IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| Airman First Class (E-3)<br>L.R.M., USAF<br><br>*Appellant,*<br><br>v.<br><br>Lieutenant Colonel (O-5)<br>JOSHUA KASTENBERG, USAF,<br><br>*Appellee,*<br><br>&<br><br>Airman First Class (E-3)<br>NICHOLAS E. DANIELS, USAF<br><br>*Real Party In Interest.* | PROPOSED BRIEF OF *AMICUS CURIAE* PROTECT OUR DEFENDERS IN SUPPORT OF APPELLANT L.R.M.'s PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS<br><br>USCA Dkt. No. 13-5006/AF Crim.<br><br>App. Misc. Dkt. No. 2013-05<br><br>Dated 28 May 2013 |

**PROPOSED BRIEF OF *AMICUS CURIAE* PROTECT OUR DEFENDERS**

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**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

## INTRODUCTION

Protect Our Defenders is filing this *amicus* brief to inform the Court on how commonplace representation of victims by an attorney is in all state and federal courts. Protect Our Defenders also offers victims' observations of the military justice system that are starkly different from the observations offered by the Defendant and his supporting *amici curiae* in their briefs in the court below. Protect Our Defenders

respectfully requests this Court to consider and understand the perspective of sexual assault victims.

At the outset, this Court should understand the nature of the proposed participation by victim's counsel in the military justice system. The victim is not seeking counsel to become a party to courts-martial proceedings. The victim is not seeking to have her counsel cross-examine witnesses or usurp any duty of trial counsel. The victim is seeking only limited participation through trial counsel to protect her privileged communications and her right to privacy. Victim counsel will only be a shield, and never a sword.

## THIS HONORABLE COURT AND THE AIR FORCE COURT OF CRIMINAL APPEALS EACH HAS JURISDICTION TO REVIEW TRIAL JUDGES' RULINGS ON MILITARY RULES OF EVIDENCE

*Amicus curiae* Protect Our Defenders concurs with the jurisdiction analysis presented by Appellant A1C L.R.M. in her Brief at 8-19. Protect Our Defenders addresses jurisdiction separately only to offer additional case law and a hypothetical that may aid this Court in its analysis.

Appellant complains of the order issued by the Appellee military judge. The Air Force Court of Criminal Appeals has jurisdiction if the order involves a subject matter to which the court's "appellate jurisdiction could in some manner, at some

time, attach." *United States v. RMI Co.*, 599 F.2d 1183, 1186 (3rd Cir. 1979). Jurisdiction exists if the court can identify how the order in any way affects the court's present or future appellate jursidiction. *Id.* The All Writs Act, 28 U.S.C. §1651, authorizes a "supervisory" review of lower court actions. See, e. g., *United States v. Weinstein*, 511 F.2d 622, 626-27 (2d Cir.), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2655, 45 L.Ed.2d 693 (1975). *United States v. Lasker*, 481 F.2d 229, 235-36 & n.3 (2d Cir. 1973), *cert. denied*, 415 U.S. 975, 94 S.Ct. 1560, 39 L.Ed.2d 871 (1974); *United States v. Dooling*, 406 F.2d 192, 198-99 (2d Cir.), *cert. denied*, 395 U.S. 911, 89 S.Ct. 1744, 23 L.Ed.2d 224 (1969). See also, *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); and *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 25 (1943).

The subject matter of the order, whether the Appellant has the right to be heard through her counsel during Art. 39(a) proceedings under Mil. R. Evid. 412, 513 and 514, is without a doubt a matter to which the Air Force Court of Criminal Appeals' appellate jurisdiction could in some manner, at some time, attach. If the Appellee military judge had instead ruled that Appellant A1C L.R.M. could be heard through counsel and Defendant Daniels appealed this ruling after a conviction, the Air Force Court of Appeals would clearly have jurisdiction. The

subject matter is the same regardless of how the Appellee ruled on the issue. This Honorable Court and the Air Force Court of Criminal Appeals each have a duty to hear and decide A1C L.R.M.'s petition.

No appellate court has ever ruled that it does not have jurisdiction to review a lower court's rulings on its own rules of evidence. This Court has jurisdiction to review the Appellee's order concerning the Military Rules of Evidence.

