IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Petitioner*	)	BRIEF ON BEHALF OF A1C LRM
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, *Respondent*	)	USCA Dkt. No. _____/AF Crim. App. Misc Dkt. 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

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

STATEMENT OF THE CASE

On 16 October 2012, Airman First Class (A1C) Nicholas Daniels was charged with raping and sexually assaulting A1C LRM in violation of Article 120, UCMJ, 10 U.S.C. § 920. Arraignment in the case of *U.S. v. Daniels* was held on 29 January 2013. (J.A. at 89-96). At the hearing, the military judge held that Airman LRM's attorney would not be permitted to make any arguments before him nor would he be permitted to speak on behalf of A1C LRM in hearings pursuant to Military Rule of Evidence (MRE) 412 and MRE 513. (*See* J.A. at 177). The military judge reconsidered his decision, but he denied all relief requested on 9 February 2013. (*See* J.A. at 215).

On 12 February 2013, A1C LRM filed a petition for extraordinary relief in the form of a writ of mandamus and a stay. She sought relief from the military judge's erroneous determination regarding the procedures mandated in MRE 412 and 513. On 2 April 2013, AFCCA issued an order

denying A1C LRM's request for a writ of mandamus and vacating the stay. (J.A. at 1). The order held that AFCCA lacked jurisdiction to review the Air Force trial court's decisions regarding interpretation of the procedural rules of MRE 412 and 513.

On 10 April 2013, the petitioner filed a motion for reconsideration en banc. As a result of the stay being lifted, the trial is now set to proceed on 22 July 2013. On 18 April 2013, AFCCA denied petitioner's motion for reconsideration en banc and her request for a stay of the proceedings. (J.A. at 11).

STATEMENT OF FACTS

Airman LRM, 627 LRS, McChord AFB, Washington, reported to authorities that on 13 August 2012, A1C Nicholas Daniels, 49 CES, Holloman AFB, New Mexico, penetrated her vagina and anus with his finger and penis despite her repeated statements to him to stop, that he was hurting her, and that she was done having sex. This allegation led to two specifications of a violation of UCMJ Article 120 being preferred against him on 16 October 2012 and then being referred to trial by General Court-Martial on 28 November 2012. (J.A. at 13-14).

On 23 January 2013, Capt Seth Dilworth, 27 SOW/JA, Cannon AFB, New Mexico, was detailed to be A1C LRM's Special Victims' Counsel. Captain Dilworth provided notice of representation to the trial court via email. (J.A. at 189). The military judge, Lt Col Kastenberg, requested that Capt Dilworth provide formal notice of his appearance along with any information supporting his detailing. (J.A. at 15). Captain Dilworth provided formal notice on 24 January 2013, including his request for standing to receive documents related to his representation and to represent A1C LRM in pretrial motions under the Military Rules of Evidence. (J.A. at 17). Captain Dilworth's request for standing was opposed in part by the trial counsel and completely by defense counsel. (J.A. at 81, 85).

Arraignment in the case of *U.S. v. Daniels* was held on 29 January 2013. Prior to the arraignment, defense counsel submitted a motion under MRE 412 and 513 seeking to admit evidence involving A1C LRM. (*See* J.A. at 81). After arraignment, the military judge took up the issue of Capt Dilworth's representation of A1C LRM. (J.A. at 101). During oral argument, Capt Dilworth initially indicated that he did not need to be heard on any pretrial motions under MRE 412 but eventually indicated to the court that his role would be to protect her privacy interests and asked the trial court to allow

him to reserve the right to represent her under MRE 412 should the need arise. (J.A. at 103, 149). The military judge treated his motion to reserve the right to be heard later under MRE 412 as "a motion in fact," that is, as a motion to represent A1C LRM at any MRE 412 hearing by making arguments on her behalf. (J.A. at 62). The trial judge held that Capt Dilworth would not be permitted to make any arguments before him nor would he be permitted to speak on behalf of A1C LRM in hearings pursuant to MRE 412 and 513. (J.A. at 177). Airman LRM's attorney subsequently filed a motion to reconsider in which he clarified his position and demanded A1C LRM be permitted to be heard through counsel and to be provided documents and court filings related to MRE 412 and 513. (J.A. at 195). The military judge reconsidered the motion, but denied all relief requested on 9 February 2013. (J.A. at 215).

SUMMARY OF ARGUMENT

The military judge deprived A1C LRM of the opportunity to be heard through her counsel during evidentiary hearings in violation of the Military Rules of Evidence. During the course of the proceedings, this discrete issue has been obfuscated. Four distinct distracters have served to divert attention from the primary issue.

First, A1C LRM is not seeking to expand the jurisdiction of military appellate courts through misapplication of the All Writs Act. Her complaint is not a collateral civil issue; the review of a military judge's application of the rules of evidence is core to an appellate court's jurisdiction. In this case, the trial judge misapplied MRE 412 and 513 in violation of existing law – the military judge arbitrarily prevented A1C LRM's lawyer from advocating on her behalf. A right to be heard has the potential to affect the admission of evidence that directly impacts the findings and sentence of a court-martial proceeding.

Second, A1C LRM is not requesting this Court allow her to control the prosecution or to take action intended to harm the accused. She seeks to assert her rights in evidentiary proceedings outside the presence of court members. She is not a "stranger to the court," she asserts her rights in a process specifically designed to promote victim and patient participation on issues that primarily affect their right to privacy – hearings under MRE 412 and 513.

Third, A1C LRM is not claiming she has a right to counsel – she is simply stating that the military judge should not deprive her of the full use of her own lawyer in hearings where she has a right to be heard. Any victim or witness that desires to be heard through counsel under MRE 412 and 513 who happens to procure civilian counsel would face the same legal predicament as A1C LRM.

Because A1C LRM has appointed military counsel, she should not be placed at a disadvantage as compared to numerous circumstances where military courts have allowed limited participants to be represented by civilian counsel in court-martial proceedings affecting their rights.

Fourth, A1C LRM is not seeking a referendum on the Air Force Special Victims' Counsel (SVC) Program. The SVC pilot program does not create jurisdiction, remove jurisdiction, provide standing, or remove standing. The rights of victims exist independent of the program; the rights existed before the SVC pilot program and will continue regardless of whether the program continues. Any consideration of the program either negative or positive in the analysis of this issue is simply not germane.

Setting these distractions aside, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 3 *William Blackstone, Commentaries* 23. Despite this bedrock principle of American jurisprudence, the military judge in *United States v. Daniels* denied A1C LRM, a victim of a crime in a military court-martial, the reasonable opportunity to be heard through counsel during proceedings specifically designed to protect her right to privacy. Further, AFCCA declined to remedy this error, claiming they lacked jurisdiction over a military judge's application of Military

Rules of Evidence in a court-martial proceeding. This Honorable Court should reverse the AFCCA's decision that they lack jurisdiction and issue the writ of mandamus that A1C LRM seeks.

STANDARD OF REVIEW

"Jurisdiction is a question of law that we review de novo." *United States v. Daly,* 69 M.J. 485, 486 (C.A.A.F. 2010). Construction of a military rule of evidence is a question of law reviewed de novo. *United States v. Matthews*, 68 M.J. 29, 35 (C.A.A.F. 2008.) Interpretation of statutes, the UCMJ, and Rules for Courts-Martial (hereinafter RCM) are questions of law reviewed de novo. *See United States v. Lopez Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008); *United States v. St. Blanc,* 70 M.J. 424, 427 (C.A.A.F. 2011).

