IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Appellant*	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, Military Judge, *Appellee*	)	Crim. App. No. 2013-05 USCA Dkt. No. 13-5006/AF
and	)	
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party in Interest*	)	

BRIEF ON BEHALF OF APPELLEE

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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

This Honorable Court has jurisdiction to review the decision of the Air Force Court of Criminal Appeals under Article 67(a)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(2). This Honorable Court also has authority to grant relief under the All Writs Act, 28 U.S.C. § 1651.

STATEMENT OF THE CASE

Appellant's statement of the case is accepted with the following exceptions. A1C LRM's Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Petition for Stay of Proceedings was filed with the Air Force Court of Criminal Appeals on 14 February 2013. (J.A. at 4.) Exception is also taken with the characterization that the military judge's ruling was "erroneous."

STATEMENT OF FACTS

Appellant's statement of facts is accepted with the following exceptions. Capt Seth Dilworth, 27 SOW/JA, Cannon AFB, New Mexico, was detailed to be A1C LRM's Special Victims' Counsel on 22 January 2013. (J.A. at 21.) Additionally, to the extent that Appellant's statement of facts implies that A1C LRM's allegation or appointment of a Special Victims' Counsel transforms her into a "victim" as opposed to an "alleged victim" or "complaining witness", Appellee would disagree given the

preliminary stage of the court-martial and A1C Daniels' fundamental right of innocence until the Government proves his guilt by legal and competent evidence beyond a reasonable doubt.

Summary of Argument[1]

Fourteen days prior to this Honorable Court's opinion in Center for Constitutional Rights v. United States, 72 M.J. 126 (C.A.A.F. 2013), the Air Force Court of Criminal Appeals correctly determined it did not have jurisdiction to consider the Appellant's extraordinary writ. Assuming, *arguendo*, that the Air Force Court of Criminal Appeals was in error regarding its jurisdictional limits, in the absence of clear statutory language or case law, the military judge correctly ruled no right existed for A1C LRM to be heard through a third party. Finally, the drastic instrument of a writ of mandamus is unwarranted in this case where there has been no judicial usurpation of power and no characteristic of an erroneous practice which is likely to recur.

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[1] Appellee notes this Honorable Court's docketing notice in the case *sub judice* directed that "the Judge Advocate General of the Air Force shall appoint counsel for Appellee" and that the Appellee "shall file" an answer on or before May 13, 2013. In accordance with that direction, Appellee hereby complies with that order by filing this brief. Compare Center for Constitution Rights v. United States, 72 M.J. 126 (C.A.A.F. 2013) (Government filed brief on behalf of military judge); Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2013) (Government filed brief on behalf of military judge).

ARGUMENT

I.

THIS HONORABLE COURT LACKS JURISDICTION TO GRANT APPELLANT'S REQUESTED RELIEF.

Standard of Review

Jurisdiction is a question of law that is reviewed de novo. United States v. Daly, 69 M.J. 485, 486 (C.A.A.F. 2010) (citing United States v. Davis, 63 MJ 171, 173 (C.A.A.F. 2006)).

Analysis

Appellant argues the Air Force Court of Criminal Appeals "abdicated its supervisory responsibility under Article 66 and the All Writs Act" by declining jurisdiction. (Appellant's Brief at 9.) Appellant further argues that the alleged victim, A1C LRM, is not "a stranger to the court." (Id.) Whether one characterizes A1C LRM as a "stranger", "alleged victim"[2], or simply a "witness", the fact remains that she is not a "party" to A1C Daniels' court-martial.[3] Moreover, A1C Daniels has not

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[2] Pursuant to Military Rule of Evidence 412, the most appropriate term appears to be "alleged victim."

[3] Rule for Courts-Martial (RCM) 103(16) defines "party" as follows:

(A) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial in question; and

(B) Any trial or assistant trial counsel representing the United States, and agents of the trial counsel when acting on behalf of the trial counsel with respect to the court-martial in question.

joined in the litigation to vindicate his rights; rather, at the trial level and on appeal he has opposed Appellant's attempts to intervene into his court-martial.

Federal courts, as courts of limited jurisdiction, "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)(citations omitted). There is a presumption "that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting the jurisdiction." Id. "On every writ of error or appeal, the first and fundamental question is that of jurisdiction." Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 453 (1900).

