONSENTING TO SEXUAL INTERCOURSE. (Citations omitted.)

N.M.Ct.Crim.App.,1997.
U.S. v. Watt
Not Reported in M.J., 1997 WL 803458 (N.M.Ct.Crim.App.)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Airman First Class (E-3) L.R.M., USAF *Appellant,* v. Lieutenant Colonel (O-5) JOSHUA KASTENBERG, USAF, *Appellee,* & Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party In Interest.*	)	MOTION TO SUPPLEMENT THE RECORD FILED BY *AMICUS CURIAE* PROTECT OUR DEFENDERS USCA Dkt. No. 13-5006/AF Crim. App. Misc. Dkt. No. 2013-05 Dated 3 JUNE 2013

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

COMES NOW Protect Our Defenders, by and through its undersigned counsel, and pursuant to Rule 30A of the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces, moves to supplement the record with the attached appendices A through E.

The attached appendices are described below. With each description is a brief explanation of why it is appropriate for this Court to accept supplementation of the record.

APPENDIX A - DECLARATION OF ALEXANDRA M. KWOKA, ESQUIRE

Protect Our Defenders respectfully moves this Honorable Court to consider the Declaration of Alexandra M. Kwoka, Esquire. Ms. Kwoka is the attorney who represented one of the complaining witnesses in *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995). Protect Our Defenders cited *Carlson* solely to provide an example of a case in which military courts, including this Court, allowed a complaining witness to be represented by counsel. In *Carlson*, Ms. Kwoka filed motions and memoranda, and she presented oral arguments.

The undersigned counsel did not believe a declaration was necessary because it appeared from *Carlson* at 402 that the complaining witnesses were sexual assault victims represented by counsel.[1] Real Party in Interest Daniels points out in his Opposition to Motion of Protect Our Defenders for Leave to File an *Amicus Curiae* Brief (hereinafter "Opposition Brief") that perhaps the *Carlson* summary disposition opinion did not clearly indicate either petitioner was a sexual assault victim. The

[1] Protect Our Defenders believed the petitioners were sexual assault victims because the *Carlson* summary disposition involved Mil R. Evid. 412 which is only applicable in proceedings involving a sexual offense. Ms. Kwoka has clarified that her client was a victim of sexual harassment. Protect Our Defenders' assumption that the petitioners were sexual assault victims was reasonable, and was shared by the United States. See *Amicus Curiae* Brief of the Air Force Appellate Government Division at 13.

attached Declaration makes it clear that one of the petitioners was a victim of sexual harassment, and not sexual assault.[2]

The Court should also understand that Protect Our Defenders' assertion in its Proposed Brief that the *Carlson* petitioners were represented by counsel was intended only to refute assertions in the briefs of Appellee, Real Party in Interest and their supporting *amici curiae* that representation by counsel of has never happened before.[3] The Real Party in Interest's assertion that representation by counsel for a complaining witness has never happened in 200 years is an assertion of fact that requires bringing into this case the record of every court martial for the last 200 years. Protect Our Defenders assertion must be considered to refute the Real Party in Interest's broad but unsupported assertion.

Protect Our Defenders respectfully moves this Honorable Court to consider the Declaration of Ms. Kwoka.

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[2] The Real party in Interest Daniels is simply incorrect in his assertion that "Nothing in the opinion indicates that it was the petitioners' Military Rule of Evidence 412 rights, privacy interests, or Article 31 rights that were at issue." Opposition Brief at 2 - 3. In *Carlson,* this Honorable Court ordered the trial judge to "issue whatever protective orders are necessary to prevent unwarranted invasions of privacy, . . . [or] violation of Mil. R. Evid. 412, ..." *Carlson* at 402.

[3] See Real Party in Interest Brief at 19 ("[C]ourts-martial have been conducted for over 200 years without counsel for complaining witnesses . . . ."); Appellee Brief at 21; and *Amicus Curiae* Marine Corps Defense Services Organization at 17 ("inconsonant with the traditions and values of western jurisprudence").

APPENDIX B – DECLARATION OF WENDY MURPHY, ESQUIRE

Protect Our Defenders respectfully moves this Honorable Court to consider the Declaration of Wendy Murphy, Esquire. Ms. Murphy is the attorney who represented Jennifer Bier, the civilian therapist who provided counseling to the sexual assault victim in *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006). The reasons this Honorable Court should consider Ms. Murphy's Declaration are similar to the reasons for consideration of Ms. Kwoka's Declaration above.

APPENDIX C – –U.S. v. ZOLIN

Protect Our Defenders Respectfully moves this Honorable court to consider the case, *United States v. Zolin*, 491 U.S. 554 (1989). In its discussion of *Church of Scientology v. United* States, 506 U.S. 9 (1992), Protect Our Defenders alleged that the case involved a nonparty seeking to intervene in a criminal investigation. Protect Our Defenders *Amicus* Brief at 8. In its Opposition Brief, Real Party in Interest asserts that the case did not involve a criminal investigation. Opposition Brief at 4.

Zolin and *Church of Scientology* are related cases. *Zolin* reached the Supreme Court in 1989. In *Zolin*, the Supreme Court stated, "This case arises out of efforts of the Criminal Investigation Division of the Internal Revenue Service (IRS) to

investigate the tax returns of L. Ron Hubbard, ..." The underlying criminal investigation by the IRS is the same investigation for both cases. Protect Our Defenders requests this Honorable Court to consider the related case, *United States v. Zolin*, 491 U.S. 554 (1989).

APPENDIX D - PAGES 12, 52, 98 AND 99 OF 2012 ANNUAL REPORT

Protect Our Defenders respectfully moves this Honorable Court to consider pages 12, 52, 98 and 99 of the Department of Defense Fiscal Year 2012 Annual Report on Sexual Assault in the Military, volume I (the "Report"). Page 12 is cited by Protect Our Defenders in its *Amicus* Brief at 22 and by the Real Party in Interest in his Opposition Brief at 7. The Real Party in Interest complains that Protect Our Defenders inaccurately describes the Report because the Protect Our Defenders stated that approximately 26,000 men and women defending our country were "sexually assaulted," but the report estimates that 26,000 men and women were subject to "unwanted sexual contact."

The Real Party in Interest's complaint appears to be that "sexual assault" under Article 120(b) is narrower than the definition of "unwanted sexual contact" in the Annual Report. The Real Party in Interest mistakenly equates "sexual assault" as defined in Article 120(b) with how that term is defined in the Annual Report. "Sexual assault" as defined on pages 52, and

98 - 99 is equivalent to "unwanted sexual contact" as defined on page 12.

The Opposition Brief also complains that Protect Our Defenders even mentions the statistics in the 2012 Annual Report. It would be appropriate for this Honorable Court to take judicial notice of reports prepared by the Department of Defense because the Department's leadership is preparing and relying on these reports to obtain the best information available so that they can determine how to end the scourge of sexual assault in the military. Sexual assault destroys unit cohesion and discipline. The military justice system's primary purpose is to maintain the good order and discipline of armed services. These reports are essential to that purpose, and this Court should consider the reports, as well as arguments by both sides concerning the significance or accuracy of the reports. See arguments concerning the Report in Brief of Air Force Trial Defense Division at 6-7 and Opposition Brief at 6-9.

APPENDIX E - PAGES V TO VI OF GENDER RELATIONS SURVEY

Protect Our Defenders respectfully moves this Honorable Court to consider pages v to vi of the 2010 Workplace and Gender Relations Survey of Active Duty Members ("Survey"). The Opposition Brief asserts that Protect Our Defenders "seriously misreads" the Survey, and that Protect Our Defenders is "not

even close" to stating what the Survey results state. Opposition Brief at 8-9. In the Executive Summary at v - vi, the Survey states, "Twenty-eight percent of women and 14% of men indicated they reported to a DoD authority (. . .), and of those who reported, 18% of women and 10% of men indicated they would make the same decision about reporting if they could do it over." There is no meaningful difference between the Survey's Executive Summary and Protect Our Defenders' Brief.