ARGUMENT

ISSUE I: WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ERRED BY DENYING THEY HAD JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS[1]

Core to AFCCA's jurisdiction is the ability to act on findings and sentence. The findings and sentence rest upon only those facts that the military judge admits pursuant to the Military Rules of Evidence. To preclude error, the rules,

[1] This Honorable Court has jurisdiction to review the AFCCA decision pursuant to UCMJ, Article 67(a)(2). *See, U.S. v. Curtin,* 44 M.J. 439, 440 (C.A.A.F. 1996)(Art 67(a)(2) authorizes jurisdiction over the action by an intermediate appellate court in a petition for extraordinary relief).

including MRE 412 and 513, contain required procedures to enable a military judge to properly assess evidentiary issues. Failure to apply these required procedures invites error that directly affects findings and sentence. By declining jurisdiction in this case, the AFCCA has abdicated its supervisory responsibility under Article 66 and the All Writs Act.

The Air Force Court of Criminal Appeals erred when it determined that it lacked jurisdiction to grant A1C LRM the relief requested. Airman LRM sought review under the All Writs Act, 28 U.S.C. § 1651, of the military judge's ruling that she lacked standing to assert her right to be heard through counsel during evidentiary hearings. Contrary to this Court's reasoning in another case, A1C LRM is not "a stranger to the court." *Compare, Center for Constitutional Rights et al. v. United States and Colonel Denise Lind, Military Judge United States*, (*CCR*), __ M.J. __, No. 12-8027/AR, slip op. at 8 (C.A.A.F. Apr. 16, 2013). She is not asking for the adjudication of "what amounts to a civil action" and, if being granted a reasonable opportunity to be heard under the rules of evidence means anything – it means the opportunity to influence the admissibility of evidence that would have a direct bearing "on any finding and sentence that may eventually be adjudged." *Id.*

a. The Air Force Court of Criminal Appeal's jurisdiction to hear A1C LRM's petition under the All Writs Act flows directly from Article 66

The All Writs Act grants the power to "all courts established by act of Congress to issue all writs necessary and appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The United States Supreme Court has recognized that "military courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act". *United States v. Denedo*, 556 U.S. 904, 911 (2009); *see also CCR,* slip op. at 6. Extraordinary writs are used by appellate courts "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." *Banker's Life & Casualty v. Holland*, 346 U.S. 379, 382 (1953).

The All Writs Act does not expand this Court's existing jurisdiction. Instead, it requires two determinations: (1) whether the requested writ is "in aid of" the court's existing jurisdiction; and (2) whether the requested writ is "necessary or appropriate." *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008). In the context of military justice, "in aid of" includes cases where a petitioner seeks "to modify an action that was taken within the subject matter jurisdiction of the military justice system." *Id*. at 120.

The All Writs Act still requires subject matter jurisdiction, which flows directly from the appellate court's statutory jurisdiction. Article 66(c), UCMJ, 10 U.S.C. § 866(c)(2006)(statutory jurisdiction for service courts of criminal appeals); Article 67(c), UCMJ, 10 U.S.C. § 866(c)(2006)(statutory jurisdiction for Court of Appeals for the Armed Forces); *CCR,* slip op. at 9 ("any potential jurisdiction we may have in this case must turn on the extent of our own statutory jurisdiction"). However, the jurisdiction to act on findings and sentence includes the ability to act on interlocutory matters where no finding or sentence has been entered in the court-martial. As the United States Supreme Court determined in *Roche v. Evaporated Milk Association,* the authority "is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal, but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." 319 U.S. 21, 25 (1943).

In denying jurisdiction, AFCCA's reliance on *Clinton v. Goldsmith* was misplaced. 526 U.S. 529, 535 (1999). *Goldsmith* did not deal with a case, a court-martial, an Article 32, or even a rule of evidence. *Id.* *Goldsmith* involved an officer who was "dropped from the rolls" in an

administrative action subsequent to his court-martial. *See Goldsmith*, 526 U.S. at 531. In finding the military court lacked jurisdiction, the Supreme Court instructed military appellate courts on the scope of their authority when dealing with actors outside of the court-martial system. *Id.* However, the Supreme Court did not speak to supervisory jurisdiction - the jurisdiction of a superior court to confine an inferior court to act within the law. *Id*. The present case is an ongoing court-martial, and the issue before this Court is the application of rules of evidence in an actual Air Force courtroom.

While neither A1C LRM nor AFCCA had the benefit of this Court's decision in *Center for Constitutional Rights,* that case clarifies what subject matter jurisdiction entails. The petitioner in that case was a coalition of journalists seeking access to court documents in *United States v. Manning*. *CCR,* slip op. at fn 1. This Court reasoned that it lacked jurisdiction to hear the case because it "amount[ed] to a civil action, maintained by strangers to the courts-martial, asking for relief – expedited access to certain documents – that [had] no bearing on any finding and sentence that may eventually be adjudged by the court-martial." *Id.* at 8. In essence, the *CCR* petitioner was using the court-martial process to litigate what

amounts to a Freedom of Information Act request. Release or non-release of those records could not potentially affect the findings or sentence in Private Manning's court-martial.

In contrast, the present petition involves a required hearing under the Military Rules of Evidence — not a civil action – and how those hearings are to be conducted in accordance with the rules. While A1C LRM is not a party to the court-martial, she is certainly no stranger. As the named victim in a case brought under UCMJ Article 120, she is an essential, though limited, participant. Her presence and participation may even be compelled against her will. The rules of evidence through which she desires to be heard were created for her benefit. Finally, and most certainly, regardless of how the military judge rules on the admissibility of evidence admitted, that ruling has the potential to affect the finding and sentence.

b. The Air Force Court of Criminal Appeals erred when it limited its supervisory jurisdiction to issues directly involving "a finding or sentence"

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." *CCR,* slip op. at 8 (citing to *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012). In

denying jurisdiction to hear A1C LRM's petition, AFCCA concluded that the military judge's ruling **did not directly** involve a finding or sentence. The Air Force Court of Criminal Appeals' conclusion that the military judge's ruling "does not directly involve a finding or sentence that was or potentially could be imposed in a court proceeding" confuses this Court's jurisdiction analysis. (*See*, J.A. at 7). It is generally impossible to tell whether any particular decision of a military judge will directly impact the findings or sentence in a particular case. Applying AFCCA's logic, decisions regarding delays, experts, counsel qualifications, bias of judges and members, investigative support, and evidentiary rulings, (just to name a few) would rarely if ever be reviewable.

