IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Appellant*	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, *Appellee*	)	USCA Dkt. No. 13-5006/AF Crim. App. Misc Dkt. No. 2013-05
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party In Interest*	)	Dated: 20 May 2013

REPLY BRIEF ON BEHALF OF APPELLANT AIRMAN FIRST CLASS LRM

CHRISTOPHER J. GOEWERT, Major, USAF
Appellate Special Victims' Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No: 33619

MATTHEW D. TALCOTT, Major, USAF
Appellate Special Victims' Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No: 33364

R. DAVIS YOUNTS, Major, USAF
Appellate Special Victims' Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No: 32742

KENNETH M. THEURER, Colonel, USAF
Chief, Appellate Special Victims' Counsel
Air Force Legal Operations Agency
United States Air Force
Court Bar No: 30255

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

Argument

A. Subject-matter jurisdiction is not dependent on the identity of the individual seeking relief.

Both Appellee and the Real Party in Interest misread *Center for Constitution Rights et al. v. United States and Colonel Denise Lind, Military Judge (CCR),* 72 M.J 126 (C.A.A.F. 2013), for the proposition that subject-matter jurisdiction depends on the identity of the individual seeking relief. (*See* Real Party Br. at 10 ("This Court based its ruling in *CCR* on a lack of jurisdiction to grant the relief requested by a non-party").) This argument ignores the distinction between subject-matter jurisdiction and standing. This Court, after oral argument in

CCR specified three issues for the parties to brief: "(1) whether this Court and the CCA have subject-matter jurisdiction over Appellants' request for extraordinary relief; (2) whether Appellants, as non-parties, have standing to file a request for extraordinary relief in this Court or the CCA; and (3) assuming jurisdiction, which officials are lawfully authorized to direct release of the records and to what extent Appellants must first demonstrate that they requested release from an appropriate release official." *Id.* at 127. This Court then proceeded to decide CCR on jurisdictional grounds – whether the ruling of the military judge "had the potential to directly affect the findings or sentence." *Id*. at 129. This Court did not hold, or even address, whether a non-party participant has standing to file a request for extraordinary relief.

Both the Appellee and Real Party in Interest appear confused by the portion of the *CCR* opinion that attempts to distinguish *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997). In dicta, this Court noted that in *Powell* the accused "joined the media as a party in seeking a writ of mandamus to vindicate his constitutional right to a public trial — something which had immediate relevance to the potential findings and sentence of his court-martial." *CCR,* 72 M.J. at 129-30. This Court did not elaborate on why the accused's joining of the same issue would

make a difference.[1] Regardless, in the present case, how the military judge conducts a hearing to admit evidence under Military Rule of Evidence (MRE) 412 or MRE 513 necessarily must have the potential to affect the findings and sentence. If it does not have that potential, one must question whether the victim was given a reasonable "opportunity to be heard" at the very hearing designed to protect her privacy interests as a victim and patient.

Even if non-party status is germane to the analysis of subject-matter jurisdiction in *CCR* – it is only because it was indicative of how tangential and unrelated the media's claim was to the findings and sentence in Private Manning's court-martial. *CCR,* 72 M.J. at 129. *CCR*, like *Clinton v. Goldsmith,* stands only for the proposition that under the All Writs Act this Court is limited to issuing writs "in aid of" its existing jurisdiction under Article 67. *CCR,* 72 MJ at 128-29 (discussing *Clinton v. Goldsmith,* 526 U.S. 529 (1999)). The validity of this argument is borne out by the fact that the petitioner in *Goldsmith* was in fact a party, the accused, to the underlying court-martial. *See* 526 U.S. at 531-32. Both cases dictate that subject-matter jurisdiction limits the availability of extraordinary relief

[1] The accused's Sixth Amendment right to an open trial ensures a fair trial and therefore directly affects the findings and sentence, whereas the First Amendment right to an open trial enjoyed by the media is more generalized and cannot potentially affect the findings or sentence. *See Richmond Newspapers, inc. v. Virginia,* 448 U.S. 555, 580 (1980)(discussing both First and Sixth Amendment rights to an open trial).

under circumstances that have no potential to affect the findings or sentence. Neither case stands for the proposition that an individual who demonstrates subject-matter jurisdiction is precluded from seeking extraordinary relief by virtue of their party status.

