

**IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

Airman First Class (E-3))	
L.R.M, USAF)	
<i>Petitioner,</i>)	
)	
)	PETITION FOR
)	EXTRAORDINARY RELIEF IN THE
v.)	NATURE OF A WRIT OF MANDAMUS
)	
Lieutenant Colonel (O-5))	&
JOSHUA E. KASTENBERG, USAF,)	
<i>Respondent</i>)	PETITION FOR STAY OF
)	PROCEEDINGS
)	
Airman First Class (E-3))	
NICHOLAS E. DANIELS, USAF)	
<i>Real Party In Interest</i>)	Misc Dkt. No. _____
)	

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

INTRODUCTION

“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. [REDACTED] is not requesting this court allow her to control the prosecution or to take action intended to harm the accused, but merely the opportunity to be heard through counsel in the assertion and defense of her own personal, legally cognizable rights.

RELIEF SOUGHT

COMES NOW Petitioner, [REDACTED], United States Air Force, by and through her undersigned counsel, and pursuant to Rule 20(a) of the Court of Criminal Appeals’ Rules of Practice and Procedure respectfully requests this Honorable Court issue a writ of mandamus ordering the Trial Judge, Lieutenant Colonel Joshua Kastenber

██████████, to be heard through counsel at hearings conducted pursuant to Military Rules of Evidence 412 and 513, and to receive any motions or accompanying papers reasonably related to her rights as those may be implicated in hearings under Military Rules of Evidence 412 and 513. Additionally, ██████████ requests that this Court immediately stay the proceedings in this case pursuant to Rule 23.7 until the completion of this Honorable Court's ruling on the issues presented by her petition in order to preserve her rights.

STATEMENT OF THE FACTS & HISTORY OF THE CASE

Airman ██████████ 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 U.C.M.J. Article 120 being preferred against him on 16 October 2012 and then being referred to trial by General Court-Martial on 28 November 2012. (Appendix A).

In January 2013, the United States Air Force created the Special Victims' Counsel ("SVC") program, and released a charter and rules of practice and procedure for SVCs. (Appendix C). This program detailed counsel to represent the interests of victims of sexual assault within the United States Air Force. (Appendix C). In accordance with the program, Capt Seth Dilworth, 27 SOW/JA, Cannon AFB, New Mexico, was detailed to be ██████████'s SVC. Captain Dilworth provided notice of representation on 23 January 2013 to the trial court via email. (Appendix B). The military judge, Lt Col Kastenber, requested that he provide formal notice of his appearance along with any information supporting his detailing. (Appendix B). Capt Dilworth provided

formal notice on 24 January 2013, (Appendix C) including his request for standing to receive documents related to his representation, and to represent [REDACTED] in pretrial motions under the Military Rules of Evidence (Mil. R. Evid.). Captain Dilworth's request for standing was opposed in part by the trial counsel (Appendix D) and completely by defense counsel (Appendix E).

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 Mil. R. Evid. 412 and Mil. R. Evid. 513 seeking to admit evidence involving A1C L.R.M.. (Appendix D). 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. (Appendix D). As of this time, copies of motions under Mil. R. Evid. 513 have not been provided to the SVC. (Appendix H). At the hearing, the military judge took up the issue of Capt Dilworth's representation of [REDACTED].. (Appendix F 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 (Appendix F at 15) 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 Mil. R. Evid. 412 should the need arise. (Appendix F 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 [REDACTED].. at any Mil. R. Evid. 412 hearings by making arguments on her behalf. (Appendix F at 62). The military judge denied the SVC standing to make any arguments before him and to speak on behalf of [REDACTED] in hearings pursuant to Mil. R. Evid. 412 and Mil. R. Evid. 513. (Appendix G). 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. (Appendix H). The military judge reconsidered the motion, but denied relief on 9 February 2013. (Appendix K) Airman [REDACTED]. filed this petition for a writ of mandamus in order to correct the legal error committed by the military judge. No other actions in this case have been filed or are pending in this or any other court.

STATEMENT OF JURISDICTION

This Court has authority to grant Petitioner, [REDACTED] the relief requested. Airman [REDACTED] seeks review under the All Writs Act, 28 U.S.C. § 1651, of the military judge's ruling that [REDACTED] has no standing to assert her rights through counsel.

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 A1C 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**

REASONS WHY THE WRIT SHOULD ISSUE

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

a. This Court Has Authority to Issue a Writ of Mandamus in This Case

This Court has authority to grant Petitioner, [REDACTED] the relief requested.

Airman [REDACTED] review under the All Writs Act, 28 U.S.C. § 1651, of the military judge's ruling that [REDACTED] has no standing to assert her rights pursuant through counsel. 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). 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). By denying [REDACTED] standing, the military judge has curtailed her rights under Mil. R. Evid. 412 and Mil. R. Evid. 513, the Crime Victims' Rights Act, 18 U.S.C. § 3771 (2009), and the United States Constitution.