Airman LRM's meaningful opportunity to be heard on a rule of evidence potentially affects the finding or sentence. Evidence is only relevant and admissible if it has the potential to make a fact of consequence more or less probable – thereby potentially affecting the finding or sentence. MIL. R. EVID. 401. More specifically, 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. *See* MIL. R. EVID. 412(c)(3). Parties are permitted to call witnesses, including the victim. *See* MIL. R. EVID. 412(c)(2). The victim must be afforded the independent right to attend and the

"opportunity to be heard." *Id.* An opportunity to be heard would be rendered meaningless if it did not have at least the potential to influence the military judge's evidentiary ruling.

c. Appellate courts may exercise jurisdiction over petitions brought by limited participants

This Court has exercised its supervisory jurisdiction in assessing the application of procedural issues – even when the application of those rules was to benefit limited trial participants.[2] Specifically, in *Carlson and Ryan-Jones v. Smith*, this Court explicitly told trial courts how to handle rules of evidence when enforcing the rights of limited participants. 43 M.J. 401, 402 (C.A.A.F 1995)(summary disposition). *Carlson and Ryan-Jones v. Smith* involved the subpoena of Equal Employment Opportunity records. This Court granted a writ of mandamus and ordered the military judge to examine the records *in camera*, in order to scrub them of matters related to MRE 412 and other

[2] Victims, as limited participants in the criminal justice process, have been permitted access to federal appellate courts in petitions for extraordinary relief and interlocutory appeals. In *F. Doe v. United States*, the Fourth Circuit specifically permitted a victim to file an interlocutory appeal of a federal judge's ruling that the past sexual behavior and habits of that victim were admissible in a rape trial. 666 F.2d 43 (4th Cir. 1981). The court opined that Federal Rule of Evidence (F.R.E.) 412 "makes no reference to the right of a victim to appeal an adverse ruling. Nevertheless, this remedy is implicit as a necessary corollary of the rule's explicit protection of the privacy interests Congress sought to safeguard." 666 F.2d at 46. Victims have also been permitted the opportunity to seek a writ of mandamus in various appellate courts when trial courts have deprived them of specific rights under various crime victims' rights statutes. In fact, the Crime Victims' Rights Act, 18 U.S.C. § 3771 (2009) (CVRA) specifically contains a provision that a victim "may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3).

privileges. *Id*. The hearing was to be conducted in the manner prescribed under MRE 412. *Id*. To protect the victim-petitioners' interests in the release of the materials, the court noted that the victims will "be given an opportunity, ***with the assistance of counsel*** if they so desire, to present evidence, argument and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents." *Id* (emphasis added). Although the summary disposition lacks detail, in order to hear the writ, this Court would have necessarily concluded that it had jurisdiction over a writ brought by limited–participants seeking to vindicate their rights to privacy. This Court concluded that a writ was "in aid" of its jurisdiction, in order to prevent the court from otherwise disclosing materials that might have fallen under MRE 412 and other privileges.

In *Carlson and Ryan-Jones v. Smith*, this Court did precisely what we are asking today, namely, to instruct a lower court on the proper procedures to allow a limited-participant the ability to protect her right to privacy by hearing from her counsel on matters relating to the release of her private sexual history and mental health matters.

d. The Air Force Court of Criminal Appeals erred when it confused subject matter jurisdiction with standing

Subject matter jurisdiction is determined by the subject of the matter to be addressed. It is not determined by the identity of the participant raising the issue – it is standing that addresses an individual's ability to seek relief in court. If the AFCCA's rationale for finding lack of jurisdiction is, as suggested by its dicta, that the court lacks jurisdiction to hear a writ brought by a non-party because of their status as a non-party, such a rationale must fail. (*See* J.A. at 8.)

In the final paragraphs of its order, the AFCCA noted that to grant jurisdiction to hear A1C LRM's petition would be an invitation to "open-ended jurisdiction to entertain every challenge brought by interested parties regarding aspects of the court-martial." (J.A. at 9). Such a fear is misplaced, as only participants with standing could seek review of these issues. Historically and practically, standing is a demanding legal test that can only be met by those closest and most directly tied to a case.

As a result of conflating subject matter jurisdiction and standing, the AFCCA failed to conduct any standing analysis. *See United States v. Wuterich,* 67 M.J. 63, 69-70 (C.A.A.F. 2008)(applying the *Lujan* test in courts-martial). An individual has standing to assert rights in court if: 1) the litigant has

suffered an "injury in fact"; 2) there is a causal connection between the injury and the conduct complained of; and 3) the injury is redressable by a favorable decision of the court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *see also, Rakas v. Illinois,* 439 U.S. 128, 134–40 (1978)("[t]he issue of standing involves two inquiries: first, whether the proponent of a particular legal right has alleged "injury in fact," and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties.").

Had AFCCA conducted the proper standing analysis, that court would have determined that A1C LRM had standing under MRE 412 and 513 to be heard by the military judge, the denial constituted an injury, and the injury was redressable by both AFCCA and this Court. Airman LRM was thus situated no differently than members of the press or individuals battling the propriety of subpoenas. *See*, *e.g.*, *CCR,* No. 12-8027 (C.A.A.F. 2013)(assumes that CCR had trial level standing to make request); *United States v. Wuterich,* 67 M.J. 63 (C.A.A.F. 2008); *United States v. Johnson,* 53 M.J. 459, 461 (C.A.A.F. 2000); *ABC Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997); *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F 1995); *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996). Airman LRM's standing gave

her the right to bring an issue to AFCCA's attention via an extraordinary writ in a case that potentially could come to it through Article 66.

ISSUE 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

Military Rules of Evidence 412 and 513 require that A1C LRM be given the opportunity "to be heard" at a "hearing." MIL. R. EVID. 412(C)(2); MIL. R. EVID. 513(C)(2). The military judge deprived her of that right by redefining "to be heard" into merely "to testify" – thereby disallowing A1C LRM the ability to make legal arguments. He further nullified her right to be heard by depriving her of her counsel's services. Fundamental due process entitles one with a "right to be heard" to address a court with facts and legal argument and to do so through counsel, if represented. The Supreme Court has described that a "hearing" must include the opportunity to make argument through counsel, if represented. Further, the phrase "to be heard" has a consistent meaning when used in the UCMJ and in the Military Rules of Evidence. Last, the exact phrase "to be heard" has been interpreted to mean legal argument through victim's counsel in federal courts.

The military judge erred by ruling A1C LRM lacks standing to assert her rights. Even if there were no explicit language from Congress or the President guaranteeing A1C LRM a "hearing" and a "right to be heard," due process requires that an individual be given notice and an opportunity to be heard before the Government takes action injuring her rights.

Airman LRM's rights are established from three separate sources of authority. First, as a patient and victim, her right to the privacy of her mental health history and prior sexual history are established by MREs 412 and 513. Second, A1C LRM has a right to privacy and dignity that is created by the CVRA. Finally, A1C LRM has a right to informational privacy flowing from the Constitution. Each of these three separate authorities establishes standing for A1C LRM "to be heard" through counsel prior to the court's injury to her rights.

a. Airman LRM has a right "to be heard" at a hearing" provided by MRE 412 and 513

The military judge failed to comply with the requirements of MRE 412 and 513. The Military Rules of Evidence require the military judge to hold an evidentiary "hearing" at which A1C LRM has a right to be "heard." MIL. R. EVID. 412(c)(2); MIL. R. EVID. 513(c)(2). A "hearing" and a right "to be heard" require at a minimum the ability to argue one's position, and that argument can be through counsel, if represented.

1. The Supreme Court has established what a hearing must include, namely, the opportunity to make argument through counsel if provided

Over eighty years ago, the Supreme Court held that the denial of the requirement of a hearing was a denial of constitutional due process rights:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45, 69 (1932).[3]

The Supreme Court has further defined what a hearing, such as that described in MRE 412[4] and 513, requires:

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[3] While this bedrock maxim stressing representation by counsel as integral to the judicial process now seems obvious, it was not at the time. Indeed, at the time of *Powell*, the Sixth Amendment requirement for attorneys in criminal trials did not yet apply to the states under the then unincorporated Fourteenth Amendment. *Id.* Accordingly, the holding of *Powell* is regarding a Fifth Amendment right to the assistance of counsel and cannot be limited to criminal accused's right to counsel under the Sixth Amendment. *Id.*

[4] Commenting on the procedures and rights of victims the authors note "pretty clearly the motion should lead to a hearing where the parties and the complaining witness have a right to attend and to be heard, or where guardians or representatives ***(such as lawyers)*** can be heard." (emphasis added) *See,* MUELLER & KIRKPATRICK, FEDERAL EVIDENCE, § 4:8 (3d Edition, 2012). Not surprisingly, with such explicit language and purpose, the Fourth Circuit in *F. Doe v. United States*, 666 F.2d 43 at 45, had no difficulty holding that a victim of sexual assault had standing to appeal (in the middle of trial) an evidentiary ruling under F.R.E. 412. In *Doe*, the holding was based on the

> What, then, does a hearing include? Historically and in practice, in our own country at least, it has nearly always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman[5] has small and sometimes no skill in the science of law.

