8 May 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) L.R.M., USAF, *Petitioner,*	)	AMICUS CURIAE BRIEF OF THE AIR FORCE APPELLATE GOVERNMENT DIVISION
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, *Respondent,*	)	USCA Dkt. No. 13-5006/AF Crim. App. No. 2013-05
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party in Interest.*	)	

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

Issues Presented

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS.

II.

WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION.

III.

WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) determined that it lacked jurisdiction under the All Writs Act, 28 U.S.C. §

1651, to reach the substantive issues raised in Petitioner's request for extraordinary relief in the form of a petition for writ of mandamus. The Air Force Appellate Government Division asserts that jurisdiction exists for this Honorable Court to review the jurisdictional issue raised in this case under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2), and the All Writs Act, 28 U.S.C. § 1651.

Statement of the Case

Petitioner's Statement of the Case is accepted.

Statement of Facts

Petitioner's Statement of the Facts is accepted.

Summary of Argument

The military judge's restrictive reading of Mil. R. Evid. 412 and 513 has the potential to influence the findings and sentence in this case. Therefore, AFCCA's review of Petitioner's writ of mandamus was in aid of its subject matter jurisdiction and it erred by holding that jurisdiction did not exist.

If this Court finds that jurisdiction exists over Petitioner's request for extraordinary relief, reading Article 67, UCMJ, as an integrated whole, this Court's review cannot extend beyond the jurisdictional question and the remaining substantive issues must be remanded back to AFCCA for a decision on the matters of law raised by Petitioner.

Finally, Mil. R. Evid. 412 and 513 confer a regulatory right for a victim to be heard through counsel during these limited evidentiary hearings. For this reason only, the writ should issue.

Argument

I.

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO REACH THE SUBSTANTIVE ISSUES RAISED IN THE PETITION FOR A WRIT OF MANDAMUS.

Standard of Review

Jurisdiction is a legal question which this Court reviews de novo. United States v. Ali, 71 M.J. 256, 261 (C.A.A.F. 2012).

Law and Analysis

1. AFCCA erred by holding that it lacked jurisdiction to reach the substantive issues.

The Air Force Appellate Government Division generally agrees with Petitioner's legal analysis contained in Issue I, subsections a.-b. (Pet. Br. at 8-15.) At its core, the substantive issues raised below required AFCCA to review a specific ruling interpreting specific Military Rules of Evidence in a specific ongoing court-martial. Therefore, AFCCA's review of Petitioner's writ of mandamus was in aid of its subject matter jurisdiction, and it erred by holding that jurisdiction did not exist.

This Court's jurisdiction 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. Center for Constitutional Rights et al. v. United States, 72 M.J. 126, No. 12-8027/AR, slip op. at 6 (C.A.A.F. 2013) (internal citations omitted) (hereinafter CCR). The All Writs Act is not an independent grant of jurisdiction, nor does it enlarge this Court's existing statutory jurisdiction. 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, this 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" AFCCA'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.*, Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012); 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).

Although Petitioner is not a party to the criminal action as defined by R.C.M. 103(16), the President has afforded her a procedural right to attend and be heard during limited evidentiary hearings to evaluate whether evidence regarding her prior sexual behavior or sexual predisposition under Mil. R. Evid. 412 and privileged communications under Mil. R. Evid. 513 should be admitted or excluded during trial.[1] Mil. R. Evid.

[1] The Air Force Appellate Government Division disagrees with Petitioner's assertion that "MRE 412 requires a military judge to conduct a hearing and to balance the victim's right to privacy against the probative value of the evidence to be admitted" as stated in lines 19-21 on page 14 of her brief. As emphasized by this Court in United States v. Gaddis, 70 M.J. 248, 250 (C.A.A.F. 2011), the "'alleged victim's privacy' interests cannot preclude the admission of evidence 'the exclusion of which would violate the constitutional rights of the accused.'" Instead, "whether evidence is constitutionally required--so as to meet the M.R.E. 412(b)(1)(C) exception to M.R.E. 412's general prohibition of sexual behavior or predisposition evidence--demands the ordinary contextual inquiry and balancing of countervailing interests, e.g., probative value and the right to expose a