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. Further, this includes 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). The Court of Appeals for the Armed Forces has recognized the authority to hear interlocutory matters in a petition for extraordinary relief in *Courtney v. Williams*, 1 M.J. 267, n.2 (C.M.A. 1976). Simply put, this Court has authority to hear a petition for extraordinary relief in any case that “may be subject to [its] review under Article 67(b), Uniform Code.” *Font v. Seaman*, 43 C.M.R. 227, 230 (C.M.A. 1971). The present case, *United States v. A1C Nicholas E. Daniels*, in which [REDACTED], is the named victim, is a case that may later be subject to the appellate jurisdiction of this Court.

A writ of mandamus is ordinarily issued by a superior court to an inferior court “directing the restoration of the complainant to rights or privileges of which [she] has been illegally deprived.” Black’s Law Dictionary 961 (6th ed. 1990). “In other words, its purpose is ‘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.’” *Dew v. United States*, 48 M.J. 639, 648 (Army Ct. Crim. App. 1998) (quoting *Roche*, 319 U.S. at 26). In the instant case, A1C L.R.M. seeks to have this Court compel the military judge to allow her to be heard, through counsel, prior to the potential deprivation of her privacy and dignity rights granted her through the military evidentiary rules, federal statute, and United States Constitution.

The issue of a victim seeking relief through a writ of mandamus is a novel issue for military courts. However, non-party participants have been permitted access to the military appellate

courts. Both the Court of Appeals for the Armed Forces and this Air Force Court of Criminal Appeals have entertained petitions by members of the press, as non-party participants, seeking extraordinary relief in the form of a writ of mandamus. *See, e.g. United States v. Wuterich*, 67 M.J. 63, 64 (C.A.A.F. 2008); *United States v. Wuterich*, 68 M.J. 511, 512 (N.M.C.C.A. 2009).

In *ABC, Inc. v. Powell*, several broadcasting companies sought a writ of mandamus requesting that the Article 32 investigation into the allegations of misconduct by the Sergeant Major of the Army be opened to the press. 47 M.J. 363, 364 (C.A.A.F. 1997). In that case, the court granted the petitioner's request and ordered the Article 32 hearing opened because "when an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied." 47 M.J. at 365. In similar fashion, this Air Force court in *San Antonio Express-News v. Morrow* entertained a petition by the press seeking a writ of mandamus to open an Article 32 hearing. 44 M.J. 706 (A.F.C.C.A. 1996). In asserting jurisdiction to entertain the petition, this Court held: "as the Air Force's highest tribunal, we have jurisdiction to supervise 'each tier of the military justice process' to ensure that justice is done." *Id.* at 709.

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 Fed .R. Evid. 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. The Fourth Circuit looked to the Supreme Court decision in *Cort v. Ash*, 422 U.S. 66, 78 (1975), to determine whether a private remedy was available to a victim under Fed. R. Evid. 412.

Id. In finding a private remedy, the Fourth Circuit reasoned:

No other party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of the victim's rights. Therefore, the congressional intent embodied in rule 412 will be frustrated if rape victims are not allowed to appeal an erroneous evidentiary ruling made at a pre-trial hearing conducted pursuant to the rule.

F. Doe, 666 F.2d at 46. In this case, [REDACTED] is seeking a far more limited appeal – not of an evidentiary ruling, but only whether the military judge erred when he denied the victim an opportunity to be heard, through counsel, at trial.

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). Because the substantive rights outlined in the Crime Victims’ Rights Act apply to “any court proceeding involving an offense against a crime victim,” this Court has the authority to grant [REDACTED] the relief sought by issuing a writ of mandamus irrespective of the fact that the statute also allows the victim to pursue a writ of mandamus in federal circuit court. 18 U.S.C. § 3771(b)(1). Although the CVRA provides for enforcement in federal district and circuit courts, this Court should consider the

Army Court's reasoning in examining its own authority to issue an extraordinary writ. In agreeing to hear a petition for extraordinary relief, the army court 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).

Once this Court is convinced that it has the prerequisite authority to grant [REDACTED] the relief sought, the next question is whether this Court *should* grant [REDACTED] extraordinary relief in the form of a writ of mandamus. Below, [REDACTED] describes the specific rights the military judge denied her by ruling she lacked standing at the trial court level to be heard through counsel. These rights can only be vindicated by this Court exercising its authority under the All Writs Act and the issuance of a writ of mandamus.

b. This Court Should Issue a Writ of Mandamus

As set out above, this Court has the authority to grant extraordinary relief and issue a writ of mandamus in an appropriate case – the next question is whether this Court should issue a writ of mandamus. Issuance of a writ 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 this military judge and others presented with a similar issue is certain to recur.

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. The Ninth Circuit in *Kenna v. United States* 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, the Second Circuit in *In re Huff Asset Mgmt. Co.* 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). Using this reasoning, this Court can issue a writ of mandamus with no further analysis than a determination that the military judge committed legal error by denying [REDACTED] the right to be heard through counsel.

