

Representing Military-Connected Victims

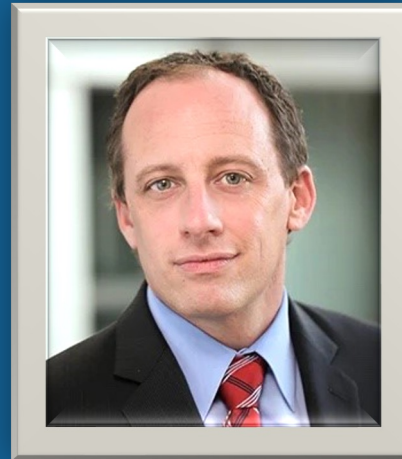
Ryan Guilds, Adelaide Kahn-Fowler

December 1, 2023

Introductions



Adelaide Kahn-Fowler
Director
Protect Our Defenders



Ryan Guilds
Counsel
Arnold & Porter

BACKGROUND ON THE ISSUE

IN 2021 IN THE US MILITARY

~35,900 members
(19,255 women & 16,620 men)
experienced unwanted sexual contact

IN AY 2021-2022 IN THE US MILITARY SERVICE ACADEMIES

~1,136 cadets and midshipmen
experienced unwanted sexual contact

What is Protect Our Defenders?



- ▶ Casework assistance and referral program
- ▶ Research and Education
 - ▶ Advocacy

Growing Need for Civilian Involvement

SEC. 549C. DISSEMINATION OF CIVILIAN LEGAL SERVICES INFORMATION

“Not later than one year after the date of the enactment of this Act [December 1, 2023], the Secretary of Defense, acting through the head of the Sexual Assault Prevention and Response Office of the Department of Defense, shall ensure that information on the availability of legal resources from civilian legal service organizations is distributed to military-connected sexual assault victims in an organized and consistent manner.”

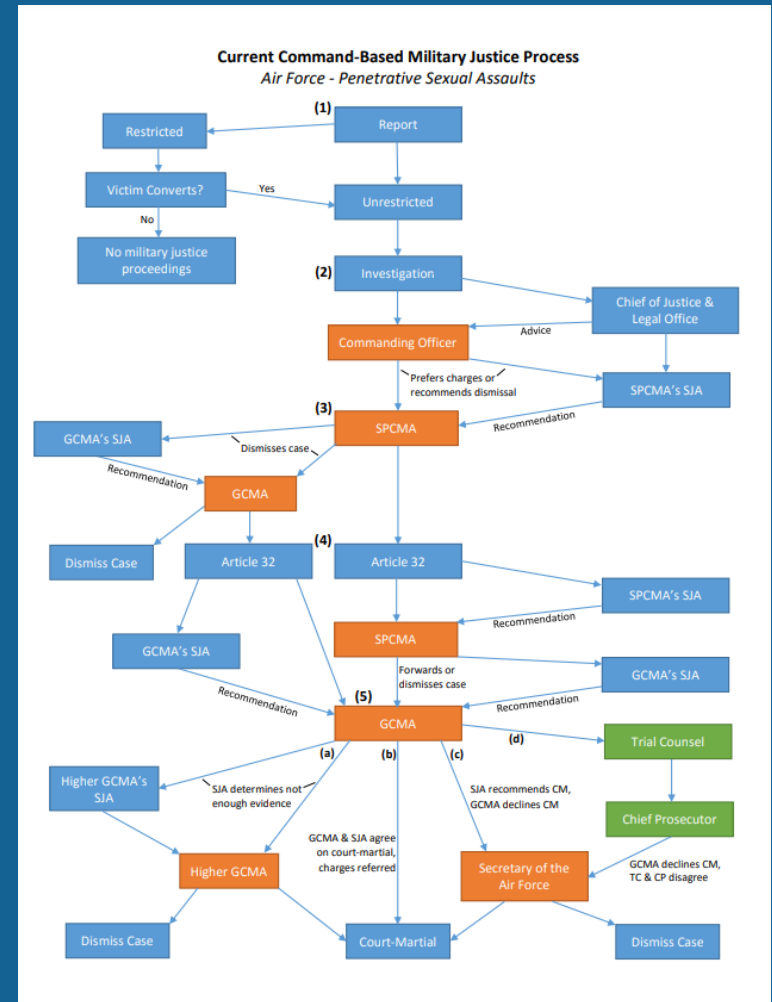
Learning Objectives

- **Articulate** key steps in military criminal justice;
- **Identify** victims' rights under Article 6b of the Uniform Code of Military Justice; and
- **Discuss** key opportunities and challenges to the application of victims' rights in the military justice system.