Implicit in the *CCR* majority opinion, and explicit in the dissent, is that a non-party may have *standing* to seek relief when that individual's rights are threatened. *CCR,* 72 M.J. at 130 (dissent)("It is well settled that the media have standing to complain if access to courts has been denied or unconstitutionally restricted. *Press–Enterprise Co. v. Superior Court,* 478 U.S. 1, 7 (1986); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 603 (1982); *ABC, Inc. v. Powell,* 47 M.J. 363, 365 (C.A.A.F.1997); *see also Washington Post v. Robinson,* 935 F.2d 282, 288–290 (D.C.Cir.1991)")(internal quotations omitted)). Standing in military courts, just as in Article III courts, depends upon three factors "an injury in fact, causation, and redressability." *See United States v. Wuterich,* 67 M.J. 63, 69 (C.A.A.F. 2008)(quoting *Sprint Communc'ns Co. v. APCC Servs., Inc.,* 554 U.S. 269, 128 (2008)). Nothing about *CCR*, or *Goldsmith,* limits a non-party's ability to seek relief provided that they demonstrate standing and subject-matter jurisdiction. Airman LRM has demonstrated standing and seeks review of a military judge's decision that goes to the very core

of subject-matter jurisdiction – the procedure for determining the admissibility of evidence.

Appellee, in a lengthy footnote, states that A1C LRM has previously argued to the military judge and Air Force Court of Criminal Appeals that granting standing could not possibly affect the findings or sentence. (App. Br. at fn. 18.) This is simply a misconstruction of A1C LRM's argument that the accused could not be impermissibly harmed by granting her an opportunity to be heard. Any harm to judicial economy from a military judge taking additional time to listen to argument or read a motion "is surely outweighed by the benefit of being more accurately briefed on the issues by the best qualified advocate." (J.A. at 202.) No participant, party or non-party, is harmed in a legal sense when a military judge is fully briefed by well-prepared advocates prior to making a decision that impacts their individual rights. Advocates arguing the positions of those whose rights are being impacted provide a judge with the tools to make an informed, well-reasoned ruling. It is the military judge's evidentiary ruling that will directly affect the findings or sentence. The military justice system presumes that it is the advocacy of attorneys that allows military judges to arrive at correct findings of fact and conclusions of law – especially in the context of the admissibility of evidence that will form the very basis of any finding or sentence.

B. Airman LRM's request for standing and the right to be heard through counsel at any hearing under MRE 412 or MRE 513 is ripe.

The Real Party in Interest claims that this Court should defer exercising jurisdiction in this case because the issue is not yet ripe.[2] (Real Party Br. at 17.) During the trial level Article 39(a) session, A1C LRM's counsel requested standing to make argument in any MRE 412 or 513 hearing. The request was treated by the military judge as a "motion in fact." (J.A. at 150.) Airman LRM's attorney did indicate that he did not yet know if he would need to argue. (J.A. at 196.) This caveat is not surprising; he could not know in advance what the arguments of the parties or evidence might show. This is especially so given the failure of the parties or the court to provide Airman LRM with any documents, discovery, or court filings with respect to any hearings under MRE 513. (J.A. at 196.) Further, A1C LRM asked the military judge to reconsider his first ruling which denied her standing and asked very specifically for the following relief:

[2] In his initial judicial ruling, the military judge concedes that the issue is ripe and even opines that the appellate courts have jurisdiction by inviting A1C LRM to seek a writ of mandamus if she believes that her rights have been violated. "Mandamus is a permissible writ in military law. Should A1C LRM seek relief through mandamus, this court will honor her right to do so." (citations omitted)(J.A. at 10-22.)