A court's power to issue any form of relief under the All Writs Act "is contingent on that court's subject matter jurisdiction over the case and controversy." United States v. Denedo, 556 U.S. 904, 911 (2009). As Clinton v. Goldsmith helped clarify, the All Writs Act is not a jurisdiction granting statute. 526 U.S. 529, 534 (1999). Nor does the All Writs Act grant authority to military appellate courts "to oversee all matters arguably related to military justice." Id. at 536.

As correctly noted in the lower court's order, the jurisdictional boundary of the Air Force Court of Criminal Appeals is set out in four separate Articles of the UCMJ. (J.A.

at 6-7.) First, under Article 62, UCMJ, 10 U.S.C. § 862, the court is authorized review of certain kinds of interlocutory Government appeals. (Id. at 6.) Second, under Article 66, UCMJ, 10 U.S.C. § 866, the court can act with respect to the findings and sentence as approved by the convening authority in cases which the sentence, as approved, includes death, a punitive discharge, or confinement for at least one year. (Id. at 6-7.) Third, under Article 69, UCMJ, 10 U.S.C. § 869, the court is authorized to review under Article 66 cases in which The Judge Advocate General has taken certain actions. (Id. at 7.) Finally, under Article 73, UCMJ, 10 U.S.C. § 873, the court is authorized to consider petitions for new trials based upon newly discovered evidence or fraud on the court. (Id.)

The jurisdictional limit of this Honorable Court is found in Article 67, UCMJ. In this regard, this Honorable Court "may act only with respect to 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. Article 67(c), UCMJ, 10 U.S.C. § 867(c). The All Writs Act "does not increase the areas of this Court's jurisdiction beyond the limitations set out in [Article 67], UCMJ." Center for Constitutional Rights v. United States, 72 M.J. 126, ___, slip op. at 7.

While the Air Force Court of Criminal Appeals did not have the benefit of this Honorable Court's decision in Center for Constitutional Rights v. United States, the legal correctness of the Air Force Court's order is all the more sound when considered in light of that decision issued fourteen days later. In Center for Constitutional Rights v. United States this Honorable Court held the appellants, journalists seeking access to documents in an on-going court-martial, failed to meet their burden of establishing that this Court or the Army Court of Criminal Appeals had jurisdiction to grant appellants relief in the form of writs of mandamus and prohibition. Id. at 2, 10.

This Court found it vital to distinguish Center for Constitutional Rights v. United States from other cases interpreting this Court's jurisdictional limits. Id. at 7-8. Of note, in each of the cases discussed the accused played a leading role in the proceeding. First, this Court noted the case was unlike United States v. Lopez de Victoria, 66 M.J. 67 (C.A.A.F. 2008), where, in a case involving a Government appeal of a military judge's decision to find the accused's convictions for indecent acts and liberties were barred by the statute of limitations, this Court held it had statutory authority to exercise jurisdiction over decisions of the courts of criminal appeals rendered pursuant to Article 62, UCMJ, 10 U.S.C. § 862. Center for Constitutional Rights v. United States, 72 M.J. 126,

___, slip op. at 7-8. Next, this Court distinguished Denedo v. United States, 66 M.J. 114 (C.A.A.F. 2008), aff'd., 556 U.S. 904 (2009), wherein an accused sought collateral review of his court-martial for alleged ineffective assistance of counsel and issuance of a writ of error coram nobis. Center for Constitutional Rights v. United States, 72 M.J. 126, ___, slip op. at 8. Thereafter, this Court distinguished Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012), wherein the harm raised by the accused regarding the bias of the military judge had the potential to directly affect the findings and sentence. Center for Constitutional Rights v. United States, 72 M.J. 126, ___, slip op. at 8. Finally, this Court distinguished ABC, Inc. v. Powell, 47 M.J. 363 (C.A.A.F. 1997), where an accused joined in the proceedings brought by various news agencies "in order to vindicate ***his*** right to a public trial." Center for Constitutional Rights v. United States, 72 M.J. 126, ___, slip op. at 8 (double emphasis added).