Overview:

Current Military Criminal Justice System

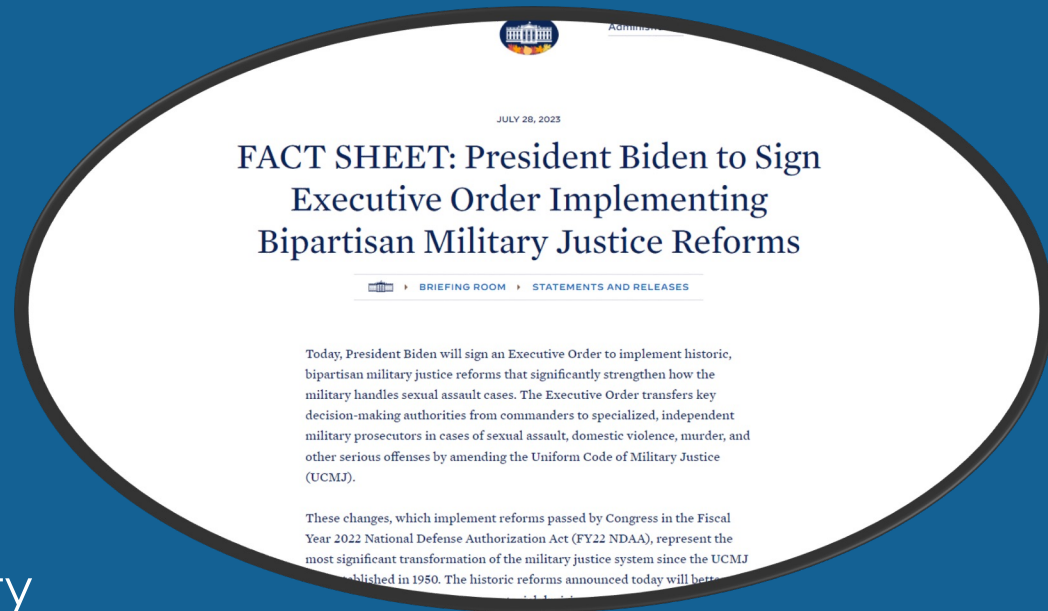
- Reporting by the victim
 - Restricted
 - Unrestricted
 - Civilian law
- Investigation – OSI/NCIS/CID
 - Also local or foreign jurisdictions
 - Victim right to request civilian prosecution (RCM 306(e))
- Convening Authority preferral
- Article 32 Hearing
- Convening Authority referral
- Courts-Martial
- Appellate Courts



Overview:

New Prosecuting Authority

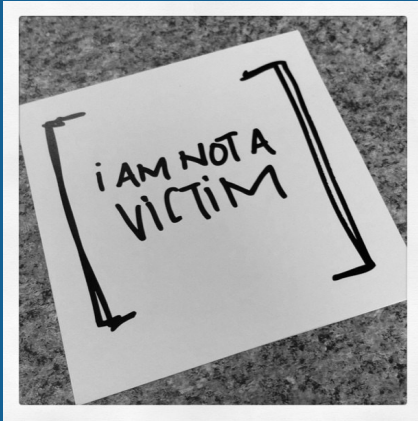
- ▶ Military Justice Improvement Act
- ▶ OSTC Preferral and Referral Authority
- ▶ Convening Authority continued responsibility for witnesses, voir dire, funding



Victims' Rights: How Did We Get Here?

- 2013 Air Force development of military VLC program
- *LRM v. Kastenberg*, 72 M.J. 364 (2013)
- 2014 NDAA
- Subsequent enhancements
 - Article 6b appellate rights
 - Right to be present for trial
 - Right to refuse interview / deposition
 - Additional therapy privilege protections





Who Is a Victim?