1. Order the Government and the Defense to produce and provide to A1C LRM through her counsel all documents, discovery materials, court filings and motions related to any proceedings, objections or rulings related to M.R.E. 412.
2. Order the Government and the Defense to produce and provide to A1C LRM through her counsel all documents, discovery materials, court filings and motions related to any proceedings, objections or rulings related to M.R.E. 513.
3. Grant A1C LRM limited standing to be heard through counsel of her choosing in hearings related to M.R.E. 412, M.R.E. 513, CVRA, and the United States Constitution."

(J.A. at 203(victim's name redacted).) The military judge reconsidered his ruling and held that the "the SVC motion for reconsideration is denied in full." (J.A. at 218.) The ruling of the military judge is both crystal clear and final, A1C LRM will not be permitted standing to present her views through counsel consistent with her "right to be heard" in any hearing in the upcoming trial of the accused. The issue is ripe.

C. The "opportunity to be heard" does not equate to the possibility of testifying.

Both Appellee and the Real Party in Interest pay no heed to the decisions of Congress and the President to provide victims and patients a "reasonable opportunity to be heard." Mil. R.

Evid. 412; Mil. R. Evid. 513. Although the Supreme Court, this Court, and the federal district courts have all uniformly interpreted that phrase in a myriad of decisions to allow a participant to make legal arguments through counsel, both Appellee and the Real Party in Interest urge a new definition. [3] (App. Br. at 11; Real Party Br. at 14-15.) The notion that a victim and patient may not vindicate her interests through her own attorney or even by making her own legal arguments is deeply troubling. The even worse suggestion advocated in the Appellee brief, is that the victim must hope for the possibility that the Government may call the victim as a witness and/or may advocate her position.[4] (App. Br. at 11.) Congress' and the President's decision – that a victim and patient have legally cognizable privacy interests and must be permitted a reasonable opportunity to be heard to defend those rights – is a decision that must be given extreme deference. *See United States v. Vazquez*, 72 M.J.

[3] *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006); *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995); *See, e.g.,* R.C.M. 806(d); R.C.M. 917(c); R.C.M. 920(c); R.C.M. 920(f); R.C.M. 1005(c); R.C.M. 1102(b)(2); MIL. R. EVID. 201(e); *In re Dean*, 527 F.3d 391 (5th Cir. 2008); *Brandt v. Gooding,* 636 F.3d 124, 136 (4th Cir. 2011).

[4] Appellee argues that the victim has been offered an opportunity to be heard because she can be "personally heard through trial counsel." (App. Br. at 11). This is a curious position because as a member of the prosecution team the trial counsel is specifically not the victim's attorney and may even be ethically forbidden from advocating the interests of the victim. Air Force Standards of Criminal Justice, Standard 3-1.1; Standard 3-1.2. Congress and the President did not give victims and patients the "opportunity to be heard" only to have trial judges strip that right and reinterpret their plain language to limit victims and patients to the possibility of advocacy by someone ethically bound not to represent their interests.

13 (C.A.A.F. 2013)(citing *Weiss v. United States*, 510 U.S. 163 (1994)).

Without case law or citation both Appellee and Real Party in Interest claim that "reasonable opportunity to be heard" should be given a new, novel, and severely restricted interpretation by this Court. They urge that for victims and patients the "opportunity to be heard" is limited to permission to testify. (J.A. at 216-17.) To support this novel definition of a well-known legal term of art, both rely on sweeping and unsupported generalizations about the history of military law and criminal justice. This "alleged" history is at odds with this Court's precedent.[5] This Court has previously ordered that

[5] Appellee claims that it will be "a significant departure from courts-martial jurisprudence or, for that matter, American criminal law jurisprudence, to permit a third party to advance a legal interest against an accused or defendant at trial." (App. Br. at 12). *c.f. United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006)(victim's doctor permitted to advance legal argument against accused); *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995)(victims and patients permitted through counsel to advance legal argument against accused); *United States v. Klemick,* 65 M.J. 576 (N.M. Ct. Crim. App. 2006)(patient represented by counsel in MRE 513 hearing); *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981)(rape victim permitted to advance legal argument against accused) (Appellant's Brief at 30)(summarizing federal cases where non-party participants were permitted to advance legal arguments against the accused or defendant).