In the case *sub judice*, as the Appellant concedes, "A1C LRM is not a party to the court-martial." (Appellant's Brief at 13.)[4] Moreover, the Accused has not joined Appellant's petition to vindicate his rights. Instead, at the trial level and on appeal he has opposed Appellant's attempts to intervene into his

[4] See also Rule for Courts-Martial 103 (16) (definition of "party").

court-martial. A court-martial where he alone faces two specifications in violation of Article 120, UCMJ, that, if convicted as charged, carries the potential punishments of a reprimand, reduction in grade, monetary penalties, restraint, and/or a punitive discharge.[5]

Appellant incorrectly overgeneralizes that this Court "recently held that jurisdiction is appropriate when the harm alleged by the petitioner has 'the **potential** to directly affect the findings or sentence.'" (Appellant's Brief at 13.) Appellant simply conflates the petitioner in Hasan v. Gross, the accused, with themselves in this case, a non-party witness.[6] Appellant goes on to cite Carlson and Ryan-Jones v. Smith, 43 M.J. 401 (C.A.A.F. 1995)(summary disposition), for the notion that this Court has exercised its supervisory jurisdiction to benefit "limited trial participants." (Appellant's Brief at

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[5] These authorized punishments are, of course, distinctly separate and apart from the potential lifelong collateral consequences of a federal conviction and sex offender registration requirements.

[6] Appellant's reliance on Hasan v. Gross is ironic. In that case this Court determined a military judge's actions could lead an objective observer to conclude that he was not impartial to the accused. Certainly if the military judge in the case *sub judice* had permitted a counsel for the complaining witness to provide both factual evidence and legal arguments against the accused, his impartiality would similarly be in question. Moreover, any such potential to directly affect the findings or sentence in this case is directly at the expense of the accused.

15.) Yet Carlson and Ryan-Jones v. Smith[7] predates Goldsmith by over three and a half years. Importantly in Goldsmith, the Supreme Court took this Court very much to task on its expansive overreaching in the jurisdictional area.[8] Appellant encourages this Court to make the same error it did in Goldsmith.

II.

IN THE ABSENCE OF CLEAR STATUTORY LANGUAGE OR CASE LAW, THE MILITARY JUDGE CORRECTLY RULED NO RIGHT EXISTED FOR A1C LRM TO BE HEARD THROUGH A THIRD PARTY.[9]

Standard of Review

Construction of a military rule of evidence, as well as the interpretation of statutes, the UCMJ, and Rules for Courts-

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[7] In addition, the amicus curiae brief of the Air Force's Appellate Government Division, filed without a motion for leave to file under Rule 26(a) of this Court's Rules of Practice and Procedure, relies on this case to support its position that the President has provided victims in military courts-martial a limited right to be heard under Military Rules of Evidence 412 and 513 and that such a right reasonably includes a right to be heard through counsel to present facts and legal argument. (Amicus Curiae Brief of Air Force Appellate Government Division at 21.) Such argument fails given Goldsmith.

[8] Should this Court find it has jurisdiction, as a court established under Article III of the Constitution prohibited from issuing advisory opinions, it must also find the issue ripe for consideration. See United States v. Chisholm, 59 M.J. 151, 153 (C.A.A.F. 2003)(holding in the absence of a challenge by a party to a concrete ruling by a military judge in an adversarial setting it would be premature to decide an issue certified by The Judge Advocate General of the Army)

[9] The military judge's rulings speak for themselves. (J.A. at 177-187, 215-218.) As this Court must consider the record before it, to include the military judge's rulings as contained therein, argument on Issue II is offered to emphasize the more pertinent points made by the military judge.

Martial, are questions of law reviewed de novo. United States v. Matthews, 68 M.J. 29, 35 (C.A.A.F. 2008); Lopez de Victoria, 66 M.J. at 73.

Analysis

The military judge never denied A1C LRM "the right to be heard at any hearing under the applicable Military Rules of Evidence." (J.A. at 217.) He specifically ruled that she had the right to be personally heard in pretrial hearings conducted pursuant to Military Rules of Evidence 412 and 513. (J.A. at 216.) He noted that she had the right to be personally heard in such hearing through trial counsel. (Id.) Similarly he acknowledged if A1C LRM was determined incompetent for reasons of minority of age or invalidity, that she would have the right to be heard through a guardian, representative, or conservator. (Id.) In sum, he simply ruled that, in the absence of clear statutory language or case law, A1C LRM's first-person singular right to be heard did not include the right to be heard at an evidentiary hearing through some other third party.