- An individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense
- Includes active duty, DOD personnel and family, and civilian victims

Right and Access to Counsel



- All defined victims have right to counsel
- Active duty, DoD, and military dependent sexual assault survivors have free access to military-detailed counsel
 - Recent expansion to DV space
- Right to counsel triggers at the time the victim seeks assistance from:
 - SARC, a Victim Advocate, a military criminal investigator, a victim/witness liaison, a trial counsel, a healthcare provider, or any other personnel designated by the Secretary
- Assistance of counsel is available regardless of whether the individual elects unrestricted or restricted reporting
- Expansion of counsel to other offenses including DV



MILITARY DETAILED COUNSEL

Figure 14: Number of DOD Special Victims' Counsels (SVC)/Victims' Legal Counsels (VLC) by Military Service, Fiscal Years 2015-2019

Fiscal Year	Army SVCs	Marine Corps VLCs	Navy VLCs	Air Force SVCs*
2015	44 ^b	21	29	44
2016	44	20	32	51
2017	44	21	33	50
2018	44	21	33	50
2019	44	20	33	50

Source: GAO analysis of Department of Defense (DOD) data. | GAO-21-113

*Numbers reflect the number of authorized SVC billets and not the actual number of SVCs assigned.

^bArmy SVCs did not begin to serve civilians until fiscal year 2017.



► Who does the representing?

► The largest victim rights legal organization in the world



► Who do they represent?

► Active duty, family of active duty, some DoD (not all civilians)

► Then why are civilian lawyers needed?

What Are Victims' Basic Rights?

Not to be excluded
from proceedings

The right to be
reasonably heard

The reasonable right to
confer with the
Government

Reasonable, accurate,
and timely notice

Reasonable protection
from the accused

Proceedings free from
unreasonable delay

Restitution as provided
in law

The right to be treated
with fairness and with
respect for the dignity
and privacy of the
victim

The Right Not to Be Excluded

- Rule: Exclusion is not allowed
- Unless: Clear and convincing evidence that victim's testimony would be materially altered if the victim heard other testimony.
- Practice Points:
 - Non-exclusion right includes pretrial proceedings
 - Victim typically testifies first
 - Participation is a personal choice (not the Government's)

The Right to Be Heard

- *LRM v. Kastenberg*, 72 M.J. 364 (2013)
- FY 14 NDAA14
 - A public hearing concerning pretrial confinement
 - A sentencing hearing relating to the offense
 - A public clemency /parole board hearing
- Standing: Courts a mixed bag on when it comes to whether victim has standing to be directly heard by the court on matters outside MRE 412 and 513 and victim impact statement.



The Right Confer

- The reasonable right to confer with the counsel representing the Government at:
 - Pretrial confinement hearing
 - Article 32
 - A court-martial
 - Clemency / parole board proceeding
 - When case not referred
 - Discharge in lieu of court martial
 - Civilian v. military preference



The Right to Notice



- Right to reasonable, accurate, and timely notice:
 - Pretrial confinement hearing
 - Article 32
 - Court-martial
 - A public clemency and parole board hearing
 - The release or escape of the accused



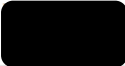
- Military must ensure SVC/VLC is “provided prompt and adequate notice of the scheduling of any hearing, trial, or other proceeding . . .” (Sec. 534)
- Court Rules / TMO provide some guidance

The Right to Reasonable Protection



- Safety planning
- Safety transfers
- Expedited transfers
- Media / Gag orders
- Military Protective Orders
- Civilian Protective Orders
- Trial Protections
 - Travel arrangements
 - Court accommodations
 - Support personnel

Right to Proceedings Free From Unreasonable Delay

UNITED STATES	
v.	
	