Other Federal circuits apply a more traditional test in analyzing whether to issue a writ of mandamus pursuant to the enforcement mechanisms of the CVRA. The Fifth Circuit analyzing a request for extraordinary relief under the CVRA held: "A writ of mandamus may issue only if (1) the petitioner has "no other adequate means" to attain the desired relief; (2) the petitioner has demonstrated a right to the issuance of a writ that is "clear and indisputable;" and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is "appropriate under the circumstances." *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008). The Tenth Circuit took a similar approach holding: "applying the plain language of the statute, we review this CVRA matter under traditional mandamus standards." *In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008). Even if this Court chooses not to adopt the relaxed standards contemplated by the Ninth and Second Circuits, a writ of mandamus is still justified under a more exacting standard applied by other courts.

The Army Court of Criminal Appeals developed a structural balancing test for examining whether a writ of mandamus should be issued in *Dew v. United States*, 48 M.J. 639, 648-49 (A.C.C.A. 1998). The army court 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.

The army court cautions 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.* This 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. (1) [REDACTED]. 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. (2) [REDACTED] will be damaged or prejudiced in a way not correctable on appeal. In this case, the right to be heard on [REDACTED]'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. (3) 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. (4) 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). (5) 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.

II. WHETHER THE MILITARY JUDGE CREATED LEGAL ERROR BY DENYING A1C L.R.M. 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

a. Airman [REDACTED] Has Limited Participant Standing To Assert Her Rights

Airman [REDACTED] has standing to assert her rights as a limited participant. Certainly, [REDACTED] will never become party to this case – third party, or otherwise. Her rights are particularized and requests are small. Before the Government injures one of her rights she humbly requests to be

heard through counsel on that issue in a pretrial hearing. Airman L [REDACTED] request is not remarkable. Indeed, it is an accepted and basic principle of constitutional law that rights shall be able to be asserted by their holder and must have a remedy. *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 non-party standing has been recognized by military courts, federal courts, and the Supreme Court. *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); *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 R.C.M. 703); *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006) (assuming standing for *victim*’s mental health provider). The minimal test for standing in a military court is no different than the test generally applied in federal courts. *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008) (citing *Sprint Communs 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)).

In this case, [REDACTED] has satisfied the requirements for standing. The Supreme Court has detailed what is required for standing: “(1) an injury in fact; (2) causation; and (3) redressability.” *Sprint Communs Co. v. APCC Servs., Inc.*, 554 U.S. at 273 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)). Airman L.R.M. (1) has suffered a legally

recognizable injury, (2) directly caused by the Court's ruling, (3) which could have and can be remedied by a favorable decision.

Airman [REDACTED] legally recognizable rights arise from the Military Rules of Evidence, the CVRA, and the Constitution. Legally protected interests can derive from the Constitution, common law, or statute. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1990) (finding standing under constitutional right); *Bd of County Com'rs v. W.H.I., Inc.*, 992 F.2d 1061 (10th Cir. 1993) (finding standing under common law right); *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981) (finding victim standing under Fed. R. Evid. 412).

Airman [REDACTED] rights under Mil. R. Evid. 412 and Mil. R. Evid. 513 are indistinguishable from rights commonly recognized to bestow standing. Privileges have repeatedly been found sufficient to create a legally cognizable right sufficient for non-participant standing to challenge the introduction or production of evidence. *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. 1976)(standing created by prothonotary "Local Rule 202"); *United States v. Nixon*, 418 U.S. 683 (1974)(non-subpoenaed party permitted standing under executive privilege); *See also, In re Grand Jury John Doe*, ___F.3d___, 2012 WL 6156176 (3d Cir 2012). The Decision in *Freeman* is illustrative. In *Freeman*, the Grand Jury sought a subpoena of the Honorable Americo V. Cortese¹, the Philadelphia County Prothonotary, for certain documents. Although Mr. Freeman was not subpoenaed and not a party to any case, the court held that *Freeman* had limited participant standing to be heard "on the basis of his claim of privilege." *Freeman*, 541 F.2d at 377.

¹ 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.

Explicit language bestowing an “opportunity to be heard” is not required. The existence of a right alone can establish standing. As the Supreme Court has held --not only can standing be implied-- an entire civil cause of action may be “implicitly” created by Congress. *Cort v. Ash*, 422 U.S. 66, 78 (1975). The Fourth Circuit Court of Appeals found² a victim had a trial and interlocutory appellate standing under Fed. R. Evid. 412. *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981). Fed. R. Evid. 412 is no different from Mil. R. Evid. 412 in any meaningful way. Importantly, neither of them uses the term “standing” and neither of them explicitly permit appeals. However, this Court, like the Fourth Circuit, should apply the Supreme Court’s unambiguous direction that “standing [is] a ‘necessary corollary of the rule’s explicit protection of the privacy interests Congress sought to safeguard.’” *Id.*

