

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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

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

ISSUES PRESENTED

I.

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

II.

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

STATEMENT OF THE FACTS AND HISTORY OF THE CASE

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

ARGUMENT

I.

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

Standard of Review

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

Law and Analysis

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

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

The precise contours of the phrase “in aid of” have not been well-defined by the courts. In Denedo, however, our superior Court stated that a petition for extraordinary relief is “in aid of” the Court’s jurisdiction when the petitioner seeks to “modify an action that was taken within the subject matter jurisdiction of the military justice system.” Denedo, 66 M.J. at 120. The Supreme Court subsequently affirmed that portion of Denedo: “As the text of the All Writs Act recognizes, a court’s power to issue any form of relief – extraordinary or otherwise – is contingent on that court’s subject-matter jurisdiction over the case or controversy.” United States v. Denedo, 556 U.S. 904, 911 (2009).

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

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

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

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

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

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

II.

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

Standard of Review

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

Law and Argument

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

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

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

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

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

- (1) The party seeking relief has no other adequate means, such as direct appeal, to attain the relief desired;
- (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal;
- (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.

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

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

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

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

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

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

(Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, Appendix H.) This assertion by counsel unequivocally demands enforcement of L.R.M.'s rights, to include being heard through counsel, which transforms this issue into a justiciable legal controversy.

- c. ██████ has no other adequate means to attain the relief desired.

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

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

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

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

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

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

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

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

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

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

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

issue of law that is certain to be repeated.

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

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

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

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

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

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

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

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

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

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

that victims' rights do not involve constitutional implications.

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

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

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

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

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

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

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

United States (2012 ed.) (MCM).

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

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

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

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

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

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



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

CONCLUSION

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


[REDACTED]
[REDACTED]
TYSON D. KINDNESS, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
[REDACTED]

[REDACTED]
[REDACTED]
GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
[REDACTED]


FOR DON M. CHRISTENSEN, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force


CERTIFICATE OF FILING AND SERVICE

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


TYSON D. KINDNESS, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
