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

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

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

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

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* Belooof, *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.

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

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

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

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,

[REDACTED]

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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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