WHEREFORE, Protect Our Defenders respectfully requests this Honorable Court to consider appendices A through E attached.

Date: 03 June 2013 Respectfully submitted,

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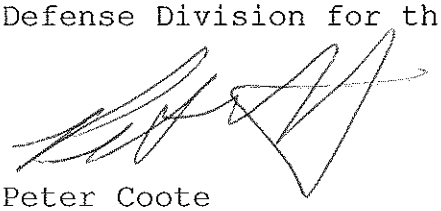
CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically mailed to the Court, Appellant, Appellee, Real Party in Interest, and *amici curiae* Air Force Appellate Government Division, Air Force Trial Defense Division, Marine Corps Defense Services Organization, Army Defense Appellate Division, and Appellate Defense Division for the Navy-Marine Corps on 03 June 2013.



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APPENDIX A

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ARMED FORCES

Airman First Class (E-3) L.R. M., USAF Appellant, v. Lieutenant Colonel (O-5) JOSHUA KASTENBERG, USAF, Appellee, & Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, Real Party In Interest.	DECLARATION OF ALEXANDRA M. KWOKA RE: *AMICUS CURIAE* PROTECT OUR DEFENDERS PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS USCA Dkt. No. 13-5006/AF Crim. App. Misc. Dkt. No. 2013-05 Dated 28 May 2013

I, ALEXANDRA M. KWOKA, without waiving the attorney client privilege, submit this Declaration at the request of counsel for *amicus curiae* Protect Our Defenders, and declare as follows:

I am an attorney who represented one of the sexual harassment complaining witness in the case described in page 18 of the 28 May 2013 Proposed Brief of Protect Our Defenders. As counsel, I represented the complaining witness's interests, including her privacy interests, during the

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proceedings at both the trial court and on petition to the Court of Appeals for the Armed Forces. I filed motions and memoranda with the courts and made oral arguments.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that this declaration was executed on May 31, 2012, at San Diego, California.

ALEXANDRA M. KWOKA

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Airman First Class (E-3) L.R.M., USAF *Appellant,* v. Lieutenant Colonel (O-5) JOSHUA KASTENBERG, USAF, *Appellee,* & Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party In Interest.*	)	DECLARATION OF COUNSEL USCA Dkt. No. 13-5006/AF Crim. App. Misc. Dkt. No. 2013-05 Dated 28 May 2013

I, Wendy Murphy, hereby depose and state:

1. I am an attorney in good standing, licensed to practice law in the Commonwealth of Massachusetts.

2. In connection with the court martial proceeding *U.S. v. Joseph J. Harding, 1LT, USAF,* at Randolph Air Force Base, San Antonio, Texas, I was retained to represent Jennifer Bier, a civilian therapist who provided counseling to the sexual assault victim in the aforementioned court martial proceeding. Ms. Bier had

received a subpoena from a military court requiring disclosure of the victim's privileged treatment file.

3. On April 11, 2005, I submitted to the court an objection to the summons and written request for a hearing on behalf of Ms. Bier.

4. On April 25, 2005, the military court issued a show cause order to Ms. Bier and scheduled a hearing for May 18, 2005.

5. I filed a memorandum of law and traveled to San Antonio, Texas where, in the company of Ms. Bier, I provided extensive oral argument to the court on May 18, 2005.

Signed under the pains and penalties of perjury this 1st day of June, 2013.

Wendy Murphy
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APPENDIX C

109 S.Ct. 2619
Supreme Court of the United States

UNITED STATES, Petitioner
v.
Frank S. ZOLIN et al.

No. 88-40. | Argued March 20, 1989. | Decided June 21, 1989.

In connection with tax investigation the United States brought action to compel state court clerk to produce sealed documents. Church and taxpayer's wife intervened. The United States District Court for the Central District of California, Harry L. Hupp, J., ordered production of some, but not all, documents. Intervenors appealed, and United States cross-appealed. The Court of Appeals, 809 F.2d 1411, affirmed. Thereafter, the Court of Appeals, 832 F.2d 127, granted en banc rehearing and withdrew prior panel assignment. Subsequently, the Court of Appeals, 842 F.2d 1135, vacated its order for en banc hearing. The Supreme Court, Justice Blackmun, held that: (1) District Court may condition order enforcing IRS summons by placing restrictions upon IRS's dissemination of information obtained through subpoena-enforcement action; (2) in camera review may be used to determine whether allegedly privileged attorney-client communications fall within crime-fraud exception; (3) before district court may engage in in camera review of allegedly privileged communications at request of party opposing privilege, that party must present evidence sufficient to support reasonable belief that in camera review may yield evidence establishing the applicability of the crime-fraud exception; and (4) threshold joined to obtain in camera review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged, even if the evidence is not independent of the allegedly privileged communications.

Affirmed in part; vacated in part; and remanded.

Justice Brennan took no part in the consideration or decision of the case.

Opinion on remand, 905 F.2d 1344.

**2621 *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*554 The Internal Revenue Service (IRS), as part of its investigation of the tax returns of L. Ron Hubbard, founder of the Church of Scientology (the Church), filed in the Federal District Court a petition to enforce a summons it had served upon the Clerk of the Los Angeles County Superior Court demanding that he produce documents, including two tapes, in his possession in conjunction with a pending suit. The Church and Mary Sue Hubbard, intervenors in the state-court action and respondents here, intervened to oppose production of the materials. They claimed, *inter alia,* that the IRS was not seeking the materials in good faith and that the attorney-client privilege barred the tapes' disclosure. The IRS argued, among other things, that the tapes fell within the exception to the attorney-client privilege for communications in furtherance of future illegal conduct-the so-called "crime-fraud" exception-and urged the District Court to listen to the tapes in making its privilege determination. In addition, the IRS submitted a declaration by a special agent which had included partial tape transcripts the IRS lawfully had obtained. The court rejected respondents' bad-faith claim and ordered production of five of the requested documents, but it conditioned its enforcement order by placing restrictions upon IRS dissemination of the documents. The court also ruled that the tapes need not be produced since they contained privileged attorney-client communications to which, the quoted excerpts revealed, the crime-fraud exception did not apply. The court rejected the request that it listen to the tapes, on the ground that that request had been abandoned in favor of using the agent's declaration as the basis for determining the privilege question. The Court of Appeals affirmed the conditional-enforcement order. As to the privilege issue, it agreed with respondents that the District Court would have been without power to grant the IRS' demand for *in camera* review of the tapes, because the Government's evidence of crime or fraud must come from sources independent of the **2622 attorney-client communications on the tapes. Reviewing the independent evidence (a review that excluded the partial transcripts), the court affirmed the District Court's determination as to the inapplicability of the crime-fraud exception.

*555 *Held:*

1. Insofar as it upheld the District Court's conditional-enforcement order, the Court of Appeals' judgment is affirmed by an equally divided Court. P. 2625.

2. In appropriate circumstances, *in camera* review of allegedly privileged attorney-client communications may be used to determine whether the communications fall within the crime-fraud exception. Pp. 2625-2632.

(a) Federal Rule of Evidence 104(a), which provides that a court is bound by the rules of evidence with respect to privileges when determining the existence of a privilege, does not prohibit the use of *in camera* review. Pp. 2627-2630.

(b) However, before a district court may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that such review may reveal evidence that establishes the exception's applicability. Once this threshold showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the court. Pp. 2630-2631.

(c) The party opposing the privilege may use any relevant nonprivileged evidence, lawfully obtained, to meet the threshold showing, even if its evidence is not "independent" of the contested communications as the Court of Appeals uses that term. Pp. 2631-2632.

(d) On remand, the Court of Appeals should consider whether the District Court's refusal to listen to the tapes *in toto* was justified by the manner in which the IRS presented and preserved its *in camera* review request. If its demand was properly preserved, that court, or the District Court on remand, should determine whether the IRS has presented a sufficient evidentiary basis for *in camera* review and whether it is appropriate for the District Court, in its discretion, to grant the request. P. 2632.

809 F.2d 1411 (CA9 1987), 842 F.2d 1135, and 850 F.2d 610 (CA9 1988), affirmed in part, vacated in part, and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which all other Members joined, except BRENNAN, J., who took no part in the consideration or decision of the case.