There can be no dispute that the existence of an attorney-client privilege would enable non-party standing to protect that right. *See 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. 1976); *In re Grand Jury John Doe*, ___F.3d___, 2012 WL 6156176 (3d Cir 2012)(standing based on attorney-client privilege). Yet in creating Fed. R. Evid. 502 and Mil. R. Evid. 502 to safeguard the lawyer-client privilege there is no mention of a “hearing,” “notice,” or an “opportunity to be heard.” Courts have repeatedly “implied” a legally recognizable right created by the privilege. *In re Grand Jury Impaneled v. Freeman*, 541 F.2d 373, 377 (3d Cir. 1976)(including string citation). Once the right exists, an individual has standing to defend that right when it is imperiled.

² 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).

In this case, [REDACTED]'s rights under Mil. R. Evid. 412 and Mil. R. Evid. 513 are clear and unambiguous. Both Mil. R. Evid. 412 and Mil. R. Evid. 513 establish definitive procedures for [REDACTED] to exercise her limited standing: the trial judge “must” and “shall” afford the victim and patient a reasonable opportunity to be heard. Mil. R. Evid. 412 (c)(2); Mil. R. Evid. 513(e)(2). Congress and the President were unambiguous. Pub. L. No. 95-540, § 2(a), Oct. 28, 1978, 92 Stat. 2046; amended Pub. L. No. 100-690, Title VII, § 7046(a), Nov. 18, 1988, 102 Stat. 4400; Apr. 29, 1994, eff. Dec. 1, 1994; Pub. L. No. 103-322, Title IV, § 40141(b), Sept. 13, 1994, 108 Stat. 1919; Apr. 26, 2011, eff. Dec. 1, 2011.

[REDACTED] has rights protected by the Constitution, the CVRA, and the applicable Military Rules of Evidence. Any decision of the Court affecting these rights will have a direct and palpably injurious effect on [REDACTED]. *See, Sprint Communs Co. v. APCC Servs., Inc.*, 554 U.S. at 273. This Court’s decisions regarding her right to be heard through counsel on each of these issues will directly affect the rights that they are designed to protect. *Id.* Finally, a favorable decision by this court on any of these issues could vindicate and protect [REDACTED] rights. *Id.* Before the Government injures one of her rights, [REDACTED] humbly requests to be heard through counsel on those issues in a pretrial hearing.

b. Airman L.R.M. Has Enforceable Rights Under Mil. R. Evid. 412 & Mil. R. Evid. 513

Military Rules of Evidence 412 and 513 provide [REDACTED] with specific rights, and she is seeking, through counsel, to meaningfully exercise those rights. The right she is provided is a right of privacy. *Id.* This right of privacy stems from Mil. R. Evid. 412 and protects her from the embarrassing, humiliating invasion created by the exposure of her prior sexual history and the sexual stereotypes arising from behaviors having a sexual connotation. *Id.* The right of

privacy stemming from Mil. R. Evid. 513 protects A1C L.R.M.'s confidential communications with her mental health care provider. *Id.*

Congress and the President intentionally created legally recognizable rights for victims like

██████████ Certainly, Congress and the President could have written Mil. R. Evid. 412 and Mil. R. Evid. 513 without any consideration for victims. The rules could have been written solely to eliminate the improper and commonplace introduction of irrelevant evidence. Congress and the President could have drafted just another rule of evidence designed solely for the purpose of the administration of justice. Congress and the President did not.

The legislative history to Fed. R. Evid. 412 makes plain that the rule was adopted with a special class in mind and a special additional 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 Mil. R. Evid. 412 stating 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 Fed. R. Evid. 412 reiterate the victim-focused purpose of the rule as well Fed. R. Evid. 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. (emphasis added). *Id.*

Scholars examining these rules have echoed this sentiment. *See* MUELLER & KIRKPATRICK, FEDERAL EVIDENCE, § 4:8 (3d Edition, 2012). 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) *Id.* Not surprisingly, with such explicit language and purpose, the Fourth Circuit in *F. Doe v. United States*, 666 F2d 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 Fed. R. Evid. 412. In *Doe*, the holding was based on the recognition that sexual assault victims have legally cognizable rights under Fed. R. Evid. 412 and necessarily have standing to assert those rights. *Id.*

Airman [REDACTED] rights under Mil. R. Evid. 513 are no less patent. Privilege holders have a legally cognizable right. The privilege established by Mil. R. Evid. 513 explicitly recognizes that the “*patient* has a privilege.” (emphasis added). The patient’s right is personal and recognizable. The drafters of the rule left no doubt that this right would be one that patients had standing to protect: the patient “shall” be provided a “reasonable opportunity” to be “heard” Mil. R. Evid. 513. In contrast, other rules contain no such language. *See, e.g.* Mil. R. Evid. 502 (no textual right to be “reasonably heard” for attorney client privilege); Mil. R. Evid. 503 (no textual right to be “reasonably heard” for clergy privilege); Mil. R. Evid. 504 (no textual right to be “reasonably heard” for marital communication privilege).