Non-constitutional privileges are to be narrowly construed. See United States v. Curtis, 65 M.J. 366, 369 (C.A.A.F. 2005)(citing Trammel v. United States, 445 U.S. 40, 50-51 (1980)); In re Grand Jury Subpoena, 662 F.3d 65 (1st Cir. 2011); United States v. Banks, 556 F.3d 967 (9th Cir. 2009). Neither Military Rules of Evidence 412 nor 513 provide that the "right

to be heard" includes the right to be heard through third parties, or by legal counsel. As noted by the military judge, "[i]t would 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." (J.A. at 180.)[10]

The Appellant's reliance on the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, as authority for her to be heard through counsel is unfounded. (Appellant's Brief at 32-44.) While no military court of appeal has considered the application of the CVRA to courts-martial[11], the CVRA "does not explicitly provide a victim the right to be represented by counsel at any pretrial hearing." (J.A. at 180, 217.) Even assuming the CVRA applies beyond the district courts, it provides the victim the

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[10] Appellant's attempt to read Military Rules of Evidence 412(c)(2) and 513(e)(2) as proof Congress and the President intended counsel for a patient or alleged victim to be permitted to present evidence and legal arguments through counsel is misguided. (Appellant's Brief at 23-25.) With both rules, a party, either the Government or the accused, may offer relevant evidence by calling witnesses, to include the patient or alleged victim. Affording the patient or alleged victim a reasonable opportunity to attend and be heard, simply acknowledges that neither party may choose to call the patient or alleged victim. In such an instance, the patient or alleged victim is simply authorized by the applicable rules to present "relevant evidence" of their own choosing without the necessity that a party be the proponent.

[11] Additionally, only in Walsh v. Hagee, ___ F.Supp.2d ___, 2012 WL 5285133 (D. D.C. 2012), has a United States District Court even inferred that the CVRA applies to the military. (J.A. at 180.)

"right to be reasonably heard at any public proceeding…involving release, plea, sentencing, or any parole proceeding." (Id.) Appellant selectively cites portions of the CVRA to this Court when it states the rights afforded crime victims apply in "any court proceeding involving an offense against a crime victim." (Appellant's Brief at 36.) The full sentence found in section (b)(1) of the CVRA is "In any court proceeding involving an offense against a crime victim, *the court shall ensure that the crime victim is afforded the rights described in subsection (a).*" 18 U.S.C. § 3771(b)(1)(emphasis added). The applicable right to this issue is that found in subsection (a)(4), which was cited by the military judge and concerns a crime victim's right "to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." (J.A. at 180, 217.) Plainly a pretrial motion hearing does not fall within the public proceedings in which the CVRA contemplates a crime victim's right to be reasonably heard, whether in person or through counsel.

While the military judge noted A1C LRM possessed privacy rights, he further noted "when necessary to ensure a fair trial, those rights must give way to the accused's right to a trial which complies with the rights enumerated" in United States v. Romano, 46 M.J. 269, 274 (C.A.A.F. 1997), which include "the Constitution, followed by the Uniform Code of Military Justice,

the Manual for Courts-Martial, departmental regulations, service regulations, and the common law." (J.A. at 178, 217.)[12] The Accused's right to a fair trial is enumerated in the Sixth Amendment[13] which reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(J.A. at 178.)[14]

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[12] This Court has held that the "'alleged victim's privacy' interests cannot preclude the admission of evidence 'the exclusion of which would violate the constitutional rights of the accused." United States v. Gaddis, 70 M.J. 248, 250 (C.A.A.F. 2011).

[13] Of note, Appellant cites to the Sixth Amendment only twice in her brief. (Appellant's Brief at 21, 45.) Neither time Appellant cites to the Sixth Amendment, does she do so to discuss how the rights she seeks do not infringe on the Accused's constitutionally protected right to a fair trial.