Appellee goes on to claim that the right to the advocacy of counsel is a "right which has never been recognized in military courts." (Appellee Brief at 19). C.f. *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995)(permitted advocacy of counsel to advance legal argument); *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008)(permitted advocacy of legal counsel); *ABC, Inc. v. Powell,* 47 M.J. 363 (C.A.A.F. 1997)(permitted advocacy of legal counsel); *Center for Constitutional Rights v. Lind,* 72 M.J 126 (C.A.A.F. 2013)(permitted advocacy of legal counsel); *San Antonio Express-News v. Morrow,* 44 M.J. 706 (A.F. Ct. Crim. App. 1996)(permitted advocacy of legal counsel).

Finally, Appellee claims that the "right of a non-party to have counsel appear on her behalf in another's court-martial" has not been "heard of." (App. Br. at 21-22). C.f. *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006)(non-party's counsel appeared at trial); *Carlson and Ryan-Jones v.*

victims and patients "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." *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995).[6] Far from being "previously unknown — A1C LRM's request is only that this Court order the military judge to comply with existing precedent.

Although Appellee and Real Party in Interest claim A1C LRM's request to use her attorney is novel, the only novelty is the military judge's holding. Indeed, in the last 200 years it has been unheard of and would be a significant departure from American jurisprudence for a trial judge to deprive a trial participant who can articulate standing the advocacy of their

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Smith, 43 M.J. 401, 402 (C.A.A.F. 1995)(non-party's counsel appeared at trial); *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008)(non party's counsel appeared at trial); *ABC, Inc. v. Powell,* 47 M.J. 363 (C.A.A.F. 1997)(non party's counsel appeared at trial); *Center for Constitutional Rights v. Lind,* 72 M.J 126 (C.A.A.F. 2013)(non-party's counsel appeared at trial); *San Antonio Express-News v. Morrow,* 44 M.J. 706 (A.F. Ct. Crim. App. 1996)(non party's counsel appeared at trial).

The Real Party in Interest makes similar sweeping historical claims such as "previously unknown right," "200 years without counsel for complaining witnesses permitted to argue," and "complaining witnesses . . . have never had the due process right to be heard through counsel." (Real Party Br. at 17-19). This version of history is confusing given the Real Party in Interest's own citation to *Carlson,* 43 M.J. at 403, in which this court ordered "victims and patients '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.'" (Real Party Br. at 11).

[6] To the extent *Clinton v. Goldsmith*, 526 U.S. 529 (1999) limited *Carlson's*, precedential value on the issue of jurisdiction, it could not and did not affect the precedential value of *Carlson's* recognition of a victim's rights to privacy and advocacy of counsel. *Carlson,* 43 M.J. at 402. *Goldsmith*, 526 U.S. at 529, said nothing about victim's rights or the advocacy of counsel.

counsel.[7] Our research found no similar ruling by any judge in any jurisdiction. Quite to the contrary, this Court and others have repeatedly (and without known exception) permitted witnesses and limited participants the advocacy of their counsel.

D. Allowing A1C LRM the right to be heard does not affect the impartiality of the military judge in fact or appearance.

The Appellee urges this Court to find that allowing A1C LRM the right to be heard would transform the military judge into an advocate "for the prosecution, a victim, an accused, or a policy." (App. Br. at 15-16.) Airman LRM is not asking the military judge to advocate her position, merely to apply a correct rule of law. Appellee cites to a number of cases that stand for the proposition that a military judge must remain impartial. (App. Br. at 15 (citing *United States v. Martinez,* 70 M.J. 154, 157 (C.A.A.F, 2011); *United States v. Butcher,* 56 M.J. 87, 90 (C.A.A.F. 2010); *United States v. Conley,* 4 M.J. 327 (C.M.A. 1978)).) However, the requirement for judicial impartiality applies to the interests of all individuals directly affected by the rulings of a judge. After all, as the Supreme Court has stated "justice, though due to the accused, is

[7] *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *see also* (Appellant's Brief at 27-39)(discussing numerous examples in military courts and federal courts where standing permits advocacy by counsel).

due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament." *Snyder v. Massachusetts,* 291 U.S. 97, 122 (1934). Airman LRM shares the Appellee's concern that the military judge remains impartial to the prosecution, the accused, and the victim alike.