Attorneys and Law Firms

Alan I. Horowitz argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Acting Solicitor General Bryson, Assistant Attorney General Rose, Deputy Solicitor General Wallace, Charles E. Brookhart,* and *John A. Dudeck, Jr.*

***556** *Michael Lee Hertzberg* argued the cause for respondents. With him on the brief were *Eric M. Lieberman* and *David Golove.**

* *Edward D. Urquhart, Silvia T. Hassell,* and *Charles J. Escher* filed a brief for Bernard M. Barrett, Jr., M.D., as *amicus curiae.*

Opinion

Justice BLACKMUN delivered the opinion of the Court.

This case arises out of the efforts of the Criminal Investigation Division of the Internal Revenue Service (IRS) to investigate the tax returns of L. Ron Hubbard, founder of the Church of Scientology (the Church), for the calendar years 1979 through 1983. We granted certiorari, 488 U.S. 907, 109 S.Ct. 257, 102 L.Ed.2d 246 (1988), to consider two issues that have divided the Courts of Appeals. The first is whether, when a district court enforces an IRS summons, see 26 U.S.C. § 7604, the court may condition its enforcement order by placing restrictions on the disclosure of the summoned information. [1] The Court of Appeals in this case upheld the restrictions. We affirm its judgment on that issue by an equally divided Court.

1 Compare *United States v. Author Services, Inc.*, 804 F.2d 1520, 1525-1526 (CA9 1986), opinion amended, 811 F.2d 1264 (1987), with *United States v. Barrett*, 837 F.2d 1341 (CA5 1988) (en banc), cert. pending, No. 87-1705.

[1] The second issue concerns the testimonial privilege for attorney-client communications ****2623** and, more particularly, the generally recognized exception to that privilege for communications in furtherance of future illegal conduct-the so-called "crime-fraud" exception. The specific question presented is whether the applicability of the crime-fraud exception must be established by "independent evidence" (*i.e.*, without reference to the content of the contested communications themselves), or, alternatively, whether the applicability of that exception can be resolved by an *in camera* inspection of the allegedly privileged material. [2] We reject the "independent evidence" approach and hold that the district court, under ***557** circumstances we explore below, and at the behest of the party opposing the claim of privilege, may conduct an *in camera* review of the materials in question. Because the Court of Appeals considered only

"independent evidence," we vacate its judgment on this issue and remand the case for further proceedings.[3]

2 Compare *United States v. Shewfelt*, 455 F.2d 836 (CA9), cert. denied, 406 U.S. 944, 92 S.Ct. 2042, 32 L.Ed.2d 331 (1972), with *In re Berkley & Co.*, 629 F.2d 548 (CA8 1980).

3 Respondents suggest that this case is now moot, because L. Ron Hubbard died January 24, 1986, thus foreclosing any further criminal investigation of him, and because the IRS civil audit of Mr. Hubbard for the relevant tax years was terminated as a " 'closed case.' " Brief in Opposition 8-10. The IRS disagrees, largely because the civil tax audit has not been terminated, and its result could affect the liability of Mr. Hubbard's estate. We are satisfied that a live controversy remains.

I

In the course of its investigation, the IRS sought access to 51 documents that had been filed with the Clerk of the Los Angeles County Superior Court in connection with a case entitled *Church of Scientology of California v. Armstrong*, No. C420 153. The *Armstrong* litigation involved, among other things, a charge by the Church that one of its former members, Gerald Armstrong, had obtained by unlawful means documentary materials relating to Church activities, including two tapes. Some of the documents sought by the IRS had been filed under seal.

The IRS, by its Special Agent Steven Petersell, served a summons upon the Clerk on October 24, 1984, pursuant to 26 U.S.C. § 7603, demanding that he produce the 51 documents.[4] The tapes were among those listed. App. 33-38. On November 21, IRS agents were permitted to inspect and copy some of the summoned materials, including the tapes.

4 The current Clerk of the Superior Court, Frank S. Zolin, is a named respondent in this case, but did not participate in briefing or argument before the Court of Appeals or before this Court. We use the term "respondents" to refer to Mary Sue Hubbard and the Church, the only active respondents in this Court.

On November 27, the Church and Mary Sue Hubbard, who had intervened in *Armstrong*, secured a temporary restraining ***558** order from the United States District Court for the Central District of California. The order required the IRS to file with the District Court all materials acquired on November 21 and all reproductions and notes related thereto, pending disposition of the intervenors' motion for a preliminary injunction to bar IRS use of these materials. Exh. 2 to Petition to Enforce Internal Revenue Summons. By order dated December 10, the District Court returned to the IRS all materials except the tapes and the IRS' notes reflecting their contents. See App. 30.

On January 18, 1985, the IRS filed in the District Court a petition to enforce its summons. In addition to the tapes, the IRS sought 12 sealed documents the Clerk had refused to produce in response to the IRS summons. The Church and Mary Sue Hubbard intervened to oppose production of the tapes and the sealed documents. Respondents claimed that IRS was not seeking the documents in good faith, and objected on grounds of lack of relevance and attorney-client privilege.

****2624** Respondents asserted the privilege as a bar to disclosure of the tapes. The IRS argued, among other things, however, that the tapes fell within the crime-fraud exception to the attorney-client privilege, and urged the District Court to listen to the tapes in the course of making its privilege determination. In addition, the IRS submitted to the court two declarations by Agent Petersell. In the first, Petersell stated his grounds for believing that the tapes were relevant to the investigation. See Declaration in No. CV 85-0440-HLH, ¶ 3 (March 8, 1985). In the second, Petersell offered a description of the tapes' contents, based on information he received during several interviews. Appended to this declaration-over respondents' objection-were partial transcripts of the tapes, which the IRS lawfully had obtained from a confidential source. See March 15, 1985, declaration ***559** (filed under seal).[5] In subsequent briefing, the IRS reiterated its request that the District Court listen to the tapes *in camera* before making its privilege ruling.

5 The IRS denied that the transcripts were made using tapes obtained from the Superior Court or from any other illicit source. Agent Petersell declared that: "The partial transcripts were not prepared by the United States from the tapes in the custody of the Superior Court for Los Angeles County, California, nor from copies of the tape now in the custody of the Clerk of this Court. The transcripts were obtained from a confidential source by another Special Agent prior to the issuance of this summons. The source was not a party to *Church of Scientology v. Armstrong*, No. 410153, nor an attorney for any party in that proceeding." See Declaration of Agent Petersell in No. CV 85-0440-HLH (Tx) (March

21, 1985). As the District Court made no finding of illegality, we assume for present purposes that the transcripts were legally obtained.

After oral argument and an evidentiary hearing, the District Court rejected respondents' claim of bad faith. App. to Pet. for Cert. 27a. The court ordered production of 5 of the 12 documents, *id.*, at 28a, and specified: "The documents delivered hereunder shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." *Id.*, at 29a.

Turning to the tapes, the District Court ruled that respondents had demonstrated that they contain confidential attorney-client communications, that the privilege had not been waived, and that "[t]he 'fraud-crime' exception to the attorney-client privilege does not apply. The quoted excerpts tend to show or admit past fraud but there is no clear indication that future fraud or crime is being planned." *Id.*, at 28a. On this basis, the court held that the Clerk "need not produce its copy of the tapes pursuant to the summons." *Id.*, at 29a. The District Court denied the IRS' motion for reconsideration, rejecting the IRS' renewed request that the court listen to the tapes *in toto*. "While this was at one time discussed with counsel, thereafter Mr. Petersell's declaration was submitted, and no one suggested that this ***560** was an inadequate basis on which to determine the attorney-client privilege question." *Id.*, at 25a-26a.

Respondents appealed to the Court of Appeals for the Ninth Circuit, and the IRS cross-appealed on two relevant grounds. First, the IRS claimed that the District Court abused its discretion by placing conditions on the IRS' future use of the subpoenaed information. The Court of Appeals disagreed, holding: "A district court may, when appropriate, condition enforcement of a summons on the IRS' agreeing to abide by disclosure restrictions." 809 F.2d 1411, 1417 (1987).