Airman [REDACTED] standing to assert her right to privacy established by the privilege exists with or without the textually explicit standing language. Courts have allowed standing to assert such a privilege even in cases where the rules contained no explicit language. A privilege, standing alone, creates a legally cognizable right for the privilege holder. *Church of Scientology v. United States*, 506 U.S. 9 (1992) (standing created by attorney-client privilege); *United States v. Nixon*, 418 U.S. 683 (1974)(presidential privilege) *In re Grand Jury Impaneled v. Freeman*, 541 F.2d 373, 377 (3d Cir. 1976)(standing created by prothonotary “Local Rule 202”). Indeed military courts and federal courts have recognized a patient’s rights to limited participant standing to protect the rights established by Mil. R. Evid. 513. *See generally United States v. Harding*, 63 M.J. 65 (2006)(victim’s representative permitted limited participant standing to protect Mil. R. Evid 513 rights in military court and federal court).

There is no dispute in this case that [REDACTED] is a victim pursuant to Mil. R. Evid. 412 and a patient pursuant to Mil. R. Evid. 513. Therefore her rights to privacy protected by the Military Rules of Evidence apply in this case, and her request for limited standing to be heard should be granted.

c. Airman L.R.M. Has Enforceable Rights Under The CVRA

[REDACTED] has legally recognized rights under the Crime Victims’ Rights Act, 18 U.S.C. § 3771 (2009). Pursuant to CVRA, A1C L.R.M. has the following specific rights:

- (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).³

³ The Air Force reiterates substantially these same rights in Air Force Guidance Memorandum (AFGM) 51-201, dated 25 Oct 2012 to Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, dated 21 Dec 2007, para. 7.11. (with the exception of the right to be heard at hearings involving release, plea, sentencing, or any parole proceeding). These rights in the AFI pre-date enactment of the CVRA in 2004. See Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, dated 26 Nov 2003 (superseded) (The AFI references the predecessor of the CVRA, the Victims' Rights and Restitution Act of 1990, 42 U.S.C., §§ 10606, 10607).

These rights apply in “any court proceeding involving any offense against a crime victim” and the court “shall assure that the crime victim is afforded [these] rights.” 18 U.S.C. § 3771(b)(1).

The statute does not limit its application to federal district court, or state court – the CVRA applies to any court and any crime victim. Based on the plain language, the CVRA would apply to any victim of any crime, including those crimes being prosecuted in trial by courts-martial.

While the statute contemplates enforcement in federal district court, a holistic reading exhorts all federal agencies to comply. The statute contemplates that the victim’s rights will be asserted in federal district court either as a result of criminal prosecutions occurring in federal district court or by means of a habeas corpus proceeding arising out of a state prosecution. In either case, the victim is entitled to seek a writ of mandamus to the court of appeals in the event that the federal district court denies the relief requested. The CVRA is applicable to the Military Departments. The CVRA demands that “[o]fficers 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).” 18 U.S.C. § 3771(c)(1) (emphasis added). As an agency engaged in the detection, investigation, and prosecution of crime, the United States Air Force is compelled to make every effort to accord [REDACTED] the rights set out in subsection (a) of the CVRA. These efforts include the ability to assert all rights contemplated under the CVRA, *through counsel*, at a trial by courts-martial.⁴

⁴ The Air Force Special Victims’ Counsel Program complies with CVRA, 18 U.S.C. § 3771(c)(1). The National Defense Authorization Act for FY2012, P.L. No. 112-81, explicitly provides: “A member of the armed forces, or a dependent of a member, who is the victim of a sexual assault may be provided... legal assistance ...by military or civilian legal assistance counsel pursuant to section 1044 of this title. 10 U.S.C. § 1565b(a)(1)(A). The Air Force has implemented this statute by permitting the appointment of Special Victims’ Counsel (SVC). Air Force Guidance Memorandum (AFGM) 51-504, dated 21 Jan 2013 to Air Force Instruction (AFI) 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, dated 27 Oct 2003, para. 1.2.9 specifically permits an appointed

The military judge's determination that [REDACTED] lacks standing to be heard through counsel on such issues as admissibility of evidence under Mil. R. Evid. 412 and Mil. R. Evid. 513 is troubling. The CVRA specifically grants a right "to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8). Although the CVRA does not specifically define the terms "dignity, respect, and fairness," those terms must, at a minimum, guarantee that crime victims' rights are given no less consideration than criminal defendants' rights. *Cf. Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.) ("[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."), *reaffirmed by Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (stating that "in the administration of criminal justice, courts may not ignore the concerns of victims"); *United States v. Heaton*, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006) (finding that under the federal Crime Victims' Rights Act, treating "a person with 'fairness' is generally understood as treating them 'justly' and 'equitably'"). As discussed above, both Mil. R. Evid. 412 and Mil. R. Evid. 513 are designed to ensure the protection of the victim's dignity and privacy. By denying [REDACTED] the right to be heard through counsel on issues involving admissibility of evidence under Mil. R. Evid. 412 and Mil. R. Evid. 513, the military judge is effectively denying [REDACTED] the ability to assert her rights under the CVRA. Further, the victim can assert her rights pursuant to the CVRA regardless of the position the Trial Counsel takes on identical issues. The CVRA contains no provisions that limits a victim's ability to assert a specified right to cases where the prosecution and the victim's interests are divergent.