TRIAL MANAGEMENT ORDER	
4 February 2021	
1. Trial Dates and Milestones. The following are due on or before 2359 ¹ on the ordered date:	
a. Arraignment (and appointment of victim's designee if applicable)	5 Feb 21
b. Defense request for discovery	26 Feb 21
c. Defense expert consultant request	5 Mar 21
d. Defense witness request ⁱⁱ	5 Mar 21
e. Government disclosure obligations ⁱⁱⁱ	12 Mar 21
f. Defense reciprocal disclosure ^{iv}	12 Mar 21
g. Government response to Defense expert consultant request	12 Mar 21
h. Government response to Defense witness request	12 Mar 21
i. Government notices pursuant to M.R.E. 404(b), 413(b), 414(b)	12 Mar 21
j. Motions filed and notice pursuant to M.R.E. 412 ^{v*}	19 Mar 21
k. Responses to motions*	2 Apr 21
l. Article 39(a)	8 Apr 21
m. Motions filed and notice pursuant to M.R.E. 412 ^{vi*}	30 Apr 21
n. Responses to motions*	14 May 21
o. Article 39(a)	20 May 21
p. Written notice of pleas and forum ^{vii*}	24 May 21
q. Written notice of certain defenses ^{viii}	24 May 21
r. Final pretrial matters ^{ix}	4 Jun 21
s. Final pre-trial conference	9 Jun 21
t. Trial Dates at Washington Navy Yard	14-18 Jun 21

Appellate Exhibit I
Page 1 of 3

- Investigation timing
- Trial timing

Right to Restitution

The right: The right to receive restitution as provided in law.

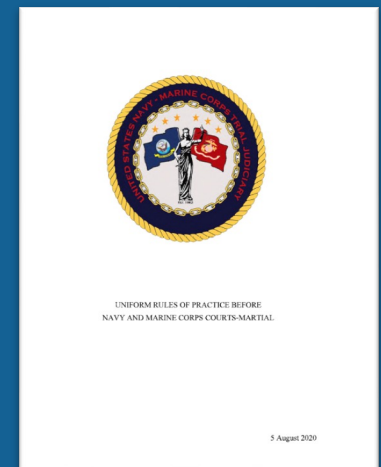
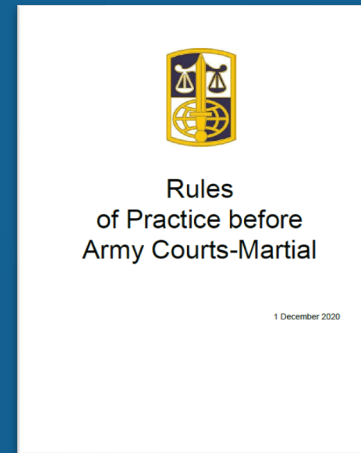
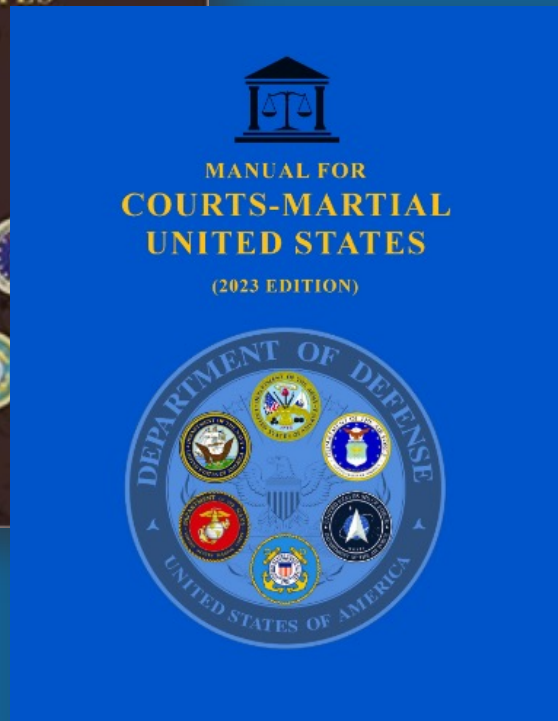
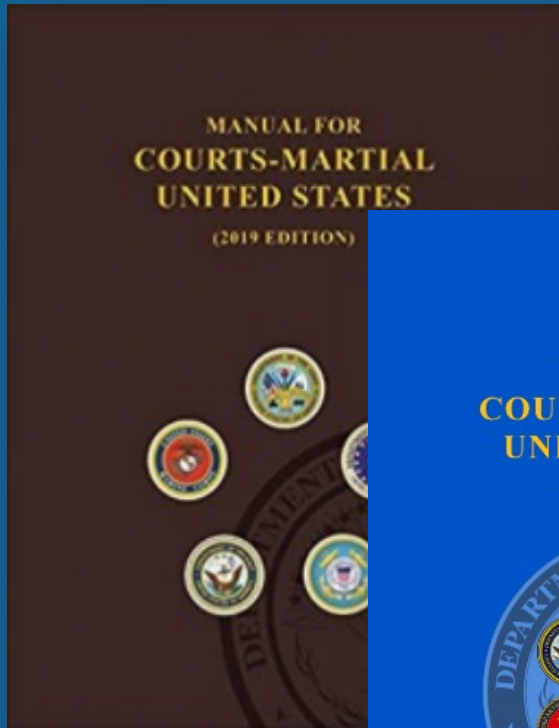
The reality: Law does not provide a mechanism for restitution in the military outside potentially plea agreements