Second, the IRS contended that the District Court erred in rejecting the application of the crime-fraud exception to the tapes. In particular, the IRS argued that the District Court incorrectly held that the IRS had abandoned its request for *in camera* review of the tapes, and that the court should have listened to the tapes before ruling that the crime-fraud exception was inapplicable. Answering Brief for United States as Appellee in No. 85-6065, and Opening Brief for United States as Cross- ****2625** Appellant in No. 85-6105 (CA9), pp. 48-49 (filed under seal). Respondents contended, in contrast, that the District Court erred in the opposite direction: they argued that it was error for the court to rely on the partial transcripts, because "[i]n this Circuit, a party cannot rely on the communications themselves-whether by listening to the tapes *or reviewing excerpts or transcripts of them*-to bear its burden to invoke the exception but must bear the burden by independent evidence. This is the clear and unambiguous holding of *United States v. Shewfelt*, 455 F.2d 836 (9th Cir.), cert. denied, 406 U.S. 944, 92 S.Ct. 2042, 32 L.Ed.2d 331 (1972)." (Emphasis added.) Answering Brief for Church of Scientology of California and Mary Sue Hubbard as Cross-Appellees in No. 85-6065, and Reply Brief as Appellants in No. 85-6105 (CA9), p. 24 (filed under seal).

The panel of the Court of Appeals agreed with respondents that, under *Shewfelt*, "the Government's evidence of crime or ***561** fraud must come from sources independent of the attorney-client communications recorded on the tapes," 809 F.2d, at 1418, thereby implicitly holding that even if the IRS had properly preserved its demand for *in camera* review, the District Court would have been without power to grant it. The Court of Appeals then reviewed "the Government's independent evidence." *Id.*, at 1418-1419. That review appears to have excluded the partial transcripts, and thus the Court of Appeals implicitly agreed with respondents that it was improper for the District Court to have considered even the partial transcripts. See Brief for United States 7. On the basis of its review of the "independent evidence," the Court of Appeals affirmed the District Court's determination that the IRS had failed to establish the applicability of the crime-fraud exception. 809 F.2d, at 1419.

The full Court of Appeals vacated the panel opinion and ordered en banc review, on the basis of a perceived conflict between *Shewfelt* and *United States v. Friedman*, 445 F.2d 1076 (CA9), cert. denied *sub nom. Jacobs v. United States*, 404 U.S. 958, 92 S.Ct. 326, 30 L.Ed.2d 275 (1971). 832 F.2d 127 (1987). Upon consideration, a majority of the limited en banc court, see Ninth Circuit Rule 35-3, determined that the intracircuit conflict was illusory; it agreed with respondents that *Friedman* did not address the independent-evidence rule. 842 F.2d 1135, 1136, amended by 850 F.2d 610 (1988). The limited en banc court vacated the order for rehearing en banc as improvidently granted and reinstated the panel opinion in relevant part. *Ibid.*

II

[2] This Court is evenly divided with respect to the issue of the power of a district court to place restrictions upon the dissemination by the IRS of information obtained through a § 7604 subpoena-enforcement action. We therefore affirm the judgment of the Court of Appeals insofar as it upheld the District Court's conditional-enforcement order.

*562 III

Questions of privilege that arise in the course of the adjudication of federal rights are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed.Rule Evid. 501. We have recognized the attorney-client privilege under federal law, as "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). Although the underlying rationale for the privilege has changed over time, see 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961),[6] courts long have viewed its central concern as one "to encourage **2626 full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn,* 449 U.S., at 389, 101 S.Ct., at 682. That purpose, of course, requires that clients be free to "make full disclosure to their attorneys" of past wrongdoings, *Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), in order that the client may obtain "the aid of persons having knowledge of the law and skilled in its practice," *Hunt v. Blackburn,* 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888).

6 See also Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 Calif.L.Rev. 1061 (1978); Developments in the Law-Privileged Communications, 98 Harv.L.Rev. 1450, 1455-1458 (1985).

The attorney-client privilege is not without its costs. Cf. *Trammel v. United States,* 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980). "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." *Fisher,* 425 U.S., at 403, 96 S.Ct., at 1577. The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection-the centrality of open client and attorney communication to the proper functioning of our adversary system of justice-"ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing,* but *563 to *future wrongdoing.*" 8 Wigmore, § 2298, p. 573 (emphasis in original); see also *Clark v. United States,* 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933). It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the "seal of secrecy," *ibid.,* between lawyer and client does not extend to communications "made for the purpose of getting advice for the commission of a fraud" or crime. *O'Rourke v. Darbishire,* [1920] A.C. 581, 604 (P.C.).

The District Court and the Court of Appeals found that the tapes at issue in this case recorded attorney-client communications and that the privilege had not been waived when the tapes were inadvertently given to Armstrong. 809 F.2d, at 1417 (noting that Armstrong had acquired the tapes from L. Ron Hubbard's personal secretary, who was under the mistaken impression that the tapes were blank). These findings are not at issue here. Thus, the remaining obstacle to respondents' successful assertion of the privilege is the Government's contention that the recorded attorney-client communications were made in furtherance of a future crime or fraud.

[3] A variety of questions may arise when a party raises the crime-fraud exception. The parties to this case have not been in complete agreement as to which of these questions are presented here. In an effort to clarify the matter, we observe, first, that we need not decide the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception. Cf. *Clark,* 289 U.S., at 15, 53 S.Ct., at 469, quoting *O'Rourke;* S. Stone & R. Liebman, Testimonial Privileges § 1.65, p. 107 (1983).[7] Rather, we are concerned here **2627 with *564 the *type* of evidence that may be used to make that ultimate showing. Within that general area of inquiry, the initial question in this case is whether a district court, at the request of the party opposing the privilege, may review the allegedly privileged communications *in camera* to determine whether the crime-fraud exception applies.[8] If such *in camera* review is permitted, the second question we must consider is whether some threshold evidentiary showing is needed before the district court may undertake the requested *565 review. Finally, if a threshold showing is required, we must consider the type of evidence the opposing party may use to meet it: *i.e.,* in this case, whether the partial transcripts the IRS possessed may be used for that purpose.

7 We note, however, that this Court's use in *Clark v. United States,* 289 U.S. 1, 14, 53 S.Ct. 465, 469, 77 L.Ed. 993

(1933), of the phrase "*prima facie* case" to describe the showing needed to defeat the privilege has caused some confusion. See Gardner, The Crime or Fraud Exception to the Attorney-Client Privilege, 47 A.B.A.J. 708, 710-711 (1961); Note, 51 Brooklyn L.Rev. 913, 918-919 (1985) ("The *prima facie* standard is commonly used by courts in civil litigation to *shift* the burden of proof from one party to the other. In the context of the fraud exception, however, the standard is used to dispel the privilege altogether *without* affording the client an opportunity to rebut the *prima facie* showing" (emphasis in original)). See also *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d 1032, 1039 (CA2 1984). In using the phrase in *Clark*, the Court was aware of scholarly controversy concerning the role of the judge in the decision of such preliminary questions of fact. See 289 U.S., at 14, n., 53 S.Ct., at 469, n. The quantum of proof needed to establish admissibility was then, and remains, subject to question. See, *e.g.*, Maguire & Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv.L.Rev. 392, 400 (criticizing courts insofar as they "have allowed themselves to be led into holding that only a superficial, one-sided showing is allowable on any admissibility controversy"), 414-424 (exploring alternative rules) (1927); 21 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5052, p. 248 (1977) (suggesting, with respect to the process of proving preliminary questions of fact,that "[p]erhaps it is a task, like riding a bicycle, that is easier to do if you do not think too much about what you are doing"). In light of the narrow question presented here for review, this case is not the proper occasion to visit these questions.