Id. at 69

Almost forty years later the Supreme Court reiterated and magnified what is required by a hearing. *Goldberg v. Kelly,* 397 U.S. 254 (1970). In *Goldberg*, welfare recipients sought relief in federal court for Constitutional violations of their due process rights. *Id.* at 255. They claimed they were being denied welfare payments without adequate due process, namely a

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recognition that sexual assault victims have legally cognizable rights under F.R.E. 412 and necessarily have standing to asset those rights. *Id.*

[5] The Court's acknowledgment that "even the intelligent and educated layman has small and sometimes no skill in the science of law" is all the more powerful in the context of people victimized by sexual assault or suffering from a mental disease or defect. Any rule precluding victims or patients from being heard through their counsel will effectively silence those victims and patients most in need of the assistance of counsel. Those victims with injuries either psychological or otherwise, or patients whose mental defect or disease are most egregious, will be the exact victims and patients most injured by the creation of such an unconstitutional and historically absurd rule. The very victims and patients most traumatized, most disabled, most afraid, and most physically injured, would be the most silenced.

hearing. *Id.* The Supreme Court held that the welfare recipients were entitled to an evidentiary hearing prior to their welfare payments being terminated. *Id.* at 266-71. The Supreme Court then defined what such a hearing must include at a minimum: cross-examination, presentation of evidence, and argument by counsel when provided. *Id.*

Just as in *Powell* and *Goldberg*, A1C LRM is entitled "to be heard" at a "hearing." *Powell*, 287 U.S. at 69; *Goldberg,* 397 U.S. at 254. Congress and the President provided those rights to victims and patients through MREs 412 and 513. The military judge erred when he redefined those entitlements as just the ability to provide facts and deprived A1C LRM the ability to make legal arguments through her counsel.

2. The phrase "to be heard" has a consistent meaning when used in the UCMJ and in the military rules of evidence

The phrase "to be heard" is used in both the Military Rules of Evidence and the Rules for Court-Martial(RCM). Each and every time it is used it refers to an occasion when the parties (through counsel) can provide argument to the military judge on a legal issue. It never refers to an occasion when a witness must or should testify.[6] *See, e.g.,* R.C.M. 806(d), Discussion,

[6] By limiting A1C LRM to "factual matters," the military judge effectively ignored the language used by Congress and only permitted A1C LRM the right to testify. Testify means "to give evidence as a witness." BLACK'S LAW DICTIONARY 1476(6th ed. 1990).

(parties have an opportunity to be heard before issuing a protective order); R.C.M. 917(c)(parties have an opportunity to be heard regarding a motion for finding of not guilty); R.C.M. 920(c)(parties have an opportunity to be heard on the findings instructions); R.C.M. 920(f)(parties have an opportunity to be heard on objections to instructions); R.C.M. 1005(c)(parties have an opportunity to be heard on sentencing instructions); R.C.M. 1102(b)(2)(parties have an opportunity to be heard at post-trial 39a sessions); MIL. R. EVID. 201(e)(parties have an opportunity to be heard regarding judicial notice).

Accordingly, there are several discrete events in every trial at which point parties in the case have a right "to be heard" through their counsel. *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). The effect of these rights is that the Accused can be heard at several keys points without having to testify. His attorney is permitted to make legal arguments and advocate on his behalf based on his right "to be heard."

In addition to those examples, Congress and the President sought to provide victims and patients the same rights as parties in at least three hearings. In MRE 412, 513, and 514, Congress and the President deliberately chose to provide victims and patients the same rights as parties in those hearings by

using the identical language they used at other places within the MREs and the RCMs. The effect of Congress's and the President's language is to give victims and patients the right to have their attorneys make legal arguments and advocate on their behalf.

Beside Congress and the President's deliberate choice of the legal term of art "to be heard," the statutory construction of MRE 412 and 513 also reveals the military judge's error. One need look no further than the text of MRE 412 or 513 to realize that the President and Congress intended far more rights for victims and patients than merely being able to testify. Both rules permit the parties to "call witnesses, including the patient [and or victim]." MIL. R. EVID. 412(c)(2); MIL. R. EVID. 513(e)(2). However, both rules also state in separate provisions that the victim and patient have an opportunity to "be heard." The military judge's determination that victims and patients can only provide testimony ignores the statutory construction of both rules and does not give effect to the extra provisions. MIL. R. EVID. 412(c)(2); MIL. R. EVID. 513(e)(2). "To be heard" must mean something more than being a witness, otherwise the rule is redundant. The phrase "to be heard" at a "hearing" are terms of art both Congress and the President have repeatedly used throughout the MREs and RCMs to permit legal argument – argument that is generally made through counsel.

3. The phrase "to be heard" has been interpreted to mean legal argument through counsel in federal courts

The federal district and circuit courts of appeal have been hearing legal arguments from victim's counsel for decades now. *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981). District and circuit courts of appeal have consistently held that "to be heard" includes the right to be heard through counsel and to make legal arguments. *In re Dean*, 527 F.3d 391 (5th Cir. 2008), is illustrative of this point. In *Dean*, the victims exercised their right to be "reasonably heard" regarding pretrial decisions of the judge and prosecutor "personally [and] through counsel." *Id.* "The attorneys reiterated the victim's requests" and "supplemented their appearance at the hearing with "substantial post-hearing submissions." *Id.* In similar fashion, the Fourth Circuit determined that the "right to be heard" "accords [victims] standing to vindicate their rights." *Brandt v. Gooding,* 636 F.3d 124, 136 (4th Cir. 2011). In *Brandt* the victim wished to prevent the Accused from being released at a habeas hearing. *Id.* The court held that motions from attorneys were "fully commensurate" with the victim's "right to be heard." *Id*.[7]

[7] *See also, Pann v. Warren*, 2010 WL 2836879 (E.D. Mich. 2010)(permitting victims to be "reasonably heard" by written "arguments" regarding a habeas hearing).

b. Limited participants have standing in a trial by court-martial to vindicate their rights

In this case, A1C LRM has satisfied the requirements for standing: "(1) an injury in fact; (2) causation; and (3) redressability." *Sprint Commun'ns Co. v. APCC Servs., Inc.*, 554 U.S. at 273 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561 (1992)).

Airman LRM has standing to assert her rights as a limited participant. Airman LRM is not a party to this case. Indeed, she is a witness in the case. However, unlike strangers to the court, she is not free to walk away. Before the Government is permitted to injure one of her rights she is permitted to be heard by the military judge through counsel. Airman LRM's request is not remarkable. Indeed, a basic principle of constitutional law is that rights may be asserted by their holder and must have a remedy. *See Marbury v. Madison,* 5 U.S. 137, 163 (1803)("it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." (quoting, 3 *William Blackstone, Commentaries* 23)).