412(c)(2) and 513(e)(2). The substantive legal issues presented in this appeal--whether Petitioner has standing, whether she can be heard through her counsel during these limited evidentiary hearings, and whether the writ should issue--invited AFCCA to evaluate the military judge's application of Mil. R. Evid. 412 and 513 during an ongoing general court-martial, which potentially impacted Petitioner's privacy interest, the accused's right to present a complete defense, and ultimately the outcome of the trial. AFCCA was not being asked to adjudicate "what amounts to a civil action, maintained by persons who are strangers to the court-martial." *See* CCR, slip op. at 8. Instead, the Court was asked to interpret the legal contours of specific evidentiary rules; rules governing evidentiary matters deemed so meaningful to the findings and sentence of a court-martial that an erroneous interpretation or application of them can rise to the level of constitutional error. *See, e.g.* United States v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011); United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006) (demonstrating the military judge's broad authority to abate court-martial proceedings when the government could not provide the victim's mental health records in a sexual assault case).

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witness's motivation in testifying versus the danger of 'harassment, prejudice, confusion of the issues, the witness' safety, or [evidence] that is repetitive or only marginally relevant.'" Id. at 252.

In many respects, this case is similar to Hasan. Just as this Court found in Hasan, 71 M.J. at 419, that the military judge's perceived bias against the petitioner had the "potential" to impact the findings and sentence, the military judge's restrictive reading of Mil. R. Evid. 412 and 513 similarly has the potential to influence the findings and sentence in this case. No one is better situated to assist Petitioner in understanding the relevance of her sexual history or mental health treatment to the proceeding than her detailed attorney. Assistance from her attorney in this area may promote victim cooperation in the court-martial process because her attorney is best situated to explain her rights and fully explore her background in relation to these evidentiary rules in a privileged setting. *See* United States v. Gaddis, 70 M.J. 248, 254 (C.A.A.F. 2011) (citing United States v. Banker, 60 M.J. 216, 219 (C.A.A.F. 2004) (noting that Mil. R. Evid. 412 was intended to encourage victim cooperation in courts-martial and to prevent embarrassment, invasion of privacy, and the infusion of sexual innuendo into the factfinding process). Moreover, her attorney can assist in the presentation of this information so it can be placed in proper context for the court. During the proceeding, Petitioner's attorney could also advocate points of law so that the military judge is fully apprised of the legal issues before weighing the countervailing considerations

involved in Mil. R. Evid. 412 and 513 proceedings, such as balancing the probative value of the evidence and the right to expose a witness' motivation in testifying versus the danger of harassment, prejudice, confusion of the issues, repetitiveness, or marginal relevance.

As explained by this Court in CCR, the question is not whether Petitioner's right to be heard through counsel "directly involved a finding or sentence that was--or potentially could be--imposed by a court-martial proceeding," L.R.M. v. Kastenberg, Misc. Dkt. No. 2013-05, slip op. at 7 (A.F. Ct. Crim. App. 2 April 2013) (unpub. op.); the question is whether the "harm alleged by [the Petitioner] . . . [has] the potential to directly affect the findings and sentence." CCR, slip op. at 9 (citing Hasan, *supra*). By fettering Petitioner's limited right to be heard, the jurisdictional threshold was exceeded and this Honorable Court should reverse AFCCA's decision and find that the lower Court erred by holding that jurisdiction did not exist to review the merits of Petitioner's request for extraordinary relief.

2. Because AFCCA determined that jurisdiction did not exist, it did not err by failing to conduct a standing analysis.

Similar to CCR, this case presented two threshold issues. First, did AFCCA have jurisdiction to hear Petitioner's extraordinary writ petition? Second, did Petitioner, as a

nonparty to the court-martial, have standing to assert a right to be heard through counsel in proceedings under Mil. R. Evid. 412 and 513? Subject matter jurisdiction concerns the "classes of cases . . . falling within a court's adjudicatory authority." Bowles v. Russell, 551 U.S. 205, 212-13 (2007). Standing concerns a person's right to complain of an injury and seek relief. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). The former focuses on the power of the court-martial; the latter focuses on the position of the complainant. Both involve separate inquiries.

In subsection d. of Issue I, Petitioner alleges that "AFCCA failed to conduct any standing analysis" as a result of conflating subject matter jurisdiction and standing. (Pet. Br. at 17.) Because jurisdiction and standing are separate threshold issues, AFCCA was not required to analyze Petitioner's standing. Once it concluded that jurisdiction did not exist, it had no duty to continue its analysis. To the extent that the last two paragraphs of AFCCA's decision can be read to conflate the concepts of jurisdiction and standing, this was error.