8 In addition, the facts of this case also suggest the question whether the partial transcripts the IRS possessed may be used by it in meeting its ultimate burden. It is by no means clear that the Government has presented that question for this Court's review. The Government noted in its petition for certiorari that the Court of Appeals had not considered the partial transcripts in making its determination that the IRS had failed to establish the applicability of the crime-fraud exception. See Pet. for Cert. 7-8. The question presented for review, however, relates solely to *in camera* review, as does the relevant discussion in the petition. See *id.*, at 20-23.

The question whether the partial transcripts may be used in meeting the IRS' ultimate burden of demonstrating the applicability of the crime-fraud exception is fairly included within the question presented, however, and we therefore address it. See this Court's Rule 21.1(a). The answer to the question would follow inexorably from our discussion in any event.

A

[4] We consider first the question whether a district court may *ever* honor the request of the party opposing the privilege to conduct an *in camera* review of allegedly privileged communications to determine whether those communications fall within the crime-fraud exception. We conclude that no express provision of the Federal Rules of Evidence bars such use of *in camera* review, and that it would be unwise to prohibit it in all instances as a matter of federal common law.[9]

9 There is some ambiguity as to whether the Court of Appeals squarely barred all use of *in camera* review for these purposes, although that is the fairest reading of the court's opinion. Respondents at times appear to advocate that position, see Brief in Opposition 19-21, but at times suggest otherwise, see Brief for Respondents 13; see also Reply Brief for United States 15. The ambiguity in respondents' position is perhaps due to the fact that they accept the premise that *in camera* review is permitted under Circuit precedent in different circumstances from those at issue in this case-*i.e.*, where the proponent of the privilege seeks *in camera* review to demonstrate the applicability of the privilege in the first instance, see Brief for Respondents 14, or when the proponent requests *in camera* review to ensure that an order requiring production of some materials held not to be privileged does not inadvertently yield privileged information, see *id.*, at 20-21.

(1)

[5] At first blush, two provisions of the Federal Rules of Evidence would appear to be relevant. Rule 104(a) provides: "Preliminary questions concerning the qualification of a person to be a witness, *the existence of a privilege*, or the admissibility of evidence shall be determined by the court.... In making its determination it is not bound by the rules of evidence *except those with respect to privileges*." (Emphasis added.) Rule 1101(c) provides: "The rule with respect to ***566** privileges applies at all stages of all actions, cases, and proceedings." Taken together, these Rules might be read to establish that in a summons-enforcement proceeding, attorney-client communications cannot be considered by the district court in making its crime-fraud ruling: to do

otherwise, under this view, **2628 would be to make the crime-fraud determination without due regard to the existence of the privilege.

Even those scholars who support this reading of Rule 104(a) acknowledge that it leads to an absurd result.

> "Because the judge must honor claims of privilege made during his preliminary fact determinations, many exceptions to the rules of privilege will become 'dead letters,' since the preliminary facts that give rise to these exceptions can never be proved. For example, an exception to the attorney-client privilege provides that there is no privilege if the communication was made to enable anyone to commit a crime or fraud. There is virtually no way in which the exception can ever be proved, save by compelling disclosure of the contents of the communication; Rule 104(a) provides that this cannot be done." 21 C. Wright & K. Graham, Federal Practice & Procedure: Evidence § 5055, p. 276 (1977) (footnote omitted).

We find this Draconian interpretation of Rule 104(a) inconsistent with the Rule's plain language. The Rule does not provide by its terms that all materials as to which a "clai[m] of privilege" is made must be excluded from consideration. In that critical respect, the language of Rule 104(a) is markedly different from the comparable California evidence rule, which provides that "the presiding officer may not require disclosure of information *claimed to be privileged* under this division in order to rule on the claim of privilege." Cal.Evid.Code Ann. § 915(a) (West Supp.1989) (emphasis *567 added).[10] There is no reason to read Rule 104(a) as if its text were identical to that of the California rule.

10 A good example of the effect of the California rule is provided by the record in this case. While the disputed matters were being briefed in Federal District Court, the State Superior Court held a hearing on a motion by Government attorneys seeking access to materials in the *Armstrong* case for ongoing litigation in Washington, D.C. The transcript of the hearing was made part of the record before the District Court in this case. Regarding the tapes, the Government argued to the Superior Court that the attorney-client conversations on the tapes reflect the planning or commission of a crime or fraud. Tr. of Hearing of February 11, 1985, in No. C420 153 (Super.Ct.Cal.), p. 52. That claim was supported by several declarations and other extrinsic evidence. The Government noted, however, that "the tape recordings themselves would ... be the best evidence of exactly what was going on." *Id.*, at 53. The intervenors stressed that, as a matter of California law, "you can't show the tapes are not privileged by the contents." *Id.*, at 58; see also *id.*, at 68. The Superior Court acknowledged the premise that "you can't look at the conversation itself to make [the crime-fraud] determination," *id.*, at 74, and concluded that the extrinsic evidence was not sufficient to make out a prima facie case that the crime-fraud exception applies, *id.*, at 75-76.

Nor does it make sense to us to assume, as respondents have throughout this litigation, that once the attorney-client nature of the contested communications is established, those communications must be treated as *presumptively* privileged for evidentiary purposes until the privilege is "defeated" or "stripped away" by proof that the communications took place in the course of planning future crime or fraud. See Brief for Respondents 15 (asserting that respondents had "established their entitlement to the privilege," and that the communications had been "determined to be privileged," before the crime-fraud question was resolved). Although some language in *Clark* might be read as supporting this view, see 289 U.S., at 15, 53 S.Ct., at 469, respondents acknowledged at oral argument that no prior holding of this Court requires the imposition of a strict progression of proof in crime-fraud cases. See Tr. of Oral Arg. 33-35.

*568 We see no basis for holding that the tapes in this case must be deemed privileged under Rule 104(a) while the question of crime or fraud remains open. Indeed, respondents concede that "if the *proponent* of the privilege is able to sustain its burden only by submitting the communications to the court" for *in camera* review, Brief for Respondents 14-15 (emphasis in original), the court is not required to avert its eyes (or close its ears) once it concludes **2629 that the communication would be privileged, if the court found the crime-fraud exception inapplicable. Rather, respondents acknowledge that the court may "then consider the same communications to determine if the opponent of the privilege has established that the crime-fraud exception applies." *Id.*, at 15. Were the tapes truly deemed privileged under Rule 104(a) at the moment the trial court concludes they contain potentially privileged attorney-client communications, district courts would be required to draw precisely the counterintuitive distinction that respondents wisely reject. We thus shall not adopt a reading of Rule 104(a) that would treat the contested communications as "privileged" for purposes of the Rule, and we shall not interpret Rule 104(a) as categorically prohibiting the party

opposing the privilege on crime-fraud grounds from relying on the results of an *in camera* review of the communications.

(2)

Having determined that Rule 104(a) does not prohibit the *in camera* review sought by the IRS, we must address the question as a matter of the federal common law of privileges. See Rule 501. We conclude that a complete prohibition against opponents' use of *in camera* review to establish the applicability of the crime-fraud exception is inconsistent with the policies underlying the privilege.

We begin our analysis by recognizing that disclosure of allegedly privileged materials to the district court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege. Indeed, this ***569** Court has approved the practice of requiring parties who seek to avoid disclosure of documents to make the documents available for *in camera* inspection, see *Kerr v. United States District Court for Northern District of Cal.*, 426 U.S. 394, 404-405, 96 S.Ct. 2119, 2124-25, 48 L.Ed.2d 725 (1976), and the practice is well established in the federal courts. See, *e.g.*, *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (CA6 1986); *In re Vargas*, 723 F.2d 1461, 1467 (CA10 1983); *United States v. Lawless*, 709 F.2d 485, 486, 488 (CA7 1983); *In re Grand Jury Witness*, 695 F.2d 359, 362 (CA9 1982). Respondents do not dispute this point: they acknowledge that they would have been free to request *in camera* review to establish the fact that the tapes involved attorney-client communications, had they been unable to muster independent evidence to serve that purpose. Brief for Respondents 14-15.