[14] Several federal courts have expressed concern that rape shield laws may result in a denial of due process under the Sixth Amendment. See, e.g., Barbe v. McBride, 521 F.3d 443, 458 (4th Cir. 2008); White v. Coplan, 399 F.3d 18, 24 (1st Cir. 2005). Although not directly addressed by the military judge, if A1C LRM were to prevail on the jurisdictional issue before this Court, then this Court should consider that the ability for a complaining witness to shield information from the Court through an attorney not subject to the full array of discovery rules or rules of professional responsibility, under the aegis "right to be heard" in either Military Rule of Evidence 412 or 513, could constitute a denial of the full right to confrontation.

Similarly, as in the cases of United States v. Martinez, 70 M.J. 154, 157 (C.A.A.F. 2011) and United States v. Butcher, 56 M.J. 87, 90 (C.A.A.F. 2001), the military judge identified his concerns about the right to an impartial military judge, both in appearance and actuality. (J.A. at 179.)[15] As generally expressed in United States v. Conley, 4 M.J. 327 (C.M.A. 1978), judges cannot exist as advocates "for the prosecution, a victim,

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[15] The military judge's discussion of the necessity of impartiality on the part of a military judge echoes the following:

> A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions. Its judges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.
>
> The dependence of society upon an unswerved judiciary is such a commonplace in the history of freedom that the means by which it is maintained are too frequently taken for granted without heed to the conditions which alone make it possible. The role of courts of justice in our society has been the theme of statesmen and historians and constitution makers. It is perhaps best expressed in the Massachusetts Declaration of Rights: 'It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.'

Bridges v. State of California, 314 U.S. 252, 283 (1941)(Frankfurter, J., dissenting).

an accused, or a policy." (J.A. at 179.)[16] Moreover, the potential for an accused to face prosecutor(s) and counsel for an alleged victim representing similar interests is "sufficiently antithetical to courts-martial jurisprudence" which, if permitted, would "cause a significant erosion in the right to an impartial judge in appearance or a fair trial." (J.A. at 186, 217-18.)[17]

The military judge recognized the important goal of ensuring and protecting the rights and dignity of victims of sexual assault, especially those perpetrated by uniformed service-members and Departmental personnel. (J.A. at 186.) The

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[16] Appellee notes the irony of filing an advocacy brief, as directed, before this Honorable Court. However, this brief is not advocating on behalf of "the prosecution, a victim, an accused, or a policy", rather it advocates for the correctness of the trial level ruling and the order subsequently issued by the military judge's immediate superior court.

[17] Such a potential "stacking of the deck" against an accused, is all the more troubling when the Special Victims' Counsel Rules of Practice and Procedure and the Air Force Special Victims' Counsel Charter create no apparent duty for Special Victims' Counsel to provide exculpatory evidence to the Government or an accused's counsel and exempts them from the most basic and fundamental duties of doing justice. (J.A. at 49-79.) Moreover, at least in appearance alone, there are fundamental fairness questions raised by the number of counsel representing each party and A1C LRM. A1C LRM has received the benefit of one counsel at trial and four counsel on appeal. (J.A. at 17-21; Appellant's Brief at 53-54.) The Government has enjoyed the benefit of two counsel at trial and three counsel on appeal. (J.A. at 90-91; Amicus Curiae Brief of Air Force Appellate Government Division at 33.) Meanwhile, against the backdrop of those ten counsel presumptively aligned against him, the Accused has had the assistance of two counsel at trial and two counsel currently on appeal. (J.A. at Cover Page, 93.)

Air Force Court likewise acknowledged the important objectives of the Special Victims' Counsel Program. (J.A. at 9.) Regardless of how unpopular a decision it might be for a military judge to find no standing for a Special Victims' Counsel at a court-martial, especially given the near daily bad press, increased Congressional oversight on sexual assaults within the military, and the Department of Defense's leaders' focus on sexual assault prevention and response, the aforementioned goals and objectives remain "subject to the legal limits on third-party standing." (J.A. at 186.)[18]