II.

THIS HONORABLE COURT LACKS JURISDICTION UNDER ARTICLE 67(a)(2)&(c), UCMJ, TO DECIDE THE SUBSTANTIVE ISSUES IN THIS CASE. EVEN IF THIS COURT IS AUTHORIZED TO EXERCISE JURISDICTION OVER THE SUBSTANTIVE ISSUES, AS A PRUDENTIAL MATTER, THIS COURT SHOULD

REMAND THE CASE TO AFCCA TO DECIDE THE SUBSTANTIVE ISSUES.

Standard of Review

Jurisdiction is a legal question which this Court reviews de novo. United States v. Ali, 71 M.J. 256, 261 (C.A.A.F. 2012).

Law and Argument

Congress has constrained this Court's authority by statute. CCR, slip op. at 6. Article 67(a)(2), UCMJ, provides that "[this Court] shall review the record in--all *cases reviewed by a Court of Criminal Appeals* which the Judge Advocate General orders sent to [this Court] for review . . . ." (Emphasis added). Article 67(c), UCMJ, provides in part, "[this Court] may act only with respect to the findings and sentence as approved by the convening authority and *as affirmed or set aside as incorrect in law by the Court of Criminal Appeals*." (Emphasis added.) Reading Article 67, UCMJ, as an integrated whole,[2] this Court's review cannot extend beyond the jurisdictional question and the remaining substantive issues must be remanded back to AFCCA for a decision on the matters of law raised by Petitioner; namely, Petitioner's standing, her

[2] Since the beginning of jurisprudence under the UCMJ, this Court has read the statutes governing jurisdiction as an integrated whole, with the purpose of carrying out the intent of Congress in enacting them. United States v. Lopez de Victoria, 66 M.J. 67, 69 (C.A.A.F. 2008).

right to be heard through counsel, and whether the writ should issue.[3]

Even though The Judge Advocate General has ordered this case to be reviewed by this Court, the "case" was not "reviewed" by AFCCA as required by Article 67(a)(2), UCMJ, because the lower Court did not transcend the jurisdictional threshold. Furthermore, AFCCA did not render a final decision determining whether the military judge's ruling on the substantive issues was correct or incorrect in law as required by Article 67(c), UCMJ. Nothing in Article 67, UCMJ, authorizes this Court to act with respect to matters of law when the lower court has not acted with respect to the same matters of law.[4]

Petitioner whistles past this second jurisdictional question. If this Court were to render a decision on the

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[3] Unlike when reviewing matters under Article 62(b), UCMJ, where the lower court may act only with respect to matters of law, *see* United States v. Baker, 70 M.J. 283, 287-88 (C.A.A.F. 2011), AFCCA is authorized to exercise factfinding power and rule on matters of law when reviewing Petitioner's request for extraordinary relief. Unlike AFCCA, this Honorable Court is not a fact-finding body. United States v. Gray, 40 M.J. 25 (C.A.A.F. 1994) (citing Article 67(c), UCMJ)).

[4] The Air Force Appellate Government Division is mindful that this Court may, in its discretion, entertain original petitions for extraordinary relief when filed by a petitioner. *See* CAAF's Rules of Practice and Procedure, Rule 4(b)(1); *see also* McPhail v. United States, 1 M.J. 457, 462 (C.M.A. 1976) (finding that this Court's authority to issue an appropriate writ in aid of its jurisdiction is not limited to the appellate jurisdiction defined in Article 67, UCMJ). Rule 4(b)(1) emphasizes that such writs rarely will be granted. Id. Although this Court is authorized to consider original petitions for extraordinary relief, this case presents a unique twist on this Court's statutory authority because this case was certified under Article 67(a)(2), UCMJ, and is not being reviewed as an original writ. Even if Petitioner would have filed a writ-appeal petition with this Court, vice TJAG certification, as a prudential matter, this Court would be limited to reviewing the decision of the Court of Criminal Appeals, i.e., the jurisdictional question, and would not review the substantive issues, which remained unresolved by the lower Court.

substantive issues in this case, its action would be analogous to granting interlocutory review of a decision of a Court of Criminal Appeals resulting from an Article 62 appeal and rendering a decision on the substantive issues even though the lower court's decision only addressed the government's failure to satisfy the jurisdictional requirements of Article 62 and R.C.M. 908, without deciding the substantive issues of the interlocutory appeal. Under this hypothetical, this Court would not have jurisdiction to analyze the merits of the Article 62 appeal via TJAG certification because the merits of the "case" had not been reviewed by the Court of Criminal Appeals. Under that circumstance, this Honorable Court would be compelled to remand the case to the lower court to comply with its statutory jurisdiction.[5] This case requires the same result.