The Right to Privacy

- The right to be treated with fairness and with respect for the dignity and privacy of the victim



The Rules: Manual for Courts-Martial & Court Rules



Rape Shield Law: MRE 412

Prohibited Uses. The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c):

- (1) evidence offered to prove that a victim engaged in other sexual behavior; or
- (2) evidence offered to prove a victim's sexual predisposition.

MRE 412 Exceptions

(b) *Exceptions*. In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

- (1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
- (2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
- (3) evidence the exclusion of which would violate the constitutional rights of the accused.

MRE 412 Trial Test

- the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy
- Evidence is still subject to challenge under MRE 403 and other evidentiary rules

Attorney
Medical
Psychotherapy
Marital
Victim Advocate

PRIVILEGES

Several thin, white, parallel diagonal lines are located in the bottom right corner of the slide, extending from the bottom edge towards the right edge.

Privileges

MRE 502: Lawyer Client Privilege

MRE 503: Clergy Privilege

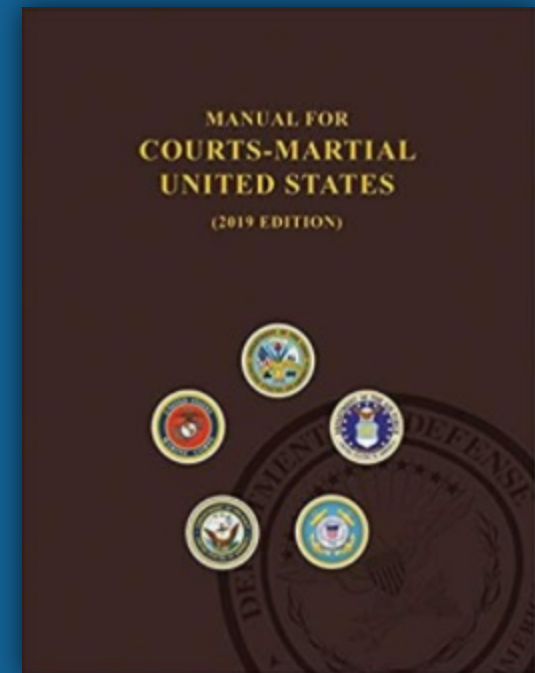
MRE 504: Marital Privilege

MRE 505: Classified Information

MRE 506: Government Information

MRE 513: Psychotherapist Patient

MRE 514: Victim Advocate



Psychotherapist-Patient Privilege: MRE 513

General rule of privilege

- A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.
- ▶ Current law: Diagnosis and treatment not covered by the privilege. *United States v. Mellette*, 82 M.J. 374 (C.A.A.F. 2022)



Victim Advocate Privilege:

MRE 514

A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate or between the alleged victim and the DOD Staff Helpline, if such communication was made for the purpose of facilitating advice or assistance to the alleged victim.

A victim advocate means any person other than a prosecutor, trial counsel, any victims' counsel, law enforcement officer, or military criminal investigator who:

- Is designated in writing as a victim advocate in accordance with service regulation
- Is authorized to perform victim advocate duties in accordance with service regulation
- Is certified as a victim advocate pursuant to federal or state requirements

Exception: Includes when disclosure is constitutionally required.

Court Martial

What to Expect at a Court Martial

UNITED STATES

v.