SVC to represent a client in a court-martial or administrative proceeding. As a result of this Air Force Instruction, the Special Victims' Counsel becomes A1C L.R.M.'s lawful representative.

d. Airman [REDACTED]. Has Enforceable Rights Under The United States Constitution

Airman [REDACTED] in this case, 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 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 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.*

The *Casey* decision was affirmed and clarified in *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the court applied these principles in finding that a statute making it a crime for two consenting adults to engage in sexual acts in the privacy of a home violated constitutionally protected rights. Citing previous decisions, the court noted that, “[i]t is a promise of the Constitution that there is a realm of personal liberty which the Government may not enter.” *Casey* at 8.

Those aspects of human life that are usually involved in matters heard under Mil. R. Evid. 412 and Mil. R. Evid. 513 are generally the same as those that are given protection from government intrusion under the Constitution. Hearings conducted under Mil. R. Evid. 412 and Mil. R. Evid. 513 often delve with excruciating granularity into a victim's past sexual experiences, sexual orientation, prior history of sexual abuses, decisions and opinions involving sexuality and the choices they have made in those regards. Hearings under Mil. R. Evid. 513 go even further by prying into a victim's psycho-medical treatment and the expressions of that person's innermost thoughts and feelings related to their providers, so that they might receive a therapeutic benefit with the goal of achieving greater personal well-being and happiness. The scrutiny that these hearings place upon a victim directly impacts her constitutional privacy interests. A victim's previous choices that were shielded under the constitution from government invasion are now open to being paraded before the world in order to effectuate the government's interest in prosecution or the defense's interest in countering the prosecution's evidence. Such a victim can rightly question whether or not their conversations with a therapist or their sexual choices could again be publicly scrutinized. Others who witness this might also be impacted in the free exercise of the protected liberty interest and therapeutic activities when they observe or learn about the exposure of these matters in court, whether in the sealed confines of a hearing or after the release of the information as evidence in the trial. Affording these individuals due process of law by being heard through counsel in these personal matters, tempers the invasion of personal liberty that is a necessity of the government's prosecution of an accused. By denying [REDACTED] [REDACTED] limited non-party standing to exercise her opportunity to be heard the Government has invaded and denied her privacy and dignity rights without due process of law.

e. Airman [REDACTED]. Has A Due Process Right To Be Heard Through Counsel

Once limited participant standing is established, [REDACTED] is permitted to be heard and to be represented by counsel. Any denial of that right is a deprivation of [REDACTED] constitutional due process rights. The Supreme Court made this point crystal in *Powell v. Alabama*, 287 U.S. 45, 69 (1932):

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.

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 allowance for attorneys in criminal trials did not yet apply to the states under the then unwritten 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.*⁵ With that historical perspective, the Supreme Court's language regarding a hearing—such as the one described in Mil. R. Evid. 412 and Mil. R. Evid. 513—resolves this issue simply:

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

⁵ Not surprisingly, the Supreme Court's recognition that the right to have one's attorney advocate on one's behalf has been correctly interpreted to extend to the civil context. *Potashnick v. Brunson*, 609 F.2d 1101, 1117 (5th Cir. 1980)(discussing the right to one's attorney); *Guajardo-Palma, v. Martinson*, 622 F.3d 801, 802 (7th Cir. 2010)(discussing the right to one's attorney).

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 has small and sometimes no skill in the science of law.

Id. at 69.

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.

Mil. R. Evid. 412 and Mil. R. Evid. 513 provide the victim and patient with a right to be heard, at a hearing that the judge "must" have, and the victim "must" be afforded a reasonably opportunity "to be heard." Mil. R. Evid. 412. Under Mil. R. Evid. 513, the judge "shall" hold a hearing and the patient "shall" be afforded a reasonable opportunity "to be heard." The term "reasonably opportunity to be heard" is a legal term of art that means, at a minimum, to have a "fair opportunity to present facts *and argument*." *Fernandez v. Leonard*, 963 F.2d 459, 463 (1st Cir. 1992); *Auode v. Mobil Oil Corp.*, 862 F.2d 890, 894 (1st Cir. 1988) (emphasis added).