Even if this Court finds that it has jurisdiction to review the substantive issues based on its authority under the All Writs Act, as a prudential matter, it should remand the case to the lower Court to decide the substantive issues.

III.

EVEN IF THIS COURT IS AUTHORIZED TO REVIEW THE SUBSTANTIVE ISSUES, PETITIONER'S RIGHT TO BE HEARD THROUGH COUNSEL IS DERIVED FROM THE MILITARY RULES OF EVIDENCE; NOT THE CONSTITUTION OR THE CVRA, 18 U.S.C. § 3771.

[5] *See also* United States v. Humphries, 69 M.J. 491 (C.A.A.F. 2011) (remanding the certified case to AFCCA because the lower Court had not acted on the findings; therefore, review of the case was not complete as required by Article 67(c), UCMJ).

Standard of Review

The interpretation of a statute or regulation is a question of law reviewed by this Court de novo. United States v. Faulk, 50 M.J. 385, 390 (C.A.A.F. 1999).

1. Mil. R. Evid. 412 and 513 provide Petitioner standing and the opportunity to be heard through counsel during these limited evidentiary hearings.

The President has provided victims in military courts-martial a limited right to be heard under Mil. R. Evid. 412 and 513; a right which reasonably includes the right to be heard through counsel to present facts and legal argument.

In Carlson and Ryan-Jones v. Smith, 43 M.J. 401 (C.A.A.F. 1995), this Court previously provided extraordinary relief to two sexual assault victims who had sought to protect their rights under Mil. R. Evid. 412, Article 31, UCMJ, generalized "invasions of privacy," and other privileges recognized by law. Although a detailed description of the circumstances of this case are not outlined in the summary disposition, this Court ordered that the victims "will be given an opportunity, with the assistance of counsel if they so desire, to present evidence, arguments and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents." Id. The Petitioner's request in this case is no different. Under the authority in 10 U.S.C. §§ 1044 and 1565(b), Congress has authorized victims of sexual assault to be

provided legal representation as part of the Department of Defense Legal Assistance Program. The Judge Advocate General of the Air Force has created the Special Victims' Counsel Program to provide legal representation to victims of sexual assault consistent with Congress' intent. Petitioner requested legal counsel under this Program and expressed a desire to be heard through her detailed counsel during limited evidentiary hearings as permitted by the Military Rules of Evidence. She should not be denied this right.

In a similar context, military law recognizes a nonparty's right 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 (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 with the subpoena should not be required. These cases also demonstrate the nonparty's right to seek a writ of mandamus with military appellate courts to resolve such question of law. 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 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).[6] The foregoing provisions

[6] *See also* R.C.M. 905(h): "upon request, either party is entitled to an Article 39(a) session to present oral argument or have an evidentiary hearing concerning the disposition of written motions;" United States v. Savard, 69 M.J. 211 (C.A.A.F. 2010) (although harmless under Article 59(a), UCMJ, and

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 victims have a right to be heard through counsel.

Therefore, the Air Force Appellate Government Division agrees that, if this Court reviews the substantive issues in this case, Petitioner has demonstrated the extraordinary circumstance where the writ should issue for this limited purpose. The Air Force Appellate Government Division only interprets Mil. R. Evid. 412 and 513 as conferring a regulatory right for a victim to be heard through counsel during these limited evidentiary hearings. 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. If the President or others involved in the administration of military justice desire to implement such rights in courts-

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the facts of the case, it was error for the military judge to fail to hold a requested hearing on a motion.)

martial, the appropriate route is through amendments to the MCM or, if necessary, legislative changes.

2. Petitioner's right to privacy regarding her past sexual behavior and right to protect privileged communications to her mental health provider are not grounded in the Constitution.