TRIAL MANAGEMENT ORDER

4 February 2021

1. **Trial Dates and Milestones.** The following are due on or before 2359^j on the ordered date:

a. Arraignment (and appointment of victim's designee if applicable) 5 Feb 21

b. Defense request for discovery 26 Feb 21

c. Defense expert consultant request 5 Mar 21

d. Defense witness request^k 5 Mar 21

e. Government disclosure obligationsⁱⁱⁱ 12 Mar 21

f. Defense reciprocal disclosure^{iv} 12 Mar 21

g. Government response to Defense expert consultant request 12 Mar 21

h. Government response to Defense witness request 12 Mar 21

i. Government notices pursuant to M.R.E. 404(b), 413(b), 414(b) 12 Mar 21

j. Motions filed and notice pursuant to M.R.E. 412^{v*} 19 Mar 21

k. Responses to motions* 2 Apr 21

l. Article 39(a) 8 Apr 21

m. Motions filed and notice pursuant to M.R.E. 412^{vi*} 30 Apr 21

n. Responses to motions* 14 May 21

o. Article 39(a) 20 May 21

p. Written notice of pleas and forum^{vii*} 24 May 21

q. Written notice of certain defenses^{viii} 24 May 21

r. Final pretrial matters^{ix} 4 Jun 21

s. Final pre-trial conference 9 Jun 21

t. Trial Dates at Washington Navy Yard 14-18 Jun 21

Sentencing

Sentencing

R.C.M. 1001(d)(3)

sworn statement and shall be subject to cross-examination concerning it by trial counsel and defense counsel or examination on it by the court-martial.

(5) Unsworn statement.

(A) *In general.* The crime victim may make an unsworn statement and may not be cross-examined by trial counsel or defense counsel, or examined upon it by the court-martial. The prosecution or defense may, however, rebut any statements of fact therein. The unsworn statement may be oral, written, or both.

(B) *Procedure.* After the announcement of findings, a crime victim who elects to present an unsworn statement shall provide a written proffer of the matters that will be addressed in the statement to trial counsel and defense counsel. The military judge may waive this requirement for good cause shown. Upon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement.

Discussion

A victim's statement should not exceed what is permitted under R.C.M. 1001(c)(3). A crime victim may also testify as a witness during presentencing proceedings in order to present evidence admissible under a rule other than R.C.M. 1001(c)(3). Upon objection by either party or *usa sponte*, a military judge may stop or interrupt a victim's statement that includes matters outside the scope of R.C.M. 1001(c)(3). A victim, victim's counsel, or designee has no separate right to present argument under R.C.M. 1001(h).

When the military judge waives the notice requirement under this rule, the military judge may conduct a session under Article 39(a) to ascertain the content of the victim's anticipated unsworn statement.

If the victim intends to submit a written statement, a copy of the statement satisfies the requirement for a written proffer.

(C) *New factual matters in unsworn statement.* If during the presentencing proceeding a crime victim makes an unsworn statement containing factual matters not previously disclosed under subparagraph (5)(B), the military judge shall take appropriate action within the military judge's discretion.

(d) Matter to be presented by the defense.

(1) *In general.* The defense may present matters in rebuttal of any material presented by the prosecution and the crime victim, if any, and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.

(A) *Matter in extenuation.* Matter in extenuation of an offense serves to explain the circumstances

surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.

(B) *Matter in mitigation.* Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

(2) Statement by the accused.

(A) *In general.* The accused may testify, make an unsworn statement, or both in extenuation, in mitigation, to rebut matters presented by the prosecution, or to rebut statements of fact contained in any crime victim's sworn or unsworn statement, whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. The accused may make a request for a specific sentence. This subsection does not permit the filing of an affidavit of the accused.

(B) *Testimony of the accused.* The accused may give sworn oral testimony and shall be subject to cross-examination concerning it by trial counsel or examination on it by the court-martial, or both.

(C) *Unsworn statement.* The accused may make an unsworn statement and may not be cross-examined by trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.

Discussion

An unsworn statement ordinarily should not include what is properly argument, but inclusion of such matter by the accused when personally making an oral statement normally should not be grounds for stopping the statement.

(3) *Rules of evidence relaxed.* The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of



Appellate Rights

Appellate Rights

- The victim may petition the Court of Criminal Appeals for a writ of mandamus
- Applies with respect to the protections afforded by Article 6(b) (victims' rights); Article 32; MRE 412, 513, 615
- To the extent practical, shall have priority over other proceedings before the court



SOME FINAL THOUGHTS ABOUT “WINNING”