Similar language to Mil. R. Evid. 513 and Mil. R. Evid. 412 has been analyzed by the circuit courts of appeal in addressing victim's rights. Under the CVRA, victims are permitted to be "reasonably heard" at any public proceeding. No court has ever held that "reasonably heard" precluded a victim from being heard through counsel. In similar fashion, no court has ever held that "reasonably heard" limited a victim to factual issues or to testimony. When Congress and the President created Mil. R. Evid. 412 and Mil. R. Evid. 513 they were well aware of the term "testify" and "testimony." They chose explicitly not to limit a victim to lay testimony. Testimony is the term used for providing factual information to a fact finder. Instead Congress and the President elected to use the well worn legal term of art "*reasonably heard*."

The federal courts have had little difficulty in recognizing that "reasonably heard" includes the right to be heard through counsel.⁶ *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" did not provide intervenor or third party standing to victims but rather "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 in addressing the right to be "reasonably heard" that motions from

⁶ Military Rule of Evidence 412(c)(1)(B) provides that "when appropriate the alleged victim's guardian or *representative*" must be notified (emphasis added). Likewise, Mil. R. Evid. 513(e)(1)(B) recognizes that a patient may have chosen a "guardian, conservator, or *representative*." (emphasis added); *United States v. Harding*, 63 M.J. 65 (2006)(victim's mental health representative granted limited participant standing to argue applicability of privilege). In the present case, the victim has chosen a Special Victims' Counsel to represent her and to assist her in the exercise of her opportunity to be heard.

attorneys were “fully commensurate” with the victim’s “right to be heard.” *Id.*; *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).

Here [REDACTED] counsel attempted to file a notice of appearance to ease all trial participants in their obligations with regard to the Petitioner’s rights. This process for providing notice of the potential for limited participant standing was found to be perfectly reasonable. *United States v. Mahon*, 2010 WL 94247 (D. Ariz. 2010). In *Mahon*, the Defense objected to the victims’ counsel’s notice of appearance because the victim was not a party. The court rejected that argument, ruling “filing an appearance so he can receive notice of public documents filed in the case is a reasonable procedure for ensuring protection of [the Victim’s] CVRA rights. *Id.* Just as in *Mahon*, it was perfectly reasonable for the Special Victims’ Counsel to file a notice of appearance as a procedure for ensuring the protection of A1C L.R.M.’s rights under Mil. R. Evid. 412, Mil. R. Evid. 513, the CVRA, and the Constitution. *Id.*

Although Mil. R. Evid. 412, Mil. R. Evid. 513 and the CVRA are explicit in demanding that a victim be “reasonably heard,” the right to be heard is generally implied with the creation of a legally recognizable right. The same legal analysis that provides [REDACTED] limited participant standing (right, causation, and redressability) is the same analysis that permits her to have an attorney advocate on her behalf. If trial participants have standing to assert rights, they can assert those rights through counsel. To the extent know, in each case cited in this brief, each party defending a legally cognizable right did so through counsel. *See, Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555(1990); *Church of Scientology v. United States*, 506 U.S. 9 (1992); *ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997); *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008); *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006); *Brandt v. Gooding*,

636 F.3d 124, 136 (4th Cir. 2011); *Bd. of County Com'rs v. W.H.I., Inc.*, 992 F.2d 1061 (10th Cir. 1993); *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981). It does not matter whether the limited participant's right emerges explicitly from statute or rule of evidence such as in Mil. R. Evid. 412 or Mil. R. Evid. 513, the CVRA or by implication from statute, common law, or the Constitution—in each and every case, the right of the limited participant to be represented by their counsel was correctly assumed. Airman [REDACTED] is permitted to be heard through counsel and the denial of that right is a deprivation of her constitutional due process rights. *Powell v. Alabama*, 287 U.S. at 69.

f. Whether A1C L.R.M.'s Interests Are Similar Or Distinct From The Prosecution or Defense Has Nothing To Do With Standing

The military judge's reliance or partial reliance on the alignment of party interest as a basis for deciding the question of standing is perplexing. We have found no court opinion where a judge has ruled that limited participant standing was not present because their rights were already being advocated by either the Defense or the Government. Indeed, generally, either the Defense's or Government's position mirrors the position of the limited participants. Each and every time standing was recognized for a newspaper, party challenging a subpoena, victim under the CVRA, victim under an applicable rule of evidence, or party raising standing under the Constitution--that standing was found without reliance on a conflict of interest with either the defense or prosecution. *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008) (finding trial and appellate standing in-part based CBS's rights under R.C.M. 703(f)(4)(C) precluding "unreasonable" subpoenas); *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997) (confirming trial standing under the predecessor statute to the CVRA); *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981) (confirming trial and finding appellate standing for victims based on Fed. R. Evid. 412); *W.H.I., Inc.*, 992 2d 1061 (10th Cir. 1993) (acknowledging standing based on common law property

rights for users of a “footpath”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555(1990) (finding standing for reporters based upon First Amendment right to public trial).

Furthermore, we have uncovered no opinion where a court has based their decision to prevent a party from defending a legally cognizable right, because the party’s interests were aligned with the Government instead of being aligned with Defense.