**VICTIM PARTICIPATION IN CRIMINAL TRIALS IS ORDINARY**

The briefs opposing A1C L.R.M.'s appeal incorrectly allege that representation of a victim by counsel is "unheard of,"[1] that the denial of counsel for nonparties has been the "norm for the entire history of the American military justice system,"[2] that no military or federal court has ever allowed a nonparty to appear in a criminal prosecution and to do so would "fundamentally alter the American criminal justice system as we know it,"[3] and that "no other United States court affords purported victims" quasi-party status.[4] These briefs are

[1] See Brief on behalf of Appellee at 21-22. The Appellee trial judge also stated in his trial order, "It would be a significant departure from courts-martial jurisprudence or, for that matter, American criminal law jurisprudence, to permit a third party" to make legal arguments at a criminal trial. (J.A. at 180).
[2] See Brief on behalf of Real Party in Interest at 16.
[3] See Brief filed by *amicus curiae* Appellate Defense Divisions of the Navy-Marine Corps at 2, 9 and 20 (Appellant seeks "an expansion of the rights of alleged victims in criminal courts heretofore unequalled in military or American jurisprudence.").
[4] See Brief filed by *amicus curiae* Army Defense Appellate Division at 11-12.

incorrect, and show that many in the military justice system are out of touch with the commonplace participation by victims and other nonparties in the federal, state and even military criminal justice systems.

Allowing victims and other witnesses to be heard through counsel, to make motions and to file interlocutory appeals is commonplace. *United States v. RMI Co.*, 599 F.2d 1186 (3rd Cir. 1979) ("[I]t is settled law that persons affected by the disclosure of allegedly privileged materials may intervene in pending criminal proceedings and seek protective orders, and if protection is denied, seek immediate appellate review."). See also, *United States v. Cuthbertson*, 651 F.2d 189, 195 (3rd Cir. 1981), *cert. denied,* 454 U.S. 1056 (1981).

An important case discussed at length by the Appellant in her brief and reply brief but completely ignored by all opposing briefs is *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981). *Amicus curiae* Protect Our Defenders fully supports the analysis of *Doe* by Appellant, and will only address incorrect assertions about *Doe* made by the Appellee trial judge.

The Appellee trial judge incorrectly dismissed *Doe*'s reasoning and application. The Appellee stated, "In *Doe*, the [trial court] had failed to ensure the victim had notice of the hearing, and the [appellate court] found that the court had

wholly ignored the provisions of Fed. R. Evid. 412." (J.A. at 217). While it is correct that the trial court *initially* failed to give notice to the victim, the trial court, on its own, reopened the Fed. R. Evid. 412 hearing. *Doe*, at 45. The appellate court did not find that the trial court "wholly" ignored Fed. R. Evid. 412 - it upheld the trial court on two of the seven items in dispute. The Appellee judge is simply incorrect in his analysis of *Doe*. Appellee does not address *Doe* in his brief before this Court.

*Doe* is a well-reasoned case often cited by military courts. See *United States v. Greaves*, 40 M.J. 432, 438 (C.M.A. 1994); *United States v. Sanchez*, 44 M.J. 174, 180 (C.A.A.F. 1996); *United States v. Black*, 42 M.J. 505, 515 (Army Ct. Crim. App. 1995); *United States v. Fox*, 24 M.J. 110, 112 (C.M.A. 1987); *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983); *United States v. Elvine*, 16 M.J. 14, 18 (C.M.A. 1983); *United States v. Colon-Angueira*, 16 M.J. 20,24 (C.M.A. 1983); *United States v. Hollimon*, 12 M.J. 791, 793 (A.C.M.R. 1982); and *United States v. Watt*, WL 803458 (N.M.Ct.Crim.App. 1997).

Federal courts have frequently and for a long time permitted nonparties, represented by counsel, to assert their interests in preventing disclosure of material sought in criminal proceedings. *United States v. Hubbard*, 650 F.2d 293

(D.C. Cir. 1980). In *Hubbard*, the Church of Scientology appealed a district court's order that made church documents publicly available. The Church was not a defendant, but sought to intervene in the criminal case against some of its leaders. The *Hubbard* court ruled that a federal trial court had ancillary jurisdiction to hear and decide claims closely related to and arising out of criminal proceedings brought before it, even if the claims are made by strangers to the criminal case. *Hubbard*, at 307. The court, in a footnote, thoroughly analyzed nonparty standing as of 1980, stating:

> "**Federal courts have frequently permitted third parties to assert their interests** in preventing disclosure of material sought **in criminal proceedings** or in preventing further access to materials already so disclosed. See, e. g., *United States v. Nixon*, 418 U.S. 683, 692, 94 S.Ct. 3090, 3099, 41 L.Ed.2d 1039 (1974) (President, a nondefendant, may appeal denial of motion to quash post-indictment subpoena duces tecum directed to him, compelling production of records of certain presidential meetings); *Gravel v. United States*, 408 U.S. 606, 608 n.1, 92 S.Ct. 2614, 2619, n.1, 33 L.Ed.2d 583 (1972) (noting that district court had permitted Senator to intervene in proceeding on legislative assistant's motion to quash grand jury subpoena and that circuit court had permitted Senator to appeal from denial of motion to quash); *Perlman v. United States*, 247 U.S. 7, 12, 38 S.Ct. 417, 419, 62 L.Ed. 950 (1918) (owner may intervene to assert property and constitutional interests in preventing release to government, for purposes of grand jury investigation, of exhibits introduced and impounded in civil case); *In re Grand Jury Applicants*, 619 F.2d 1022 (3d Cir. 1980) (employer may appeal denial of motion brought as intervenor to quash grand jury subpoenas *ad testificandum* served on employees); *United States v. RMI Co.*, 599 F.2d at 1186-87 (corporation may appeal denial of motion for protective order brought as *de facto* intervener to prevent