Limited participant standing has been recognized by military courts, federal courts, and the Supreme Court. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)

(standing created by First Amendment right); *Church of Scientology v. United States*, 506 U.S. 9 (1992) (standing created by attorney-client privilege); *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995)(standing for victims created to avoid "unwarranted invasions of privacy," "violations of MRE 412," and "breach[es] of privilege[s]")(summary disposition); *ABC, Inc. v. Powell,* 47 M.J. 363, 364 (C.A.A.F. 1997) (standing under First Amendment); *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008) (assuming standing for CBS in part under RCM 703); *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006) (assuming standing for *victim*'s mental health provider).

The test for standing in a military court is no different than the test generally applied in federal district courts. See *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008)(citing *Sprint Commun'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269 (2008). Military courts, although Article I courts, have adopted the same constitutional standards as Article III courts for determining standing. *Id.* (citing *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003)).

c. Airman LRM's rights arise from the Military Rules of Evidence, the CVRA, and the Constitution

1. The Military Rules of Evidence provide A1C LRM procedural rights

Airman LRM's rights under MRE 412 and 513 are indistinguishable from rights commonly recognized to bestow standing. These rights recognize the unique role that victims and patients play in the court-martial process.[8] In criminal cases and hearings, privileges have repeatedly been found sufficient to justify limited participant standing. See, *Church of Scientology v. United States*, 506 U.S. 9 (1992)(non-subpoenaed party granted standing base on attorney-client privilege); *In re Grand Jury Impaneled v. Freeman*, 541 F.2d 373, 377 (3d Cir. 1976)(standing created by prothonotary "Local Rule 202"); *United States v. Nixon*, 418 U.S. 683 (1974)(non-

[8] The legislative history to Federal Rule of Evidence (FRE) 412 states Congress's purpose: "to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives." 124 Cong. Rec. at H 11945 (1978). This purpose is echoed in the advisory comments to MRE 412, which state that the purpose is to "safeguard the alleged victim against the invasion of privacy." Manual for Court-Martial, Appendix 22, Mil. R. Evid. 412. Similarly, the advisory comments to the 1994 amendment to FRE 412 reiterate the victim-focused purpose of the rule as well. The FRE 412 advisory committee's notes:

> The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process.

Not only did Congress and the President create these rules for the special protection of the privacy interests of victims and patients, they had another purpose in mind as well. "By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute *and to participate in* **legal proceedings** against alleged offenders." *Id* (emphasis added).

subpoenaed party permitted standing under executive privilege); *See also, In re Grand Jury John Doe*, 705 F.3d 133, (3d Cir 2012). The decision in *Freeman* is illustrative. In *Freeman*, the Grand Jury sought a subpoena of the Honorable Americo V. Cortese,[9] the Philadelphia County Prothonotary, for certain documents. Although Mr. Freeman was not subpoenaed and not a party to any case, the court held that Mr. Freeman had limited participant standing to be heard "on the basis of his claim of privilege." *Freeman*, 541 F.2d at 377.

The existence of a right alone can establish standing to seek a remedy. The Fourth Circuit Court of Appeals found a victim had a trial and interlocutory appellate remedy based on F.R.E. 412.[10] *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981). There is no meaningful difference between FRE 412 and MRE 412. Importantly, neither rule use the term "standing," and neither explicitly permit appeals. However, this Court, like the Fourth Circuit, should apply the Supreme Court's unambiguous direction that "this remedy is implicit as a 'necessary corollary of the rule's explicit protection of the privacy

[9] The court in *Freeman* found standing for both the Prothonotary and Mr. Freeman to challenge the subpoena. Both were permitted standing even though their positions on the issue were identical, namely, Local Rule 202 provided a privilege. *Freeman*, 541 F.2d at 377.

[10] All courts are required to evaluate standing at all stages of a proceeding because standing is a jurisdictional issue. *FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215 (1990). The Court's resolution of the issue on appeal can only be interpreted one way -- the court must have also found trial level standing for the assertion of the rights. *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981).

interests Congress sought to safeguard.'" *Id.* (*citing Cort v. Ash*, 422 U.S. 66 (1975)).

The owner of a privilege has standing to defend that privilege when it is imperiled. *See United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006)(assuming trial standing for the lawyer of a victim's doctor to assert MRE 513 privilege); *see also generally, Church of Scientology v. United States*, 506 U.S. 9 (1992)(non-subpoenaed party granted standing under attorney-client privilege); *In re Grand Jury Impaneled v. Freeman*, 541 F.2d 373, 377 (3d Cir. 197); *In re Grand Jury John Doe*, 705 F.3d 133 (3d Cir 2012)(standing based on attorney-client privilege).

Perhaps no case demonstrates the simplicity of this issue better than this Court's decision in *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995). In *Carlson*, two sexual assault victims filed a petition for extraordinary relief to protect their rights. *Id.* Specifically, they sought to protect their rights that were in jeopardy in the trial of CDR Reeves. *Id.* They asserted standing to defend their rights under MRE 412, Article 31 of the UCMJ, generalized "invasions of privacy," and their "privileges." *Id.* This Court granted relief and ordered the military judge to review the records sought *in camera*. *Id*. This Court further ordered that, "in addition to trial and defense counsel in the *Reeves* case, petitioners 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.* (emphasis added). Airman LRM's request is no different. She wishes only the "opportunity, with the assistance of counsel...to present evidence, arguments and legal authority to the military judge." *Id.*

2. Airman LRM has rights that arise from the Crime Victims' Rights Act (CVRA)

Independent of rights flowing from the rules of evidence, A1C LRM has a right to privacy protected by the CVRA.[11] The CVRA protects the rights of all victims of federal offenses, including those within the military justice system. Airman LRM has an explicit right to "dignity and privacy" under the CVRA. 18 U.S.C. 3771(a)(8). This is the same right often at issue under MRE 412 and 513. This right provides A1C LRM standing to defend this right, including the right to make arguments through counsel.

Although this Court has yet to address the applicability of the Crime Victims's Rights Act to military members, this Court's

[11] Obviously, if this Court determines that A1C LRM has the right to make legal arguments through counsel at the MRE 412 and 513 hearings, it need proceed no further. This Court could determine that A1C LRM independently has standing and the right to be heard based on the rights to privacy created by the CVRA and the Constitution, but that determination is not necessary.

precedent supports a finding that it does. *See United States v. Dowty*, 48 M.J. 102, 107 (C.A.A.F. 1998). The CVRA is meant to be a broad right-creating statute applicable to all U.S. citizens and there is no facet of the UCMJ or military law that is contrary to the CVRA.

The passage of the broad-sweeping CVRA by Congress marked a turning point for all victims in the United States. 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).

As this Court and the Supreme Court have acknowledged, "Congress has plenary control over ***rights***, duties, and responsibilities within the framework of the Military Establishment, including regulations, procedures, and remedies". *United States v. Dowty*, 48 M.J. at 106 (emphasis added, quoting *Weiss v. United States*, 510 U.S. 163 (1994). In making the CVRA applicable to "any court" and for all "federal offenses," Congress ensured that victims who are sexually assaulted by military members would be treated with no less "privacy" and "dignity" than all other citizens of the United States. Victims, military or civilian, hauled into military courts should not have to suffer the further indignity of being told

they are the only victims of a federal offense in the United States without the right of privacy or dignity.

Absent an explicit and clear military necessity, military members are afforded the same statutory and constitutional rights as civilians. *See Dowty*, 48 M.J. at 107 ("in the absence of a valid military purpose requiring a different result, generally applicable statutes are normally available to protect service members"). As this Court has recognized, absent clear inconsistency or contrary purpose, there is a "general direction to apply civilian procedures." *Dowty*, 48 M.J. at 107.