It is an accepted and basic principle of constitutional law that every constitutional right can be asserted by its holder and must have a remedy. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). To hold that only the Government can assert the privacy and dignity rights of the victim would remove the possession of these rights from the victim and vitiate any possible remedy for her if the Government inadvertently or purposefully violates her rights to privacy and dignity in this case.

g. Allowing [REDACTED] To Defend Her Rights Does Not Harm Or Appear To Harm The Accused

Airman [REDACTED] right to standing is not dependent on speculative perceptions. In seeking to assert [REDACTED] right to privacy and advocate for the protection of her privacy rights, the SVC is in a separate, independent role and function from the Convening Authority, Staff Judge Advocate and Trial Counsel.⁷ (Appendix C, SVC Charter and Policy and Procedures). Despite these separate and distinct roles, the military judge appears to have concerns that allowing the victim to exercise her right to privacy and dignity interests through the exercise of limited standing might interfere with the accused’s due process rights.

⁷ The court below cites *dicta* in the Supreme Court case *Linda R.S. v. Richard D.* for the proposition that an individual lacks a judicially cognizable interest in the prosecution or non-prosecution of others. 410 U.S. 614, 619 (1973). In footnote 3 of that case, the court talks about the power of Congress to change outcomes. *Id. at n.3.* In this case, since the *Linda R.S.* decision in 1973, Congress passed the implementing statute for Fed. R. Evid. 412 and the CVRA. Likewise, MRE 513 was implemented by Executive Order.

It is unclear what that harm would be. Once [REDACTED] is granted standing, the court must still proceed in its analysis under Mil. R. Evid. 412 and Mil. R. Evid. 513 using an unaltered burden and test. In short, either the court weighs the positions of all of the participants on these issues and reaches a legally correct result (which does not violate defendant's constitutional rights) or it reaches a legally incorrect result. So long as a legally correct result is reached, defendant cannot claim any harm or prejudice arising out of victim providing the court with argument.

Presumably, the addition of one more attorney advocating a position may cause a military judge some additional time to listen to an argument or read a motion response. As a practical matter, the additional judicial time spent on this matter could be minimized by the military judge giving direction to counsel to focus the arguments or limit their arguments as judges often do. The “discretionary” and complete denial of standing is certainly not appropriate or required. Indeed, the “harm” is surely outweighed by the benefit of being more accurately briefed on the issues by the best qualified advocate.

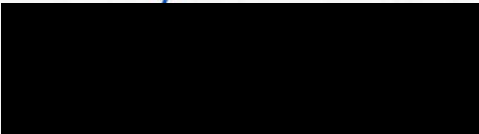
Although at times a victim’s counsel and a prosecutor may have similar positions on motions, it is not clear how that would make a judge appear partial, nor is it clear how that harms the accused. Presumably a military judge would enforce the law independent of the number of attorneys or voices based on the law and the evidence. Further, the assumption that the public may perceive the two advocates as somehow “teaming” up is misplaced. Indeed, the public and lawmakers currently perceive that it is victims of sexual assault that are treated unfairly in the military justice system. *See, e.g.,* Ike Skelton National Defense Act (NDAA) for Fiscal Year (FY) 2011, Pub. L. No. 111-383, § 1631(d) (requiring DoD to provide to Congress an annual report on sexual assaults occurring in the military services).


Indeed, the public may perceive the appearance of the Special Victims' Counsel conversely. That is, they may assume that the victim and the prosecutor do not have exactly the same goals and interests at trial because she has brought her own attorney. This perception is accurate. Furthermore, justice and the appearance of justice can only be increased if the public realizes that in the military justice system all individual rights are protected, that no person in a military court: victim, accused, or witness has to sit silent if their rights are violated. As this Court opined in *San Antonio Express-News v. Morrow*: "we believe our 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 we serve." 44 M.J. at 709.

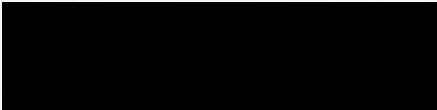
CONCLUSION

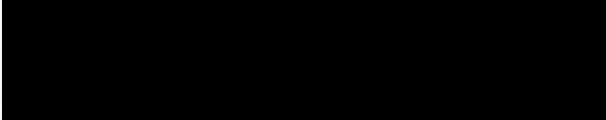
"It is said to be a writ of discretion. But the discretion of a court always means a found, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court are bound to grant it. They can refuse justice to no man." *Marbury v. Madison*, 5 U.S. at 153. For the reasons set out above, we respectfully request this Court grant the relief sought.

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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 Colonel Don Christensen, Chief Appellate Government Trial; to Appellate Counsel Division and to Colonel Tom Posch, Chief, Appellate Defense Division; Captain Danko Princip, Area Defense Counsel, and to Lieutenant Colonel Joshua Kastenberg, Respondent, at

[REDACTED] and [REDACTED] on 14 February 2013.

[REDACTED]

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APPENDIX