> pre-trial disclosure to defendants of corporate books and records previously disclosed by subpoena to grand jury which indicted defendants). See also *In re 1975-2 Grand Jury Investigation*, 566 F.2d 1293, 1294-95, 1296 & n.6, 1301 (5th Cir.), *cert. denied*, 437 U.S. 905, 98 S.Ct. 3092, 57 L.Ed.2d 1135 (1978) (dismissing as nonappealable district court's order permitting party with no apparent ownership interest in documents to intervene in proceedings begun with purpose to disclose to another district court documents used in terminated grand jury investigation); *Ill. v. Sarbaugh*, 552 F.2d 768, 772-73 (7th Cir.), *cert. denied*, 434 U.S. 889, 98 S.Ct. 262, 54 L.Ed.2d 174 (1977) (permitting defendants in terminated criminal proceeding to intervene in motion brought by state for disclosure to it of grand jury transcripts). These assertions of interest have sometimes been denominated "intervention," *Perlman v. United States*, *supra*; *Ill. v. Sarbaugh*, *supra*; see *In re Grand Jury Applicants*, *supra*, *United States v. RMI Co.*, *supra*, and the intervention criteria of the Federal Rules of Civil Procedure have occasionally been applied. *Ill. v. Sarbaugh*, *supra*. See *In re 1975-2 Grand Jury Investigation*, *supra*."
>
> *United States v. Hubbard*, 650 F.2d 293, 313 (D.C. Cir. 1980) (emphasis added).

In the unrelated case, *Church of Scientology v. United States*, 506 U.S. 9 (1992), the Church again sought to intervene in a criminal investigation, asking the Supreme Court to order the Internal Revenue Service ("IRS") to return recordings of conversations between church officials and their attorneys. The IRS obtained the recordings by subpoenaing a California Superior Court clerk in an unrelated civil case. The unanimous Supreme Court stated that a "person's interest in maintaining the privacy of his 'papers and effect' is of sufficient importance

to merit constitutional protection." *Id.* at 13.[5] The Supreme Court held that an appellate court's jurisdiction to review a trial court's order "turns not on the subject matter of Congress' jurisdictional grant to the district courts, but on traditional principles of justiciability, . . . ." *Id.* at 15. In both Church cases, the Church was represented by counsel and was permitted to file interlocutory appeals relating to its privacy or privileges.

Nonparty news organizations, represented by counsel, have often appealed rulings denying them access to criminal trials in federal courts. See *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records,* 864 F.2d 1559, 1561 (11th Cir.1989); *United States v. Antar,* 38 F.3d 1348, 1355-56 (3d Cir.1994); and *United States v. Chagra,* 701 F.2d 354, 360 (5th Cir.1983). In *People v. Bryant*, 94 P.3d 624 (Col. 2004) (*en banc*), the attorneys for the Associated Press, CBS Broadcasting,

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[5] The Supreme Court recognized that the Church, which was not a defendant and did not have possession of the documents sought by the government, had a Constitutional right under the Fourth Amendment to be free from unreasonable searches. The Fourth Amendment provides:

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, . . . ."

*Church of Scientology*, 506 U.S. at 13.

Appellant A1C L.R.M. has a constitutional right to be free from unreasonable searches of her other sexual behavior and her communications with her psychotherapist or victim advocate.

Denver Post, ESPN, Fox News, Los Angeles Times, and Warner Brothers Television petitioned the Colorado Supreme Court to review a district court's order that prohibited the news organizations from revealing the contents of hearing transcripts. The limited participation by these news organizations in a criminal trial is similar to the recognition of nonparty news organizations by the military justice system. See *A.B.C., Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997) (appeal by ABC News, CNN, Fox News, NBC and The Washington Post); *Stars and Stripes v. United States*, Not Reported in M.J., WL 3591156 (N.M.Ct.Crim.App. 2005); and *Denver Post Corp. v. United States*, Not Reported in M.J., WL 6519929 (Army Ct.Crim.App. 2005).

In *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981), the court held that a nonparty whose telephone conversations were recorded without his knowledge had standing to object to the disclosure of the recordings. See also *United States v. Sandoval*, Not Reported in F.Supp.2d, WL 2757188 (S.D. Fla. 2010) (the theft victim Amazon.com, through its attorneys, filed a motion to quash a defendant's subpoena of its business records); *United States v. Seibel*, Not Reported in F.Supp.2d, WL 3489803 (D.S.D. 2011); *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (attorney, represented by an attorney, moved to quash grand jury subpoena because of attorney-client privilege); and

*United States v. Nixon*, 418 U.S. 683, 692, 94 S.Ct. 3090, 3099, 41 L.Ed.2d 1039 (1974).