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[18] The difficulty a military judge faces in attempting to balance the competing interests of this novel issue is evident from this court-martial when it was unclear where the Special Victims' Counsel should sit. (J.A. at 131.) Additionally, the Government's positions are reminiscent of Justice Jackson's comment of parties changing positions "as nimbly as if dancing a quadrille." Orloff v. Willoughby, 345 U.S. 83, 87 (1953). For example, the Government asserted to the military judge at trial that it held no objection to A1C LRM and her Special Victims' Counsel being heard during hearings on Military Rules of Evidence 412, 513, and 514 "if such hearing is limited to factual matters bearing on the admissibility of evidence and a statement of [A1C LRM]'s wishes, so long as it does not encompass an opportunity to present legal argument on admissibility of evidence." (J.A. at 212.) Now on appeal, the Government asserts to this Court that A1C LRM's right to be heard under Military Rules of Evidence 412 and 513 "reasonably included the right to be heard through counsel to present facts *and legal argument*." (Amicus Curiae Brief of Air Force Appellate Government Division at 21 (emphasis added).) Similarly, Appellant essentially argued before the military judge and the Air Force Court of Criminal Appeals, that there was no possibility of affecting the findings and sentence and the only harm, if any, from the participation of the Special Victims' Counsel was the possibility of the judge spending more time on evidentiary issues. (J.A. at 202-03; Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, LRM v. Kastenberg, Misc. Dkt. No. 2013-05 (A.F. Ct. Crim. App. 2013).) Now Appellant argues the Special Victims' Counsel should be given "the opportunity to influence the admissibility of evidence that would have a direct bearing 'on any finding and sentence that may

III.

THE DRASTIC INSTRUMENT OF A WRIT OF MANDAMUS IS UNWARRANTED IN THIS CASE WHERE THERE HAS BEEN NO JUDICIAL USURPATION OF POWER AND NO CHARACTERISTIC OF AN ERRONEOUS PRACTICE WHICH IS LIKELY TO RECUR.

Standard of Review

"The writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations." United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983); see also Denedo, 556 U.S. at 917 (quoting Nken v. Holder, 556 U.S. 418, 437 (2009)). Appellant "must establish a clear and indisputable right to the requested relief." Denedo, 66 M.J. at 126 (citing Cheney v. United States District Court, 542 U.S. 367, 381 (2004)).

Analysis

While there should be no need for this Court to reach Issue III, or Issue II for that matter, should it do so, the drastic instrument of a writ of mandamus is unwarranted.[19] Appellant

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eventually be adjudged.'" (Appellant's Brief at 9.) Although this Court may find that the Appellant is not bound to arguments raised below, there is an incongruity to their two positions. Moreover, in no law does a witness (victim or otherwise) possess a right to influence the outcome of a trial.

[19] The Government states this Honorable Court's "review cannot extend beyond the jurisdictional question and the remaining substantive issues must be remanded back to [the Air Force Court of Criminal Appeals] for a decision on the matters of law raised by [Appellant]." (Amicus Curiae Brief of Air Force Appellate Government Division at 10-11.) Any facts necessary to the resolution of the substantive issues have been sufficiently salted down in the Air Force Court's order.

encourages this Court to use the Army Court of Criminal Appeals framework for issuance of a writ of mandamus announced in Dew v. United States, 48 M.J. 639, 648-49 (A. Ct. Crim. App. 1998). (Appellant's Brief at 49-51.) Even if this Court were to conduct its analysis using a framework incorporating Bauman[20] factors, Appellant's request must fail.

First, A1C LRM is not a party, so whether or not she has any other adequate means to attain the relief desired is not material. Second, A1C LRM's claim that denial of her "right" to be heard through counsel results in her damage and prejudice in a way not correctable on appeal invents an injury from a fictional "right", a "right" which has never been recognized in military courts. Third, for all of the reasons stated in Issue

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(J.A. at 1-9.) Only matters of law remain, which are certainly within the purview of this Court pursuant to Article 67(c), UCMJ. The Government's challenge to this Court proceeding is easily dismissed as "no requirement that a petition for extraordinary relief be filed in a Court of Military Review as a prerequisite to this Court's consideration of a matter." Gray v. Mahoney, 39 M.J. 299, 303 (C.M.A. 1994); see also McPhail v. United States, 1 M.J. 457 (C.M.A. 1976)(the Court granted relief in a case finally reviewed by the Judge Advocate General of the Air Force under Article 69, UCMJ). Rule 4(c) of this Court's Rules of Practice and Procedure provides that the rules "shall not be construed to extend or to limit the jurisdiction" of this Court. Should this Court reach the remaining substantive issues, deciding them now, as a purely discretionary matter, would be consistent with this Court's "considerable responsibility for maintaining the independence, integrity, and fairness of the military justice system." United States Navy Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328, 330 (C.M.A. 1988).