Once it is clear that *in camera* review does not destroy the privileged nature of the contested communications, the question of the propriety of that review turns on whether the policies underlying the privilege and its exceptions are better fostered by permitting such review or by prohibiting it. In our view, the costs of imposing an absolute bar to consideration of the communications *in camera* for purpose of establishing the crime-fraud exception are intolerably high.

"No matter how light the burden of proof which confronts the party claiming the exception, there are many blatant abuses of privilege which cannot be substantiated by extrinsic evidence. This is particularly true ... of ... situations in which an alleged illegal proposal is made in the context of a relationship which has an apparent legitimate end." Note, The Future Crime or Tort Exception to Communications Privileges, 77 Harv.L.Rev. 730, 737 (1964). A *per se* rule that the communications in question may never be considered creates, we feel, too great an impediment to the proper functioning of the adversary process. See generally 2 D. Louisell & C. Mueller, Federal Evidence § 213, pp. 828-829 (1985); 2 J. Weinstein & M. Berger, Weinstein's Evidence ***570** ¶ 503(d)(1)[01], p. 503-71 (1988). This view is consistent with current trends in the law. Compare National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence, Rule 26(2)(a) (1953 ed.) ("Such privileges shall not extend ... to a communication if the judge finds that sufficient evidence, ****2630** *aside from the communication,* has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort" (emphasis added)), reprinted in 1 J. Bailey & O. Trelles, The Federal Rules of Evidence: Legislative Histories and Related Documents (1980), with Uniform Rule of Evidence 502 (adopted 1974), 13A U.L.A. 256 (1986) (omitting explicit independent evidence requirement).

B

[6] We turn to the question whether *in camera* review at the behest of the party asserting the crime-fraud exception is *always* permissible, or, in contrast, whether the party seeking *in camera* review must make some threshold showing that such review is appropriate. In addressing this question, we attend to the detrimental effect, if any, of *in camera* review on the policies underlying the privilege and on the orderly administration of justice in our courts. We conclude that some such showing must be made.

Our endorsement of the practice of testing proponents' privilege claims through *in camera* review of the allegedly privileged documents has not been without reservation. This Court noted in *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), a case which presented a delicate question concerning the disclosure of military secrets, that "examination of the evidence, even by the judge alone, in chambers" might in some cases "jeopardize the security which the privilege is meant to protect." *Id.*, at 10, 73 S.Ct., at 533. Analogizing to claims of Fifth Amendment privilege, it observed more generally: "Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, ***571** while a complete

abandonment of judicial control would lead to intolerable abuses." *Id.*, at 8, 73 S.Ct., at 532.

The Court in *Reynolds* recognized that some compromise must be reached. See also *United States v. Weisman*, 111 F.2d 260, 261-262 (CA2 1940). In *Reynolds*, it declined to "go so far as to say that the court *may automatically require* a complete disclosure to the judge before the claim of privilege will be accepted *in any case*." 345 U.S., at 10, 73 S.Ct., at 533 (emphasis added). We think that much the same result is in order here.

A blanket rule allowing *in camera* review as a tool for determining the applicability of the crime-fraud exception, as *Reynolds* suggests, would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk. There is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings. See, *e.g.*, *In re John Doe Corp.*, 675 F.2d 482, 489-490 (CA2 1982); *In re Special September 1978 Grand Jury*, 640 F.2d 49, 56-58 (CA7 1980). Finally, we cannot ignore the burdens *in camera* review places upon the district courts, which may well be required to evaluate large evidentiary records without open adversarial guidance by the parties.

There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents. Courts of Appeals have suggested that *in camera* review is available to evaluate claims of crime or fraud only "when justified," *In re John Doe Corp.*, 675 F.2d, at 490, or "[i]n appropriate cases," *In re Sealed Case*, 219 U.S.App.D.C. 195, 217, 676 F.2d 793, 815 (1982) (opinion of Wright, J.). Indeed, the Government conceded at oral argument (albeit reluctantly) that a district court would be mistaken if it reviewed documents *in camera* solely because "the government beg[ged it]" to do so, "with no reason to suspect crime or fraud." Tr. of Oral Arg. 26; see also *id.*, at 60. We agree.

***572** In fashioning a standard for determining when *in camera* review is appropriate, we begin with the observation that "*in* ****2631** *camera* inspection ... is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure." Fried, Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds, 64 N.C.L.Rev. 443, 467 (1986). We therefore conclude that a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege. *Ibid.* The threshold we set, in other words, need not be a stringent one.

We think that the following standard strikes the correct balance. Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo.1982), that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

[7] [8] [9] Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court. The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply. The district court is also free to defer its *in camera* review if it concludes that additional evidence in support of the crime-fraud exception may be available that is *not* allegedly privileged, and that production of the additional evidence will not unduly disrupt or delay the proceedings.

***573 C**

[10] The question remains as to what kind of evidence a district court may consider in determining whether it has the discretion to undertake an *in camera* review of an allegedly privileged communication at the behest of the party opposing the privilege. Here, the issue is whether the partial transcripts may be used by the IRS in support of its request for *in camera* review of the tapes.

The answer to that question, in the first instance, must be found in Rule 104(a), which establishes that materials that have been determined to be privileged may not be considered in making the preliminary determination of the existence of a privilege. Neither the District Court nor the Court of Appeals made factual findings as to the privileged nature of the partial transcripts,[11] so we cannot determine on this record whether Rule 104(a) would bar their consideration.

11 There are no findings as to whether respondents themselves would be privileged to resist a demand that *they* produce the partial transcripts. Nor has there been any legal and factual exploration of whether respondents may claim privilege as a bar to the IRS' use of the copy of the transcripts it lawfully obtained from a third party. See, *e.g.*, Developments in the Law-Privileged Communications, 98 Harv.L.Rev., at 1648, 1660-1661 (discussing controversy concerning the legal effect of an inadvertent disclosure which does not constitute a waiver of the privilege, and citing cases); 8 Wigmore § 2326.

Assuming for the moment, however, that no rule of privilege bars the IRS' use of the partial transcripts, we fail to see what purpose would be served by excluding the transcripts from the District Court's consideration. There can be little doubt that partial transcripts, or other evidence directly but incompletely reflecting the content of the contested communications, generally will be strong evidence of the subject matter of the communications themselves. Permitting district courts to consider this type of evidence would aid them substantially in rapidly and reliably determining whether *in camera* review is appropriate.

**2632 *574 [11] Respondents suggest only one serious countervailing consideration. In their view, a rule that would allow an opponent of the privilege to rely on such material would encourage litigants to elicit confidential information from disaffected employees or others who have access to the information. Tr. of Oral Arg. 40-41. We think that deterring the aggressive pursuit of relevant information from third-party sources is not sufficiently central to the policies of the attorney-client privilege to require us to adopt the exclusionary rule urged by respondents. We conclude that the party opposing the privilege may use any nonprivileged evidence in support of its request for *in camera* review, even if its evidence is not "independent" of the contested communications as the Court of Appeals uses that term.[12]

12 In addition, we conclude that evidence that is not "independent" of the contents of allegedly privileged communications-like the partial transcripts in this case-may be used not only in the pursuit of *in camera* review, but also may provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies. We see little to distinguish these two uses: in both circumstances, if the evidence has not itself been determined to be privileged, its exclusion does not serve the policies which underlie the attorney-client privilege. See generally Note, The Future Crime or Tort Exception to Communications Privileges, 77 Harv.L.Rev. 730, 737 (1964).

D

In sum, we conclude that a rigid independent evidence requirement does not comport with "reason and experience," Fed.Rule Evid. 501, and we decline to adopt it as part of the developing federal common law of evidentiary privileges. We hold that *in camera* review may be used to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception. We further hold, however, that before a district court may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that *575 establishes the exception's applicability. Finally, we hold that the threshold showing to obtain *in camera* review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.

Because the Court of Appeals employed a rigid independent-evidence requirement which categorically excluded the partial transcripts and the tapes themselves from consideration, we vacate its judgment on this issue and remand the case for further proceedings consistent with this opinion. On remand, the Court of Appeals should consider whether the District Court's refusal to listen to the tapes *in toto* was justified by the manner in which the IRS presented and preserved its request for *in camera* review.[13] In the event the Court of Appeals holds that the IRS' demand for review was properly preserved, the Court of Appeals should then determine, or remand the case to the District Court to determine in the first instance, whether the IRS has presented a sufficient evidentiary basis for *in camera* review, and whether, if so, it is appropriate for the District Court, in its discretion, to grant such review.