Other cases where federal courts have allowed a nonparty represented by counsel appeal in a criminal case include *United States v. Yielding*, 657 F.3d 722, 726 n. 2 (8th Cir.2011) (holding the nonparty had "standing to appeal" because "it [was] bound or adversely affected by an injunction"); *In re Siler*, 571 F.3d 604, 608-09 (6th Cir.2009) (allowing nonparties to appeal the use of a presentencing report in a civil suit); *United States v. Perry*, 360 F.3d 519, 523-24 (6th Cir.2004) (allowing a non-party victim to appeal an order vacating a lien securing her restitution award); and *Kenna v. United States*, 435 F.3d 1011 (9th Cir. 2006). [6] The common thread in the criminal cases in which courts have permitted nonparty appeals is that each related to specific trial issues and did not disturb a final judgment. *United States v. Hunter*, 548 F.3d 1308, 1314 (10th Cir. 2008); and *United States v. Fast*, 709 F.3d 712, 717 - 718 (8th Cir. 2013). In all cases, the nonparties are represented by counsel.

[6] In *U.S. v. Mahon*, Not Reported in F.Supp.2d, 2010 WL 94247 (D. Ariz. 2010), the court denied defendant's motion to strike the victim's counsel's formal appearance because even though the victim was not a party, filing an appearance was a reasonable procedure for ensuring protection of the victim's rights.

Even where federal courts ultimately deny the relief the nonparties seek, they still permit nonparties, represented by counsel, to participate. See *United States v. Trustees of Boston College*, 831 F.Supp.2d 435 (D. Mass. 2011) (Boston College and individual intervener, each represented by separate counsel, moved to quash subpoena); *United States v. Hunter*, 548 F.3d 1308 (10th Cir. 2008) and *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008) (in these two related cases, the parents (represented by counsel) of a murder victim sought mandamus from the circuit court to order the district court to recognize their crime victim status); *In re Grand Jury*, 103 F.3d 1140 (3rd Cir. 1997) (nonparties, represented by counsel, appealed district courts' orders denying their claims of parent/child privilege); *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984) (nonparty attorney, represented by the attorney's counsel, appealed district court's order directing attorney to testify about privileged conversations); and *Matter of Grand Jury Impaneled January 21, 1975*, 716 F.2d 373 (3rd Cir. 1976) (nonparty attorney, represented by the attorney's counsel, moved to intervene and quash a subpoena issued to prothonotary).

A case that demonstrates the importance of allowing nonparties to be represented by counsel is *In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011). In *Amy Unknown*, a child depicted

in pornographic images sought restitution from a defendant convicted of possessing child pornography. The child, Amy, was represented by counsel. The district court denied Amy's request for restitution. Amy, through counsel, immediately filed a petition for a writ of mandamus and also filed a direct appeal of the district court's order. The circuit court panel assigned to hear the petition denied relief. Amy's counsel then sought both panel and *en banc* rehearing of her mandamus petition. The circuit court panel assigned initially to hear only the direct appeal was also assigned the rehearing of the mandamus petition. This second panel granted Amy's petition for a writ of mandamus. Amy would have never prevailed without the assistance of counsel filing both a petition and a direct appeal, and a request for rehearing.

Another case demonstrating the importance of victims' counsel is *United States v. Shrader*, 716 F.Supp.2d 464 (S.D.W.Va. 2010). In the 1970's, the defendant was convicted of murdering his former girlfriend's mother and a man he thought the former girlfriend was dating. The incarcerated defendant continued to harass his former girlfriend and her family over the ensuing decades. In 2009, the defendant was charged with two counts of stalking (18 U.S.C.A. §2261A(2)) when he sent a 32 page letter to his former girlfriend/victim. The defendant

filed an *ex parte* motion for a Fed. R. Crim. P. 17(c) subpoena to compel the victim's psychotherapist to produce records relating to the victim's emotional condition. The defendant argued the records were relevant because §2261A(2) required proof that the defendant's conduct caused the victim to experience substantial emotional distress. The clerk of the court issued the requested subpoena.

The psychotherapist opposed the subpoena, asserting the records were subject to privilege. The victim's counsel moved to quash the subpoena and submitted a memorandum of law. The magistrate quashed the subpoena.