[20] Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977); See also In Re American Medical Systems, Inc., 75 F.3d 1069, 1078 (6th Cir. 1996).

II, the military judge's decision is not clearly erroneous as a matter of law. Fourth, there is no evidence in the record which suggests the military judge's ruling is an oft-repeated error. A trial level court's decision cannot create binding precedent on another trial level court. United States v. Pereira, 13 M.J. 632, 635 (A.F.C.M.R. 1982)(stating military judges are only bound by decisions of the applicable service Court of Criminal Appeals, this Court, and the United States Supreme Court). Lastly, the military judge's ruling does address new and important problems created by the Special Victims' Counsel pilot program[21] instituted by the Air Force and there is no precedent in military law addressing these issues. However, this factor resoundingly weighs against Appellant. If this Court were to issue the writ as requested it would not solve the problems the Special Victims' Counsel program has created in A1C Daniels' court-martial, problems the military judge's ruling has already resolved to ensure a fair trial for the Accused both in

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[21] A pilot program championed by The Judge Advocate General of the Air Force who exercised his unique Article 67(a)(2) power to certify this case to this Honorable Court. See Special Victims' Counsel Rules of Practice and Procedure and Air Force Special Victims' Counsel Charter (J.A. at 49-71, 73-79.) A program at least in intent, while perhaps not in practice, designed to "enhance the military justice system while neither causing unreasonable delays nor infringing upon the rights of an accused." Special Victims' Counsel Rules of Practice and Procedure (J.A. at 51.); see also Brief for Air Force Trial Defense Division as Amicus Curiae, LRM v. Kastenberg, Misc. Dkt. No. 2013-05 (A.F. Ct. Crim. App. 2013).

appearance and actuality. Rather, issuance of such a writ would revive fundamental fairness issues in A1C Daniels' court-martial and generate them in untold court-martials *ad infinitum*.

In order for issuance of a writ of mandamus on the military judge's discretionary decision, this Court's case law requires that decision to "amount to more than even 'gross error'; it must amount 'to a judicial usurpation of power,' or be 'characteristic of an erroneous practice which is likely to recur.'" Labella, 15 M.J. at 229 (citations omitted). The military judge's correct ruling that, in the absence of clear statutory language or case law, no right existed for A1C LRM to be heard through a third party can hardly be considered "gross error." Nor can one consider his decision a judicial usurpation of power especially given the Manual for Courts-Martial's emphasis on "the importance of an impartial judiciary, advising military judges that when carrying out their duties in a court-martial, they 'must avoid undue interference with the parties' presentations or the appearance of partiality.'" United States v. Quintanilla, 56 M.J. 37, 43 (C.A.A.F. 2001)(citing Rule for Courts-Martial 801(a)(3)(discussion)). As in this case, "[t]he military judge must exert his authority with care, so as not to give even the appearance of bias for or against either party." Id. Similarly, in a case where Appellant seeks recognition of an unheard of right for a non-party to have counsel appear on

her behalf in another's court-martial, there can be no "erroneous practice which is likely to recur", unless the writ of mandamus to grant that "right" is actually issued.

CONCLUSION

WHEREFORE, Appellee requests this Honorable Court hold, like the Air Force Court of Criminal Appeals correctly found, that it lacks jurisdiction to hear Appellant's petition for a writ of mandamus. If this Court determines the Air Force Court of Criminal Appeals erred regarding its jurisdictional limits, Appellee requests this Court uphold the military judge's ruling that A1C LRM held no right to be heard through a third party.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, Mr. Dwight Sullivan and Capt Christopher James (Counsel for Real Party in Interest), and Colonel Kenneth Theurer, Major Christopher Goewert, Major Matthew Talcott, and Major R. Davis Younts (Counsel for Appellant), on 13 May 2013.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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

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/s/
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Dated: 13 May 2013