13 The Court of Appeals also will have the opportunity to review the partial transcripts, and to determine whether, even without *in camera* review of the tapes, the IRS presented sufficient evidence to establish that the tapes are within the crime-fraud exception.

It is so ordered.

Justice BRENNAN took no part in the consideration or decision of this case.

Parallel Citations

109 S.Ct. 2619, 105 L.Ed.2d 469, 63 A.F.T.R.2d 89-1483, 57 USLW 4781, 89-1 USTC P 9380, 27 Fed. R. Evid. Serv. 833

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APPENDIX D

USC is the survey term for the range of contact sexual crimes between adults prohibited by military law, ranging from rape to abusive sexual contact.[22]

For Active Duty women, the 2012 USC rate is a statistically significant increase from the USC rate found in 2010 (6.1 percent versus 4.4 percent, respectively). For Active Duty men, there was no statistically significant change in the USC rate between 2012 and 2010 (1.2 percent versus 0.9 percent). Figure 5 illustrates the USC rates from 2006 to 2012 for Active Duty women and men.

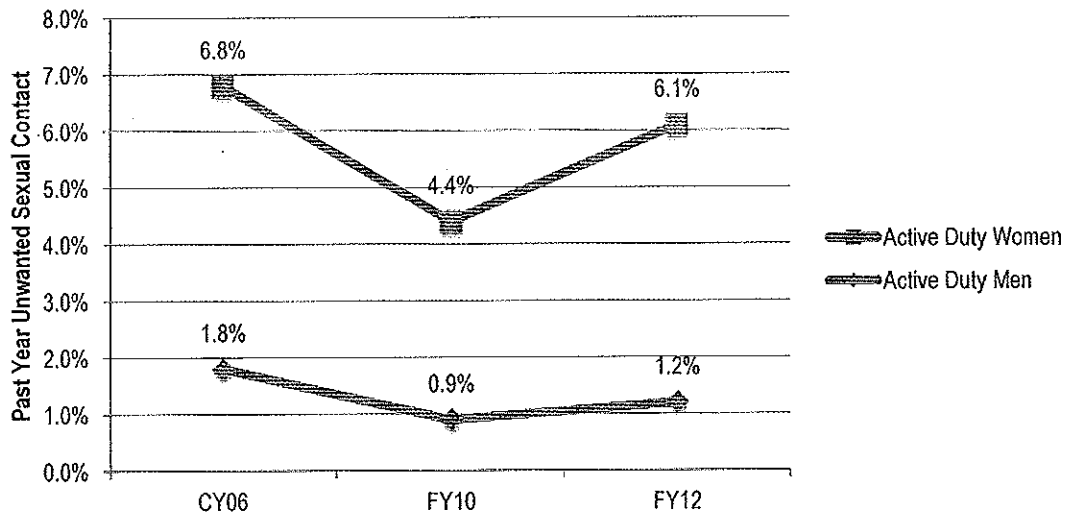

Figure 5: Rates of USC from the DMDC *WGRA*, 2006 through 2012.

The *WGRA* is designed so that the results accurately represent the Active Duty force. The design allows the Department to use weighted counts of survey respondents and Military Service end strength on record with DMDC to roughly estimate the number of victims of sexual assault in the years for which data is available. Estimates derived from the rates of USC in the *2012 WGRA* suggest that there may have been approximately 26,000 Service members who experienced some form of USC in the year prior to being surveyed. This estimate suggests that there may have been approximately 7,000 more Service members who experienced some kind of USC in 2012 than in 2010, but also suggests that there may have been approximately 11,000 fewer Service members who experienced some form of USC in 2012 than there

[22] USC involves intentional sexual contact that was against a person's will or occurred when the person did not or could not consent. The term describes completed and attempted oral, anal, and vaginal penetration with any body part or object, and the unwanted touching of genitalia and other sexually-related areas of the body.

STATISTICAL DATA ON SEXUAL ASSAULT

BACKGROUND ON DOD SEXUAL ASSAULT DATA

What It Captures:

Reports of Sexual Assault

- The Department uses the term "sexual assault" to refer to a range of crimes, including rape, sexual assault, nonconsensual sodomy, aggravated sexual contact, abusive sexual contact, and attempts to commit these offenses, as defined by the UCMJ. When a report is listed under a crime category, it means the crime was the most serious of the infractions alleged by the victim or investigated by investigators. It does not necessarily reflect the final findings of the investigators or the crime(s) addressed by court-martial charges or some other form of disciplinary action against a subject.
- Pursuant to reporting requirements levied by Congress, DoD sexual assault data captures the Unrestricted and Restricted Reports of sexual assault made to the Department during an FY that involves a military subject and/or a military victim.
- In the context of the DoD statistics that follow, an Unrestricted Report of sexual assault is an allegation by one or more victims against one or more suspects (referred to in the Department as "subjects of investigation" or "subjects") that will be referred to and investigated by an MCIO (CID, NCIS, or AFOSI).
- Data on Restricted Reports is limited, because these are reports of sexual assault made to specified parties within the Department (that is, SARC, SAPR VA, or healthcare provider) that allow the report to remain confidential and the victim to seek care and services. Given the victim's desire for confidentiality, these reports are not investigated and victims are not required to provide many details about these sexual assaults. As a result, only data about the victim and the offense is recorded. Subject identities are not requested or maintained by the Department.
- The Department's sexual assault reporting statistics include data about contact sexual crimes by adults against adults, as defined in Articles 120 and 125 of the UCMJ. This data does not include sexual assaults between spouses or intimate partners that fall under the purview of DoD FAP, nor does this data include sexual harassment which falls under the purview of EO. While most victims and subjects in the following data are aged 18 or older, DoD statistics also capture some victims and subjects aged 16 and 17. Service members who are approved for early enlistment prior to age 18 are included in this category. Because the age of consent under the UCMJ is 16 years, military and civilian victims aged 16 and older who do not fall under FAP are included as well.
- The number of sexual assaults reported to DoD authorities in FY12 *does not* necessarily reflect the number of sexual assaults that occurred in FY12.
    - Civilian research indicates victims only report a small fraction of sexual assaults to law enforcement. For example, of the 1.1 million U.S. civilian

"SAPR Program Procedures."[76,77] DoDD 6495.01 was revised and reissued in FY12 with a requirement that the Military Services align their prevention strategies with DoD SAPR strategy. DoDI 6495.02 was modified in FY08 to close gaps identified by the Department and clarify Military Service responsibilities. Further revisions to DoDI 6495.02 were published in FY10, FY11, and FY12.

The DoD-wide change in policy was also intended to address events at the Military Service Academies. In 2003, after receiving reports from cadet victims, former Representative Tillie Fowler was appointed to lead a review of the treatment of women at the U.S. Air Force Academy. Based on the findings of the Fowler Commission, the Task Force on Sexual Harassment and Violence at the MSAs was established in 2004. Congress directed this task force to assess and make recommendations concerning how the Departments of the Army and Navy could more effectively address sexual harassment and assault at the U.S. Military Academy and the U.S. Naval Academy. Congress later passed legislation requiring the Department to assess the MSAs' SAPR programs annually.

In October 2005, the Department established DoD SAPRO to take over as the single point of responsibility for SAPR policy in the Department. However, medical care, legal processes, and criminal investigations remained the responsibility of the Office of the Assistant Secretary of Defense for Health Affairs, the Offices of the JAGs of the Military Departments, the MCIOs of the Military Departments, and the Office of the DoD IG, respectively. Since the establishment of DoD SAPRO, the Department has developed a prevention strategy, increased reporting, improved care and response to victims, implemented program oversight, and expanded knowledge of the SAPR program among Service members and other key stakeholders.