Not only are there no contrary provisions or inconsistent purposes in the Manual for Court-Martial, the existing provisions are entirely consistent with the robust recognition and protection of victim's rights. *See generally* MIL. R. EVID. 303; MIL. R. EVID. 502; MIL. R. EVID. 503; MIL. R. EVID. 513; MIL. R. EVID. 514, discussion of R.C.M. 806 (recognizing prohibitions on degrading questions, various privileges and accordant rights therewith, and the ability to close the courtroom to avoid "embarrassment or extreme nervousness"). Further, the now defunct version of MRE 615, which in 1999 appeared contrary to federally created victim's rights, was repealed and superseded by an amendment to the Military Rules of Evidence. Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002); Crime Victims' Rights Act, 18 U.S.C. § 3771 (2004). In 2002, the President

corrected and ensured the fullest protection of victims' rights in courts-martial by amending MRE 615 to include two additional rights for victims. *Id.*

The purpose and language of the CVRA is wholly aligned and consistent with current military law. The rights provided by the CVRA are not alien to those currently provided to victims within the Department of Defense. For eight years, the Department of Defense has expressly instructed, *inter alia*, that a victim has the right to "[b]e treated with fairness and respect for the victim's dignity and privacy." DoDD 1030.01 page 2. That directive and its accompanying instruction, DoDI 1030.2, implemented 42 U.S.C. § 10606, the predecessor to the CVRA. Virtually all of the rights provided by the CVRA are included in this DoD Directive and Instruction and were further implemented in Air Force Instruction (AFI) 51-201 Chapter Seven, which states unequivocally that a victim has the right to "[b]e treated with fairness and respect for the victim's dignity and privacy." (J.A. at 221)

Before applying a federal statute to court-martial practice, *Dowty* directed that courts consider as factors (1) whether the statute interfered with a fundamental principle of military law and whether or not the military had implemented any of the rights contained in the legislation. 48 M.J. at 110-11. The Department of Defense has for eight years instructed its

trial counsel and law enforcement officials that a victim's rights to privacy and dignity are paramount. A victim's rights to privacy and dignity have themselves become a fundamental principle, having been included in instructions and directives for eight years with little reverberation in the greater body of military law. While the current Department of Defense and Air Force Instructions reference the implementation of 42 U.S.C. § 10606, that statute was superseded in 2004 by the CVRA. Hence, current DoD Directives and Instructions, Air Force Instructions, and Military Rules of Evidence should be read to incorporate the CVRA.

The plain meaning of the words in the CVRA speak volumes—"in ***any court*** proceeding involving an offense against a crime victim." 18 U.S.C. § 3771 (emphasis added). Crime victim is defined to include any person directly or even proximately harmed as a result of any "federal offense."[12] *Id.* Further, in addition to the mandate for all courts to apply these rights, all "**departments** and agencies of the **United States** engaged in the detection, investigation, or prosecution of crime" are assigned this task as well. *Id.* (emphasis added).

The conclusion that the CVRA provides rights that can be exercised in military court is consistent with current law and

[12] All military offenses under the UCMJ are federal offenses. *See* 10 U.S.C. § 877 et. seq.

controlling precedent. *See Dowty,* 48 M.J. at 102. In *Dowty,* the Court was forced to address the applicability of the Right to Financial Privacy, 12 U.S.C. § 3401-3422 (RFPA). *See Dowty*, 48 M.J. at 102. The RFPA was created by Congress in response to a Supreme Court decision denying the Fourth Amendment protection to certain types of searches and seizure of bank records. *Id.* at 106. In response, Congress created the RFPA which provided privacy rights with regard to their banking records. *Id.* Just like the RFPA the CVRA was created by Congress to provide rights in response to Congress's perceived need for additional protection.

The argument for the application of the CVRA to military courts is much stronger than the argument which prevailed in applying the RFPA to military courts. Unlike the CVRA the RFPA was directly inconsistent with the UCMJ. Accordingly, this Court, in *Dowty*, was cautious in holding that the RFPA was applicable. *See Dowty*, 48 M.J. at 105 (noting conflict between RFPA and UCMJ Art. 43). Ultimately, this Court correctly decided that RFPA did apply to trials by court-martial. *Id.* at 108. In overcoming the dilemma raised by the inconsistency, thia Court first noted that the RFPA created actionable rights for all service members. *Id.* at 108. This Court in *Dowty* relied on the language from the act extolling its application by "any agency or **department** of the United States." *Id.* at 108

(emphasis added). This is similar to language Congress used in the CVRA. *See* 18 U.S.C. § 3771(c)(1)("Officers and employees of the Department of Justice *and other departments and agencies of the United States* engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)"). This Court further noted that, although Congress could have excluded the Department of Defense, the Act "provides **no exemption** for the Department of Defense in general or **military disciplinary matters** in particular"[13] (emphasis added). 48 M.J. at 109. Likewise, there is no military disciplinary exemption in the CVRA. 18 U.S.C. § 3771.

After finding the RFPA created rights for service members, the Court had to determine if it would also incorporate the Act's contradictory provisions regarding the statute of limitations – UCMJ Art 43 was directly contrary to the RFPA. *Dowty,* 48 M.J. at 110-11. The RFPA mandated that the tolling provision apply to "any applicable statute of limitations." Accordingly, the Court found with "no reservations" that the RFPA was applicable to the military's statute of limitations.

[13] In applying a rule of evidence, the presumption that federal statutes and regulations apply to trial by court-martial is even stronger. *See* MIL. R. EVID. 1102 (requiring the President to affirmatively opt out of the existent Federal Rules of Evidence before they are automatically applied to Military Rules of Evidence).

Id. at 110. The CVRA uses similar sweeping language; it applies in "any court proceeding." *See* 18 U.S.C. § 3771.

In *Dowty*, this Court explicitly rejected the argument that Congress was required to use any specific language when passing legislation that had the effect of modifying prior legislation. *See Dowty,* 48 M.J. at 109 ("Congress is not required to use specific language"). Further, the Court rejected an argument that an intervening amendment to UCMJ Art. 43 had any effect on their analysis. *Id*. at 110. After the passage of the RFPA, Congress amended UCMJ Art. 43--extending the statute of limitations from 3 to 5 years and modifying some of the exceptions. *Id.* Congress did not in those amendments acknowledge, embrace, reference, or codify the tolling exception from the RFPA. *Id.* In *Dowty*, the appellant argued that Congress's inaction or silence with regard to the RFPA's application to UCMJ Art. 43 suggested their intent. *Id.* This Court rejected this "repeal by implication" argument. *Id.* at 110.

In finding the RFPA applicable, significant to this Court was the absurdity of ruling otherwise — that active duty military members would have recognizable privacy rights in civilian courts, but military courts would be forbidden from enforcing the corollary response to the exercise of those

rights. *Id*. at 111. No such absurdity was tolerated in *Dowty*, nor should it be in the present case.