The defendant filed objections to the magistrate's order, and the district court affirmed. During this ordeal, victim's counsel addressed numerous tedious legal issues raised by the defendant, including the applicability of *Brady v. Maryland*, 373 U.S. 83 (1963), arguing the psychologist was not a government agent and the government was not in possession of the records, the meaning of the word "reasonable" as used by the magistrate, whether §2261A(2) requires that the *actus reus* be established through medical records (using a civil case to argue in a criminal case), and the defendant's confrontation rights is only a trial right and not a discovery right. *Id.*, at 468-469. The victim's counsel also argued the records were privileged under

*Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), and noted that the defendant's hypothetical arguments were not applicable and offered a more compelling hypothetical argument. The victim's attorney argued that the defendant's Sixth Amendment rights did not meet the requirements of *United States v. Caro*, 597 F.3d 608 (4th Cir. 2010) for Rule 17(c) subpoenas. Finally, the victim's attorney argued that the defendant was not unfairly prejudiced because the prosecutor did not have access to the records either. *Shrader*, at 468-469.

*Shrader* is an example of how a criminal justice system is supposed to work. The victim's attorney was focused on representing the victim, and only the victim. The prosecutor does not represent the victim. The judge may not look after the interests of the victim. *United States v. Taylor*, 47 C.M.R. 445 (A.C.M.R. 1973).

The mere existence of Fed. R. Crim. P. 17(c) exposes the falsity of the claim that allowing victims the right to be represented by an attorney or to participate by filing objections and motions is unprecedented in any American court. Rule 17(c)(3) states:

"Subpoena for Personal or Confidential Information About a Victim. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are

exceptional circumstances, the court must require giving notice to the victim so that the **victim can move to quash or modify the subpoena or otherwise object.**"

Fed. R. Crim. P. 17 (emphasis added).

Rule 17 explicitly allows victims to make motions and objections, which implicitly means they may be represented by counsel. Victims' participation throughout the federal criminal justice system is commonplace and ordinary. Many state court rules are patterned after the federal Rule 17. *People v. Spykstra*, 234 P.3d 662, 666 (Col. 2010); *Massachusetts v. Lampron*, 441 Mass. 265, 806 N.E.2d 72, 76 (2004) (Massachusetts' rule modeled after the federal rule); *Schreibvogel v. State*, 228 P.3d 874, 881 n.5 (Wyo. 2010) (Wyoming's rule is based upon the federal rule).

Aside from state rules patterned after Fed. R. Crim. P. 17(c), state courts, on other bases, allow nonparties and victims to be represented by counsel and to participate in criminal proceedings. Pennsylvania has numerous cases allowing counseling centers, represented by counsel, to file motions to quash subpoenas and appeal adverse orders in criminal cases. See *Pennsylvania v. Miller*, 406 Pa. Super. 206, 593 A.2d 1308 (1991); *Pennsylvania v. Wilson*, 529 Pa. 268, 602 A.2d 1290 (1992); *Pennsylvania v. Simmons*, 719 A.2d 336 (Pa. Super. 1998), and *Pennsylvania v. Makara*, 980 A.2d 138 (Pa. Super. 2009).

These Pennsylvania cases presented difficult legal challenges concerning the interpretation of various statutes, court rules and case law. But for the able assistance of counsel, these victims would have had their privacy rights violated.

Other states also recognize the rights of victims and other nonparties represented by counsel to appear, file motions and appeal orders affecting their privacy interests. *State v. Gomez*, 63 P.3d 72 (Ut. 2002) (Rape Crisis Center moved to quash subpoena); *In re Crisis Connection, Inc.*, 930 N.E.2d 1169 (Ind. Ct. App. 2010) (same); and *People v. Turner*, 109 P.3d 639 (Col. 2005) (same); and *People v. Sisneros*. 55 P.3d 797 (Col. 2002). In *People v. Bryant*, Not Reported in P.3d, WL 869618 (Colo. Dist. Ct. 2004), the sexual assault victim and her three medical treatment providers (represented by counsel) all moved to quash subpoenas served by the defendant.

The military justice system has also allowed victims and related nonparties to participate through counsel in courts-martial proceedings. In *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006), the military trial judge held an evidentiary hearing under Mil. R. Evid. 513(e)(2), and ordered the production of the victim's psychotherapy notes for an *in camera* review. The victim's psychotherapist, Jennifer Bier, refused to provide the documents, and through her attorney requested a

hearing before the military judge. Ms. Bier and her attorney appeared before the judge to make legal arguments.

In *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995), two sexual assault victims filed a petition for extraordinary relief to protect their privacy rights under Mil. R. Evid. 412, Article 31 of the U.C.M.J., generalized "invasions of privacy," and their "privileges." The Court of Appeals for the Armed Forces granted relief, and ordered that the victims would be given an "opportunity, **with the assistance of counsel if they so desire**, to present evidence, arguments and legal authority to the military judge . . . ." *Carlson* at 402 (emphasis added).

In *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008), CBS News filed a motion to quash a government subpoena seeking unaired video of 60 Minutes' interviews of the defendant. The military judge quashed the subpoena, but the Navy-Marine Corps Court of Criminal Appeals reversed and vacated. CBS News petitioned the Court of Appeals for the Armed Forces for extraordinary relief. This Court of Appeals vacated the orders of both the military judge and the Navy-Marine Corps Court of Criminal Appeals, and ordered the military judge to conduct an *in camera* review of the unaired video. CBS News' motion and petition were based upon an alleged "newsgathering privilege."