Appellee lacks a plausible argument concerning how allowing an attorney to advocate for the individual rights of a victim in a closed hearing, outside the presence of members, in any way affects the impartiality of a military judge. Military judges can, must, and do hear from attorneys arguing varying positions. Based on those arguments, military judges make rulings. Those rulings "almost never constitute a valid basis for a [judicial] bias or partiality motion." *Liteky v. United States,* 510 U.S. 540, 554 (1994). There is simply no legal basis for the argument that hearing from the victim of a crime, through an attorney, prior to depriving her of her right to privacy in an MRE 412 or MRE 513 hearing, renders a military judge impartial in fact or appearance. On the other hand, denying A1C LRM a reasonable "opportunity to be heard" certainly may create the perception that the military judge does not consider her right to privacy important – and thereby deter victim and patient participation in the very hearings designed to promote participation.

E. No prudential concerns are furthered by remanding issues II and III to the Air Force Court of Criminal Appeals.

This Court should resolve certified issues II and III for three reasons. First, the Air Force Court did address all three certified issues. Second, this Court necessarily must address certified issues II and III in order to resolve the certified application for extraordinary relief. Finally, any prudential concerns in this case are outweighed by the need for speedy resolution of these issues.

The Air Force Court has already erroneously addressed all three certified issues.[8] The Air Force Court purported to not address what it called the "substantive issues." (J.A. at 5.) However, as a result of the AFCCA's failure to distinguish standing and subject-matter jurisdiction the Court reached all three certified issues.

First, the AFCCA appears to believe that it is the constitutional nature of an allegation by a non-party that gives rise to jurisdiction. (*See* J.A. at 8.) Airman LRM has a constitutional due process right to be heard through counsel under MRE 412 and MRE 513 and she has a constitutional right to

[8] As noted by the Appellee, the factual issues have already been "salted" and all of the legal issues are "within the purview of this Court pursuant to Article 67(c), UCMJ." (App. Br. at 18-19, fn 19). There is "no requirement" the review be sought by a lower service court "'as a prerequisite to this Court's consideration of a matter.' *Gray v. Mahoney*, 39 M.J. 299, 303 (C.M.A. 1994)."*Id*.

privacy. Despite these arguments the AFCCA held that the military judge's "ruling did not implicate constitutionally based rights." (J.A. at 8.) They have in fact ruled that A1C LRM has no constitutionally based right to due process or privacy. This holding was in error.

After addressing the Military Rules of Evidence and the right to privacy, the Air Force Court addressed the CVRA.[9] A1C LRM has a right to "privacy" and "dignity" provided by the CVRA. The Air Force Court rejected this argument and held that the CVRA had no application in military courts: "the CVRA's provision that states it applies to 'any court proceeding'" does not include military courts. (J.A. at 8.) This holding was in error.

Finally, the Air Force Court analyzed A1C LRM's standing at trial. The Air Force Court's discussion of non-party versus party participation at trial is standing analysis not subject-matter jurisdiction analysis. (J.A. 8-9.) In this standing analysis, the Court held that finding jurisdiction "would, in effect, be granting a non-party to the court-martial judicially

[9] The Appellee, the Air Force Court of Criminal Appeals, and the Real Party suggest the CVRA, even if applicable to trial by court-martial, does not grant the victim a right to be heard in the circumstances suggested by A1C LRM. (*See* J.A. at 8, 217; Real Party Br. at 21-22.) The CVRA specifically states that the victim has a right to dignity and privacy. 18 U.S.C. § 3771(a)(7). The CVRA further directs that "the court shall ensure that the victim is afforded the rights described in subsection (a). 18 U.S.C. § 3771(b). It is the constitutional test for standing; "an injury in fact, causation, and redressability" which provide A1C LRM a "right to be heard." *See United States v. Wuterich,* 67 M.J. 63, 69 (C.A.A.F. 2008).

recognized rights equal to those of party participants." (J.A. at 8.) Courts lack jurisdiction "to entertain every challenge brought by interested entities." *Id.* As a limited participant who was injured, with causation, and redressabiliy, A1C LRM is not merely an "interested entity." Yet, the Air Force Court erroneously held that she was. (J.A. at 9.) This determination was in error; it can and should be reviewed.