Two other decisions from this Court are similarly instructive on this issue. See *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999); *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000). In *McElhaney,* this Court addressed an issue similar to *Dowty*, namely, whether to enforce a federal law that was inconsistent with existing military law. 54 M.J. at 120. Unlike in *Dowty*, *McElhaney* did not deal with the creation of broad encompassing federal rights. *McElhaney,* 54 M.J. at 120; *Dowty*, 48 M.J. at 106. Instead, *McElhaney* addressed the narrower issue of the congressional update to federal child abuse laws. 54 M.J. at 120. Congress extended the statute of limitations for child abuse cases. *Id.* The military already had crimes for child abuse victims and already had a statute of limitations. *See* UCMJ Art. 128; Art. 134; Art. 43. Additionally, this Court noted that the law appeared to only apply to crimes "prosecuted by the Department of Justice" as opposed to the language of the RFPA and CVRA, applicable to "any agency or department of the United States." *McElhaney,* 54 M.J. at 125-6; *Dowty*, 48 M.J. at 106. Not surprisingly, this Court ultimately held that the new contrary and inconsistent statute of limitations did not repeal *sub silentio* the existing UCMJ Art. 43. *McElhaney,* 54 M.J. at 120. *McElhaney* and *Dowty,* when

read together, reveal only what *Dowty* actually stated: absent clear inconsistency or contrary purposes, there is a "general direction to apply civilian procedures," and "in the absence of a valid military purpose requiring a different result, generally applicable statutes are normally available to protect service members." *Dowty*, 48 M.J. at 106-7.

The decision in *Spann* now serves as a historical marker and turning point for victims' rights in the military justice system. In *Spann*, this Court addressed whether the Victim's Rights and Restitution Act, 42 U.S.C. § 10606, repealed by implication the then existing MRE 615. 51 M.J. 89. At the time of *Spann*, the military's existing evidentiary rule of sequestering witnesses was entirely inconsistent with the rights putatively created by the new law. *See* Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002). In 1999, there were only three existing exceptions to the general rule of sequestration at the behest of either party: (1) the accused, (2) a representative of the United States designated by trial counsel, and (3) a person whose presence is shown by a party to be essential to the presentation of the party's case. *See Spann*, 51 M.J. at 90. In addition to the inconsistency, it was unclear if the Victim's Rights and Restitution Act--which purported to create a host of new rights for victims--actually created any rights. *United States v. McVeigh*, 106 F.3d 325 (10th Cir.

1997)(holding that victims had no appellate standing because the act did not create legally recognizable rights). Indeed, this Court in *Spann* was "primar[ily] concern[ed with] the lack of clarity as to the effect of 42 U.S.C. § 10606 in federal civilian criminal trials." *Spann*, 51 M.J. at 92. It was the ambiguities of the language, legislative history and judicial interpretation that kept this Court from applying the statute. *Id*.

Faced with an ambiguous provision that was inconsistent with military law and not apparently creating any federally recognizable rights, this Court, for good reason, found that MRE 615 was not "repealed by implication" by 42 U.S.C. § 10606. The landscape of victims' rights could not be more different now. The CVRA's language is clear, and the rights therein are unambiguous.[14]

This Court's decision in *Spann* prompted both congressional and presidential action to correct the apparent inconsistency between MRE 615 and their desire for the broadest recognition of victim's rights. See Exec. Order No. 13,262, 67 Fed. Reg. 18773

[14] The CVRA has been successfully applied by counsel for victims in the 5th Circuit Court of Appeals, 4th Circuit Court of Appeals, 10th Circuit Court of Appeals, 2d Circuit Court of Appeals, and the 9th Circuit Court of Appeals. *See Brandt v. Gooding,* 636 F.3d 124, 136 (4th Cir. 2011);*In re Dean*, 527 F.3d 391 (5th Cir. 2008); *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008); *Kenna v. United States,* 435 F.3d 1011 (9th Cir. 2006);*In re Huff Asset Mgmt. Co.,* 409 F.3d 555 (2d Cir. 2005). Indeed, in the decade of victims exercising their rights, we are aware of no federal district or circuit court of appeals that failed to enforce the rights created by the CVRA.

(Apr. 11, 2002); Crime Victims' Rights Act, § 3771. First, the President fixed MRE 615. Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002). Federal Rule of Evidence (FRE) 615 and subsequently MRE 615 were both amended to add a fourth exception forbidding automatic sequestering of "a person authorized by statute to be present." *See* Mil. R. Evid. 615(4). Both federal cases and the analysis of the amendments of Rule 615 make clear that "a person authorized by statute to be present" refers to victims protected by victims' rights legislation.[15] *United States v. Edwards,* 526 F.3d 747 (11th Cir. 2008)(holding that CVRA is a statute under the fourth exception of FRE 615 and that the accused has no Constitutional right to exclude witnesses).

Next, Congress, in response to the *McVeigh* decision passed the CVRA. *McVeigh*, 106 F.3d at 325. The CVRA superseded the earlier victims' rights legislation "mov[ing]" and "amplify[ing] the current rights." H.R. REP. 108-711, pt. A, at pg 2. The newly drafted legislation worked. The CVRA ushered in a renaissance in federal courts where victims were afforded limited participant standing through counsel to exercise their rights. *See, e.g., In re Dean*, 527 F.3d 391 (5th Cir. 2008); *Brandt v. Gooding*, 636 F.3d 124, 136 (4th Cir. 2011); *Kenna v. United States*, 435 F.3d 1011 (9th Cir. 2006); *Pann v. Warren*,

[15] *See*, MIL. R. EVID. 101, which directs a court-martial to apply federal district court interpretation of rules of evidence.

2010 WL 2836879 (E.D. Mich. 2010); *United States v. Mahon*, 2010 WL 94247 (D. Ariz. 2010). Federal courts throughout the country have uniformly recognized that victim's now have standing to assert their rights created by the CVRA. *Id.*

This Court's decision in *Spann* was based on the existing landscape of victim's rights. 51 M.J. at 89. At the time, they were inconsistent with military law and it was uncertain whether they even existed as drafted. *Id.* The current landscape could not be more certain. Since the time *Spann* was decided, Congress has passed new legislation, the President has updated the Military Rules of Evidence, and the Department of Defense and military departments have updated regulations and instructions. All of these provide significant rights for victims. Accordingly, this Court should recognize the applicability of the CVRA and permit A1C LRM standing to assert her rights.

3. Airman LRM has rights that arise from the United States Constitution

The right to privacy is a Constitutional right sufficient to provide standing for A1C LRM to defend her privacy in regard to her prior sexual history and mental health history.[16]

The Supreme Court has recognized that the Constitutional right to privacy would be sufficient to provide standing for more than thirty years. *See United States v. Nixon,* 433 U.S. 425, 457 (1977)(*quoting Whalen v. Roe,* 429 U.S. 589, 599-600 (1977)). Indeed, the Constitutional right to privacy, insofar as it is a right that creates standing, was used as support for the media's standing to demand a right to an open trial. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). In *Richmond*, the accused moved the Court for closure and the state joined. The trial judge closed the trial. The press appealed citing to a "First Amendment" right to a public trial. *Id.* at 559. At the Supreme Court, the state argued that, although the Accused has a 6th Amendment right to a public trial, the press

[16] Although there can be little serious debate remaining as to whether there is a Constitutional right to privacy, this truth says little about what evidence will ultimately be admitted at trial. In an Accused's criminal trial, his constitutional right to fair trial cannot be subordinated to a victim's right to privacy. However this acknowledgment says nothing about standing. The victim and patient still have legally cognizable rights to privacy, and accordingly, have the right to a hearing and argument through their counsel to demonstrate for example that prior sexual history or mental health history are not relevant or material in a particular case. The Accused's right to a fair trial does not include a right to admit irrelevant evidence; when appropriate, a victim must be permitted to point this out.

has no independent right to a public trial. *Id.* at 579. The State argued that the text of the Constitution does not mention anything about the press's right to a public trial. The Supreme Court dismissed the state's argument, noting that many "recognized" and "important" Constitutional rights are not included in the text of the Constitution. *Id.* In noting the Constitutional rights that provide standing, the Supreme Court listed the right "of privacy." *Id.*

Airman LRM has a constitutional right to privacy with regard to her past sexual relationships based on established Supreme Court case law. In *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992), the Supreme Court reaffirmed the substantive force of the liberty interests protected by the Due Process Clause. The *Casey* decision confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.* at 851. In discussing the respect the Constitution demands for personal privacy, dignity, and autonomy, the Supreme Court stated:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the

> Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id.