It is discordant to allow CBS News, through its many lawyers, the right to make motions and petitions during a court-martial to defend a privilege while denying a victim (or any patient, penitent, spouse or client) the rights to be represented by counsel and to make motions and petitions defending other privileges.

In addition to these reported military cases, the Rules for Courts-Martial and Military Rules of Evidence reference the right to be heard and recognize in at least one instance the role of a witness's counsel. The Appellant's Brief at 23 to 25 discusses numerous instances where the Rules for Courts-Martial provide an opportunity to be heard. Another instance is Rule for Courts-Martial 109, Professional Supervision of Military Judges and Counsel which gives military judges and counsel the "right to be heard." R.C.M. 109(a), (b), (c)(5)(C), and (c)(6)(D). It is unlikely the Judge Advocate General would prohibit a judge or counsel who is facing a misconduct complaint, from making legal arguments or retaining a lawyer. In fact, it is likely the Judge Advocate General would appoint an attorney if requested. Victims deserve nothing less than the

rights military judges and lawyers get under identical "right to be heard" language. [7]

Mil. R. Evid. 301(b) states, "**Counsel** for any party or **for any witness** may request the military judge to so advise a witness, . . ." (emphasis added). This is an explicit recognition that witnesses may be represented by counsel. Representation by counsel of witnesses, victims and other persons with an interest in military courts-martial proceedings are commonplace.

The cries of "unprecedented" ring hollow when there are so many federal, state and military courts that have recognized, for many years, the right of victims and other limited participants, represented by counsel, to file motions and appeals in criminal trials.[8] The development of the law has been greatly assisted by the attorneys for these limited participants. A military judge, like any federal or state

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[7] Courts tend to treat lawyers more favorably than non-lawyers. See Benjamin H. Barton, *Do Judges Systemically Favor the Interests of the Legal Profession?*, 59 Ala.L.Rev. 453 (2008). The Appellee trial judge has been appointed counsel to file a brief with the Court of Appeals for the Armed Forces in this case. While I recognize the Appellee is named as a party to the Petition, it is ironic that an attorney has been appointed to represent the Appellee (an experienced attorney and not a party to the court-martial) before this Court as this Court considers whether a victim has a right to an attorney.

[8] There are no reported cases in which any federal or state court denied a victim or other nonparty the right to be represented by counsel that has either been retained personally or been appointed. This Court would be making unprecedented new law if it were to deny Appellant this right.

judge, wants to make the correct ruling. To make correct rulings, judges need the perspective of the attorneys for victims and other limited participants who have a direct and tangible interest. The defendants do not have any right to keep persuasive legal authority and argument from military judges. Attorneys representing victims in criminal trials are ordinary and common.

## VICTIMS' PERSPECTIVE OF COURTS-MARTIAL PROCEEDINGS

The military judge Appellee and the *amicus curiae* Brief of Air Force Trial Defense Division in the Air Force Court of Criminal Appeals each provided a defendant's perspective of the military justice system. The Appellee perceived an unconstitutional appearance of partiality if the Court permitted the "stacking of two parties to the trial, the Government and the SVC, to argue evidentiary matters against the accused's interest." (J.A. at 184-185). The Appellee's concern is that the Defendant is being unfairly attacked by two parties.[9] The *amicus curiae* Brief of Air Force Trial Defense Division provides a distorted view of a carnival-like atmosphere where unethical and lying trial counsel and Special Victim Counsel conspire with

[9] "[The] prospect of an accused having to face two attorneys representing two similar interests are [sic] sufficiently antithetical to courts-martial jurisprudence and would . . . cause a significant erosion in the right to an impartial judge in appearance or a fair trial." (J.A. at 185).

convening authorities to wrongfully deny defendants due process. See Brief by *amicus curiae* Air Force Trial Defense Division at 8 (stating the Special Victim Counsel are "turning courts into unpredictable carnivals" and predicting "three ring circuses").

These views are starkly different from the perspective of a victim. Only a small percentage of sexual assaults are ever reported and investigated.[10] Victims do not report rapes and assaults because they lack faith in and fear the military justice system and their chain of command.[11]

Of course sexual assault victims hear the President, Secretary of Defense and other senior leadership announce the

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[10] Based on the reporting done by the Department of Defense (the "DoD"), in fiscal year 2012 approximately 26,000 men and women defending our country were sexually assaulted. Department of Defense Fiscal Year 2012 Annual Report on Sexual Assault in the Military (the "2012 Annual Report"), at 12. The 2012 Annual Report may be found at http://www.sapr.mil/media/pdf/reports/FY12 DoD SAPRO Annual Report on Sexual Assault-VOLUME ONE.pdf
Of the 26,000 assaults, only 3,374 were reported to military authorities. *Id.* at 24. Only 2,558 reports of assault were able to be investigated because the victim filed restricted reports in 816 cases. *Id.* at 58. In fiscal year 2012, only 594 subjects had court-martial charges for sexual assault preferred against them, only 302 subjects proceeded to trial, and only 238 subjects were convicted. *Id.* at 68 and73. Convictions in fiscal year 2012 were less than 1% of the 26,000 sexual assaults that occurred in fiscal year 2012.