Petitioner's rights under Mil. R. Evid. 412 and 513 are derived directly from the Military Rules of Evidence, not the Constitution. In fact, the congressional history of the CVRA serves as the best evidence to demonstrate 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 was well received by 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,[7] 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

[7] *See, e.g.,* 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).

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 appropriately yield to countervailing concerns. Likewise, the constitutional right of an 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 overriding interest in accessing constitutionally required evidence. *See* Gaddis, *supra*; Harding, *supra*. Mil. R. Evid. 412 and 513 strike an appropriate balance between shielding victims from the unnecessary exposure of their sexual history and the disclosure of privileged communications, and providing a fair mechanism for the accused to prepare and present a complete defense. Petitioner's position goes too far in this regard.

3. The CVRA, 18 U.S.C. § 3771, does not apply 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 provisions. 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).

This 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 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 Air Force Appellate Government Division acknowledges that many of the rights contained in the CVRA have been adopted by the Department of Defense in DoDD 1030.1, Victim and Witness Assistance, and DoDI 1030.2, Victim and Witness Assistance Procedures; however, the plain language of the CVRA envisions application and enforcement of its provisions in the federal

civilian criminal justice system. *See* 18 U.S.C. § 3771(b)(2) (describing the application of victims' rights in the context of federal habeas proceedings); 18 U.S.C. § 3771(c)(1) (establishing an aspirational policy that all departments and agencies of the United States provide the same victims' rights listed in subsection (a) of the statute without mandating these departments follow the same procedural framework); 18 U.S.C. § 3771 (d)(3) (establishing the procedural process for seeking a writ of mandamus in the federal court system if a victim has been denied rights listed in the statute); 18 U.S.C. § 3771(d)(4) (authorizing the government to assert as error the federal district court's denial of a victim's rights on appeal); 18 U.S.C. § 3771(b)(6) (noting that nothing in the statute shall be construed to impair the prosecutorial discretion of the Attorney General); and 18 U.S.C. § 3771(f) (mandating the implantation of procedures by the Attorney General to promote compliance with the statute).

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, and a close reading of the statute demonstrates that its enforcement mechanisms and procedures to promote compliance are unworkable in the military context without further guidance from Congress or the President.

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. Furthermore, 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.[8] 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 this Court's holding in Spann to specifically adopt provisions of the Victim Rights and Restitution Act of 1990 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 court-martial practice despite having over eight years to adopt a workable framework.[9]

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[8] *Compare* Mil. R. Evid. 412, MCM 1995, and Mil. R. Evid. 513, adopted on 6 October 1999,[8] *with* 18 U.S.C. 3771, effective 30 October 2004, Pub.L. 108-405, Title I, § 101.

[9] DoDI 1030.2, para. 4.2, and DoDD 1030.1, para. 4.3, expressly state, "[t]his [Instruction/Directive] is not intended to, and does not, create any entitlement, cause of action, or defense in favor of any person arising out of the failure to accord to a victim or a witness the assistance outlined in this [Instruction/Directive]." Even though the DoD has adopted many of the rights provided by the CVRA, the DoD has expressly renounced that the

Accordingly, we are compelled to find that Petitioner's right to be heard through counsel is not derived from the CVRA without further action from the President or Congress. However, we are mindful of Congress' overwhelming support for the CVRA and the important rights it has created for crime victims, and, thus, we recommend that the Joint Service Committee on Military Justice strongly consider amending the MCM to incorporate appropriate rights into the UCMJ or the RCMs given the undeniable need to place victims' rights in the military on equal footing with the rights afforded to victims in the civilian justice system.

CONCLUSION

WHEREFORE, the Air Force Appellate Government Division respectfully requests that this Honorable Court reverse AFCCA's jurisdiction decision and remand this case for further review of the substantive issues raised by Petitioner's request for extraordinary relief. If this Court decides the substantive issues, Petitioner has demonstrated that the writ should issue for the limited purpose of providing her a right to be heard through counsel under Mil. R. Evid. 412 and 513.

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implementation of these rights creates an enforceable legal cause of action. This is in direct conflict with the CVRA and Petitioner's argument.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and counsel for Petitioner, Respondent, and the Real Party in Interest on 8 May 2013.

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COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

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