Even before the *Casey* decision, the Supreme Court in *Whalen* and *Nixon,* while upholding the constitutionality of the statutes at issue in those cases, noted that an element of constitutionally protected privacy rights includes, "the individual interest in avoiding disclosure of personal matters...." *United States v. Nixon,* 433 U.S. 425, 457 (1977) (*quoting Whalen v. Roe,* 429 U.S. 589, 599-600 (1977)). Assessing an individual's legitimate expectation of privacy is part of the constitutional analysis that must occur before information is disclosed to the public by government action. "When information is inherently private, it is entitled to protection." *Fraternal Order of Police, Lodge 5 v. City of Philadelphia,* 812 F.2d 105, 116 (3d Cir.1987); *see also, York v. Story,* 324 F.2d 450, 455 (9th Cir.1963)("We cannot conceive of a more basic subject of privacy than the naked body.").

The privacy interests that are protected from disclosure by the Constitution include the highly personal and "intimate aspects of human affairs" that are at issue in the present case. *See, Eagle v. Morgan,* 88 F.3d 620, 625 (8th Cir. 1996)(quoting, *Wade v. Goodwin,* 843 F.2d 1150, 1153 (8th Cir.) *cert. denied,* 488 U.S. 854, 109 S.Ct. 142, 102 L.Ed.2d 114 (1988)). Intimate details of a person's sexual history fall squarely within that protected sphere. Airman LRM has a constitutionally protected right to privacy that is at issue in the present case.

ISSUE III: WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS

As set out above, this Court, like the AFCCA below, has the jurisdiction to grant extraordinary relief and issue a writ of mandamus in an appropriate case.[17] The next question is whether this Court should issue a writ of mandamus.[18] Issuance of a writ

[17] Although the CVRA also provides for enforcement in federal district and circuit courts, this Court should consider ACCA's reasoning in examining its own authority to issue an extraordinary writ. In agreeing to hear a petition for extraordinary relief, ACCA concluded that "we will not force soldiers to bring collateral attacks of their courts-martial in the civilian federal courts or the U.S. Court of Appeals for the Armed Forces." *Dew v. United States*, 48 M.J. 639, 647 (A.C.C.A. 1998).

[18] At least two federal circuit courts would interpret the CVRA's enforcement mechanism as lowering the hurdle for a crime victim seeking a writ of mandamus in federal circuit court. In *Kenna v. United States,* the Ninth Circuit held that "we must issue the writ whenever we find that the district court's order reflects an abuse of discretion or legal error." 435 F.3d 1011, 1017 (9th Cir. 2006). In similar fashion, in *In re Huff Asset Mgmt. Co.,* the Second Circuit held "a petitioner seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus." 409 F.3d 555, 562 (2d Cir. 2005).

of mandamus is discretionary on the part of this Court and is "a drastic remedy ... [that] should be invoked only in truly extraordinary situations, and we pointed out that to justify reversal of a discretionary decision by mandamus, the judicial decision must 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.'" *Murray v. Haldeman,* 16 M.J. 74, 76 (C.M.A. 1983) (quoting *United States v. Labella,* 15 M.J. 228, 229 (C.M.A. 1983), *United States v. DiStefano,* 464 F.2d 845, 850 (2d Cir.1972)) (internal quotations removed). Without the benefit of guidance from this Court, the erroneous practice of the military judge and others presented with a similar issue is certain to recur.

The Army Court of Criminal Appeals borrowed a useful framework for determining whether a writ of mandamus should be issued in *Dew v. United States,* 48 M.J. 639, 648-49 (A. Ct. Crim. App. 1998). The Army Court of Criminal Appeals used guidelines synthesized from the Sixth and Ninth Circuits, referred to as "*Bauman*" factors "to frame the boundaries of their mandamus power." *Id.* at 648 (citing to *In re American Medical Systems, Inc.,* 75 F.3d 1069, 1078 (6th Cir.1996); *Bauman*

v. United States District Court, 557 F.2d 650, 654–55 (9th Cir.1977)). The guidelines are as follows:

> (1) The party seeking relief has no other adequate means, such as direct appeal, to attain the relief desired;
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal;
>
> (3) The lower court's order is clearly erroneous as a matter of law;
>
> (4) The lower court's order is an oft-repeated error, or manifests a persistent disregard of federal rules;
>
> (5) The lower court's order raises new and important problems, or issues of law of first impression.

Id. at 648-49.

In applying the framework, ACCA cautioned that a petitioner need not satisfy all of the factors and not all will be relevant in every case, and "rarely will they all point to the same conclusion." *Id.* However, the current case is the rare case where all five of the *Bauman* factors are present, and all point to the same direction – a writ of mandamus is appropriate. First, A1C LRM has no other adequate means of challenging the

military judge's ruling through the appellate process. While a federal *habeas petition* is available through the enforcement section of the CVRA, such courts lack expertise in the field of military justice and military courts have expressed a reluctance to force military members to seek relief in civilian federal courts. *See,* 18 U.S.C. § 3771(d)(3); *Dew v. United States*, 48 M.J. at 647. Second, A1C LRM will be damaged or prejudiced in a way not correctable on appeal. In this case, the right to be heard on A1C LRM's issues relating to her privacy and dignity cannot be corrected on subsequent appeal. No possible ruling of this Court at a later point in time can redress the error. Third, the military judge's ruling in this case is plainly erroneous. As discussed below, the military judge denied the victim's right to be heard, through counsel, prior to depriving her of constitutional, statutory, and regulatory rights. Fourth, absent any guidance from this Court, the military judge's ruling, and those of military judges with a similar mindset, will be "oft-repeated." With no other meaningful way for these issues to reach appellate review, every military judge will be free to determine the scope and extent of a victim's rights with neither guidance nor oversight. Such a result will create a judicial landscape where a victim's rights vary from courtroom to courtroom with no clear guiding principles. *See, e.g.,* Douglas E. Beloof, *The Third Wave of Crime Victims'*

Rights: Standing, Remedy, and Review, 2005 BYU L. Rev. 255 (2005). Finally, the military judge's ruling raises new and important problems, and also issues of law of first impression. There is no precedent in military law addressing these issues.

It is appropriate for this Court to grant extraordinary relief at this stage rather then returning the case to AFCCA for further review. Both the accused and petitioner have a common interest in a speedy resolution of this matter that would be thwarted by further appellate delay. *See ABC, Inc. v. Powell* M.J. at 364.

CONCLUSION

To allow AFCCA to claim they lack jurisdiction to review a military judge's interpretation of a rule of evidence is to allow them to abdicate their supervisory responsibility. To deny A1C LRM a writ of mandamus that ensures that she has a meaningful way to voice her position is to deny justice to a victim and a patient. "It is said to be a writ of discretion. But the discretion of a court always means a found, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court [is] bound to grant it. They can refuse justice to no man." *Marbury v. Madison,* 5 U.S. at 153. For the reasons set out above, we respectfully request this Court

reverse AFCCA's decision that they lack jurisdiction and to issue on behalf of A1C LRM the writ of mandamus that she seeks.

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CERTIFICATION OF FILING

I certify that a copy of the foregoing was delivered to the Court, the Respondent, Government Trial and Appellate Division, and the Appellate Defense Division

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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 12,254 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.

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