The Air Force Court's holdings that A1C LRM does not have constitutional due process rights under the Military Rules of Evidence, that she does not have a constitutional right to privacy, that the CVRA does not apply in military courts, and that A1C LRM lacked standing were each made in error; those holdings can and should be reviewed.

If this Court concludes that the Air Force Court did not address the "substantive issues," there are prudential concerns in doing so now.[10] This Court has the discretion and authority to do so, and should in this case. CAAF's Rules of Practice and Procedure, Rule 4(b)(1). First, the case is scheduled to commence on 22 July 2013. (Appellant's Br. at 3.) This trial date is the result of several delays--arraignment occurred on 29 January 2013. (Appellant's Br. at 2.) All parties, to include

[10] To the extent this Court would ordinarily avoid issues out of deference for the Air Force or the Air Force justice system those concerns seem to be nullified by the fact that the Air Force's Judge Advocate General has explicitly requested resolution of all three issues.

the Accused, have an interest in the speedy resolution of these issues.[11] The virtue of a speedy resolution has previously been sufficient to overcome prudential concerns. ABC, Inc. v. Powell, 47 M.J. 363,364 (C.A.A.F. 1997).

CONCLUSION

WHEREFORE, Appellant respectfully requests that this Honorable Court find for the Appellant on the three certified issues and issue a writ of mandamus ordering the military judge to provide an opportunity for A1C LRM to be heard through counsel at hearings conducted pursuant to MRE 412 and MRE 513, and to receive any motions or accompanying papers reasonably related to her rights as those may be implicated in hearings under MRE 412 and MRE 513.

KENNETH M. THEURER, Colonel, USAF
Chief, Appellate Special Victims' Counsel
Air Force Legal Operations Agency
United States Air Force
150 Chennault Cir, Bldg 694
Maxwell Air Force Base, Alabama 36112
(334)-953-2802
CAAF Bar No: 30255

[11] Both Appellee and the Real Party in Interest have indicated a desire for the speedy resolution of this extraordinary writ. (App. Br. at 18; Real Party Br. at 17.)

CHRISTOPHER J. GOEWERT, Major, USAF
Appellate Special Victims' Counsel
Air Force Legal Operations Agency
United States Air Force
150 Chennault Cir, Bldg 694
Maxwell Air Force Base, Alabama 36112
(334)-953-2802
CAAF Bar No: 33619

MATTHEW D. TALCOTT, Major, USAF
Appellate Special Victims' Counsel
Air Force Legal Operations Agency
United States Air Force
150 Chennault Cir, Bldg 694
Maxwell Air Force Base, Alabama 36112
(334)-953-2802
CAAF Bar No: 33364

R. DAVIS YOUNTS, Major, USAF
Appellate Special Victims' Counsel
Air Force Legal Operations Agency
United States Air Force
150 Chennault Cir, Bldg 694
Maxwell Air Force Base, Alabama 36112
(334)-953-2802
CAAF Bar No: 32742

CERTIFICATION OF FILING

I certify that a copy of the foregoing was delivered to the Court, Judge Kastenberg, Appellee's Counsel, Government Trial and Appellate Division, the Appellate Defense Division, counsel for amicus National Crime Victim Law Institute, and counsel for amicus Protect Our Defenders on May 20, 2013.

KENNETH M. THEURER, Colonel, USAF
Chief, Appellate Special Victims' Counsel
Air Force Legal Operations Agency
(334)-953-2802
CAAF Bar No: 30255

CERTIFICATION OF COMPLIANCE WITH RULE 24(D)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains 4282 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief was prepared using Microsoft Word Version 2007 with Courier New 12-point font, a monospaced font.

KENNETH M. THEURER, Colonel, USAF
Chief, Appellate Special Victims' Counsel
Air Force Legal Operations Agency
United States Air Force
(334) 953-2802
CAAF Bar No: 30255