[11] Underreporting is widespread. The majority of sexual assault victims do not report the crime because they did not want anyone to know of it (67%), they felt uncomfortable making a report (65%), or they did not believe their report would be kept confidential (60%). More than half were afraid of retaliation or reprisals, and almost half had heard about the negative experiences other victims had endured. 2010 Workplace and Gender Relations Survey of Active Duty Members: Overview Report on Sexual Assault, DMDC Report No. 2010-025, March 2011(hereinafter "WGRA 2010"), at vi. The WGRA 2010 report can be found at http://www.sapr.mil/media/pdf/research/DMDC 2010 WGRA Overview Report of Sexual Assault.pdf

zero tolerance policy, but they see a convening authority dismiss - make disappear - a sexual assault conviction of a field grade officer.[12] They see a field grade officer responsible for preventing and responding to sexual assault be arrested for sexually assaulting a woman.[13] They see a unit sexual assault response coordinator arrested for pandering, abusive sexual assault, assault and maltreatment of subordinates.[14] They see a general officer on trial for sexual assault creating a website to attack the victim.[15] They see scandal after scandal.[16]

Sexual assault victims are not blind. They are not dumb.

Congress adopted Mil. R. Evid. 412 to protect victims from unnecessary and irrelevant exposure of their private sexual histories and lives; however, this protection is useless if the victim cannot enforce it. *Doe*, 666 F.2d at 46. Victims see this Court, albeit in *dicta*,[17] say that trial judges may not

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[12] American Forces Press Service, *Hagel Orders Review of Sex Assault Case, Convening* Authority, 12 March 2013, http://www.defense.gov/news/newsarticle.aspx?id=119504&buffer share=b5e40

[13] Rueters News service, *Head of Air Force's Anti-Sexual Assault Unit Arrested for Sexual Battery*, 6 May 2013, http://www.reuters.com/article/2013/05/07/us-usa-airforce-sexassault-idUSBRE9450YH20130507 .

[14] Stars and Stripes, *Fort Hood soldier's arrest is latest blow to DOD on sexual assault*, 15 May 2013, http://www.stripes.com/news/fort-hood-soldier-s-arrest-is-latest-blow-to-dod-on-sexual-assault-1.221001

[15] Stars and Stripes, *Accused Brig. Gen. Sinclair Also Fights the Court of Public Opinion Online*, 11 March 2013, http://www.stripes.com/news/army/accused-brig-gen-sinclair-also-fights-the-court-of-public-opinion-online-1.211290 .

[16] Tailhook, Aberdeen Proving Ground, Air Force Academy, and Lackland AFB.

[17] *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). Although this Court held that consideration of the victim's privacy was constitutional under

even consider victims' privacy despite the explicit direction in Mil. R. Evid. 412. Mil. R. Evid. 412, 513 and 514 also promise the opportunity to be heard. But victims see other brave victims left betrayed after they relied upon these promises. Victims see defense counsel use their sexual history as leverage to undermine their credibility, to intimidate them, to humiliate them, and to ultimately dissuade them from proceeding with the case.[18] Article 39(a) proceedings for Mil. R. Evid. 412 and 513 are conducted by skilled and aggressive attorneys against a defenseless victim.

The military justice system leaves victims feeling exposed and naked. This is why only 18 percent of the women who reported their sexual assault to the DoD would make the same decision to report if they could do it over.[19] It is fundamentally unfair to repeatedly expose the victim to attacks

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facts of that case, it needlessly warned trial judges that consideration of victims' privacy in other cases may be unconstitutional.

[18] In testimony before the United States Commission on Civil Rights on 11 January 2013, Air Force Judge Advocate General LTG Richard Harding stated that 29% of the Air Force's sexual assault victims, who had originally agreed to participate in the prosecution of their offender, changed their minds before trial and declined to cooperate with the prosecution. He believed that had these victims been represented by their own attorney, many of them would have continued to participate. See transcript of meeting at page 169. The transcript of meeting is at http://www.usccr.gov/calendar/trnscrpt/Transcript 01-11-13.pdf

[19] WGRA 2010, at iii – iv. Only 10% of men who reported sexual assault would make the same decision.

by skilled defense counsel when she is unrepresented and powerless to defend herself.[20]

Victims also believe that trial judges may be challenged on appeal only if they rule against the defendant, creating at least a subconscious motive to rule against the victim.[21]

Although victims understand and expect that defendants are entitled to zealous advocacy, victims do not see anyone fighting for their interests. It is not the trial counsel's duty to fight for the victim. Trial counsel's only client is the government, and the government's interests sometimes conflict with the victim's interest.[22] There is no attorney-client relationship between trial counsel and victim. *United States* v.