MILITARY DEFINITION OF SEXUAL ASSAULT

In the Department, the term "sexual assault" does not refer to one specific crime; rather, it encompasses a range of sex crimes that represent a broad spectrum of offenses from rape to nonconsensual sodomy to wrongful sexual contact as well as attempts to commit these offenses. Consequently, the definition of sexual assault in the military is broader than the crime of rape. In its current form, DoDD 6495.01 defines sexual assault as follows:

> *Intentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent. Sexual assault includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive, or wrongful (including unwanted and inappropriate sexual contact), or attempts to commit these acts.*

[76] DoDD 6495.01, "SAPR Program," was reissued on January 23, 2012. 32 CFR Part 103 Final Rule (RIN 0790-AI37). Available at http://www.sapr.mil/index.php/law-and-dod-policies/directives-and-instructions.
[77] DoDI 6495.02, "SAPR Program Procedures," March 2013. Available at http://www.sapr.mil/index.php/law-and-dod-policies/directives-and-instructions.

Consent is defined as:

> *Words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. There is no consent where the person is sleeping or incapacitated, such as due to age, alcohol or drugs, or mental incapacity.*[78]

Sexual assault is also defined in military law, as contained in the UCMJ. The sexual crimes within SAPR policy are included in Article 120, *Rape and Sexual Assault generally,* and Article 125, *Sodomy.*[79,80] Article 120 includes the crimes of rape, sexual assault, aggravated sexual contact, and abusive sexual contact. The criminal offense of sodomy is covered under Article125. Attempts to commit these crimes are under Article 80 and are also included under SAPR policy.

Other misconduct, such as indecent exposure and stalking, is not included in this report because it does not fall within the SAPR program as chartered in 2005. However, the Military Services investigate and adjudicate these and other sex crimes as appropriate. Incidents of sexual harassment are also not in this report because they fall under the purview of the Office of the Secretary of Defense Office of Diversity Management and Equal Opportunity. Lastly, sex crimes against children and spouses are not contained in this report because they fall under the purview of DoD FAP.

DEPARTMENT'S REPORTING OPTIONS AND PROCEDURES

As discussed briefly in the "Increase the Climate of Victim Confidence Associated With Reporting" section of this report, the Department offers two sexual assault reporting options: Restricted and Unrestricted Reporting. The creation of the Restricted Reporting option in June 2005 was a critical addition to the SAPR program. Restricted Reporting allows Service member victims of sexual assault to confidentially access medical care and advocacy services without initiating an official investigation. DoDD 6495.01 defines Restricted Reporting as:

> *Reporting option that allows sexual assault victims to confidentially disclose the assault to specified individuals (i.e., SARC, SAPR VA, or healthcare personnel)...and receive medical treatment, including emergency care, counseling, and assignment of a SARC and SAPR VA, without triggering an official investigation. The victim's report provided to healthcare personnel*

[78] DoDD 6495.01, "SAPR Program," January 2012. 32 CFR Part 103 Final Rule (RIN 0790-AI37).
[79] DoD, UCMJ, Article 120, *Rape and Sexual Assault generally*. Excerpt available at http://www.sapr.mil/index.php/law-and-dod-policies/directives-and-instructions.
[80] UCMJ, Article 125, *Sodomy*. Excerpt available at http://www.sapr.mil/index.php/law-and-dod-policies/directives-and-instructions.

APPENDIX E

31% indicated the most serious behavior they experienced was unwanted sexual touching only. Eleven percent indicated they experienced attempted sexual intercourse, anal or oral sex; and 20% indicated they experienced completed sexual intercourse, anal or oral sex. Thirty-eight percent of men did not identify the behaviors they experienced.

Circumstances of the One Situation. Among the 4.4% of women and 0.9% of men who experienced unwanted sexual contact, the circumstances of their experience were as follows:

- Seventy percent of women and 63% of men indicated the unwanted sexual contact occurred at their military installation. Twenty-five percent of women and 27% of men indicated the unwanted sexual contact occurred while they were deployed to a combat zone or to an area where they drew imminent danger pay or hostile fire pay. Forty-one percent of women and 59% of men indicated the unwanted sexual contact occurred during their work day/duty hours. Seventeen percent of women and 25% of men indicated the unwanted sexual contact occurred while TDY/TAD, at sea, or during field exercises/alerts.[5]
- Forty percent of women and 23% of men indicated their experience included the use of alcohol and/or drugs (including knock-out drugs), either by them or by the offender.
- Forty-three percent of women and 20% of men indicated the offender used force and/or threats to make them consent.
- Fifty-five percent of women and 38% of men indicated the offender sexually harassed or stalked them before or after the situation.

Characteristics of the Offenders. The 4.4% of women and 0.9% of men who experienced unwanted sexual contact were asked to describe the offender in their situation. The majority (96%) of women indicated the offender was male and the offender acted alone (76%). Men were as likely to indicate the offender was female (40%) as male (35%); a majority indicated the offender acted alone (71%). About one-half of women (49%) and men (48%) indicated the offender was a military coworker and 39% of women and 25% of men indicated the offender was a military person of higher rank/grade (not in their chain of command). Thirty-three percent of women and 29% of men indicated the offender was another military person (not of higher rank/grade), 23% of women and 26% of men indicated the offender was someone in their chain of command, and 16% of women and 20% of men indicated the offender was a military subordinate. Four percent of women and 14% of men indicated the offender was a DoD/Service civilian employee and 4% of women and 15% of men indicated the offender was a DoD/Service civilian contractor. Ten percent of women and 11% of men indicated the offender was someone from the local community and 8% of women and 12% of men indicated the offender was unknown.

Coming Forward for Help. The 4.4% of women and 0.9% of men who indicated they experienced unwanted sexual contact were asked if they reported the situation to a civilian or DoD authority. Twenty-eight percent of women and 14% of men indicated they reported to a DoD authority (either only to a DoD authority or to both DoD and civilian authorities), and of

[5] Because these characteristics are not mutually exclusive, Service members could select all that applied.

those who reported, 18% of women and 10% of men indicated they would make the same decision about reporting if they could do it over.

Reasons for Not Reporting. Of the 4.4% of women and 0.9% of men who indicated they experienced unwanted sexual contact, the majority (71% of women and 85% of men) chose not to report it to a DoD or civilian authority. The most frequently endorsed reasons women and men gave for not reporting the incident were:

- They did not want anyone to know (67% of women and 43% of men).
- They felt uncomfortable making a report (65% of women and 32% of men).
- They did not think their report would be kept confidential (60% of women and 36% of men).
- They were afraid of retaliation/reprisals from the person who did it (54% of women and 27% of men).
- They had heard about negative experiences other victims went through (47% of women and 20% of men).
- Not important enough to report (46% of women and men).

Bystander Intervention

Active duty members were asked about their responsibility to intervene in a social setting to prevent fellow Service members from being harmed or harming others. The majority of women and men (both 93%) indicated they felt it was their duty to intervene. When given a hypothetical scenario involving a female Service member, whom they did not know very well, getting drunk at a party and being led off by a guy from their work group so he could have sex with her, 93% of women and 83% of men indicated they would actively intervene (e.g., find someone who knows the woman, stop the guy from leaving with woman, etc.).

Military Personnel Policies, Practices, and Training Related to Sexual Assault

Active duty members were asked their perceptions of sexual assault policies and practices as well as the availability of sexual assault support and resources.

Sexual Assault Complaint Climate. Eighty-nine percent of women and 88% of men indicated members of their work group would feel free to report sexual assault to some extent without fear of reprisal.

Sexual Assault Support and Resources. Eighty-three percent of women and 80% of men indicated there was a Sexual Assault Response Coordinator to help those who experience sexual assault at their installation/ship. Eighty-five percent of women and 83% of men indicated there was a Sexual Assault Victim Advocate to help those who experience sexual assault at their installation/ship.

Training. Ninety-three percent of women and men indicated they had sexual assault training in the 12 months preceding the survey. Of those who had training, the majority of women and men indicated it provided a good understanding of what actions are considered sexual assault (both 92%), taught that the consumption of alcohol might increase the likelihood