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[21] The defense counsel gets his first opportunity to aggressively cross-examine the victim at the Article 32 hearing. He may get additional opportunities at sequential Mil. R. Evid. 412 and 513 hearings, and then again at trial.

[21] This erroneous belief is held not only by victims. In his Real Party In Interest's Answer To Certified Question, Defendant Daniels argues, "A1C L.R.M. will never have a right to seek review." Brief at 12-13. A1C L.R.M. has the right to seek review.

[22] This was acknowledged by Defense Counsel at the 29 January 2013 Article 39(a) session. Defense Counsel stated that a victim's interest will not be aligned with the government's interest "in almost every case." (J.A. at 143). He further admitted that trial counsel do not usually prepare victims for Mil. R. Evid. 412, 513 and 514 motions "because that is not their focus. They are focused on prosecuting." (J.A. at 14-146). Defense Counsel contended that if SVC were allowed to argue privacy interests, his job would be "bifurcated" and he would have to have to take his focus off defending the Defendant. He stated he may need additional defense counsel to focus on researching privacy interests because that is not usually the defense counsel's focus. (J.A. at 142-143). Mil. R. Evid. 412, 513 and 514 are part of the Military Rules of Evidence, which certainly seem to be within the responsibilities of any attorney participating in a court-martial. This view indicates that in practice defense counsel do not need to focus on victims' privacy because trial counsel do not focus on it either. The message that no one cares about the victim or her rights is heard loud and clear throughout the services.

*Whittaker*, 201 F.R.D. 363, 367 (E.D. Pa. 2001). Trial Counsel stated in his 6 February 2013 Response to SVC Motion for Reconsideration that he "could choose not to oppose defense attempts to admit Mil. R. Evid. 412 evidence for a myriad of reasons" (such as tactical decisions, or his belief that defense attempts to "tar" the victim would backfire, or to avoid creating an appellate issue). (J.A. at 210).

The government's and the victim's interests often conflict. *Amicus* curiae Protect Our Defenders has seen trial counsel consent to the disclosure of the victim's psychotherapy notes because he believed the notes would help his case. He ignored the victim's pleas for her privacy. No attorney protected the victim from aggressive cross-examination and no attorney made any legal arguments on her behalf.

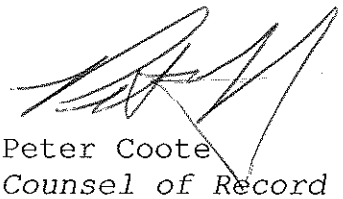
The Air Force's Special Victim Counsel Program has offered new hope for victims. After less than three months, the Program has represented over 260 victims. Victims in the Air Force are now provided someone who will advise them on the law and zealously fight for them. Congress through the National Defense Authorization Act for 2012 wanted victims to have counsel. The President, through his promulgation of the Military Rules of Evidence, promised victims the right to be heard. The Air Force Judge Advocate General created the Special Victim Counsel

Program to fulfill the promises made to sexual assault victims. In order for Special Victims' Counsels to have any real effect, they must be able to assert the victim's rights in courts martial. Protect Our Defenders is asking the Court to for allow victims' attorneys to protect their clients' privacy by making legal arguments on their behalf.

## CONCLUSION

Protect Our Defenders respectfully requests this Honorable Court to give voice to victims of sexual assault, and to recognize the right of sexual assault victims to be represented by counsel in the military justice system.

Date: 28 May 2013 Respectfully submitted,



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**CERTIFICATE OF FILING AND SERVICE**

I certify that the foregoing was electronically mailed to the Court, Appellant, Appellee, Real Party in Interest, and *amici curiae* Air Force Appellate Government Division, Air Force Trial Defense Division, Marine Corps Defense Services Organization, Army Defense Appellate Division, and Appellate Defense Division for the Navy-Marine Corps on 28 May 2013.

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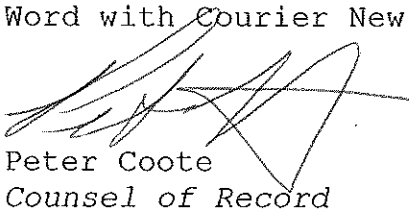
**CERTIFICATE OF COMPLIANCE WITH RULES**

I certify that this brief complies with the maximum length authorized by Rule 26(d) because this brief contains is 6,439 words. This brief complies with the typeface and type style requirements of Rule 37 because it was prepared using Microsoft Word with Courier New 12-point font, a monospaced font.



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