IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re SD *Petitioner* **United States** *Real Party in Interest A* **SrA GABRIEL A. BINKLEY** 77 FGS (ACC) Shaw AFB, South Carolina *Real Party in Interest B*	**PETITION FOR EXTRAORDINARY RELIEF** *in the nature of a* **WRIT OF MANDAMUS** Misc. Dkt. No. 2025-XX

COMES NOW S.D. by and through her undersigned Victims' Counsel (VC), petitioning for a writ of mandamus under Article 6b(e) and under The All Writs Act, 28 U.S.C. § 1651 in accordance with Air Force Court of Criminal Appeals Rule of Practice and Procedure 19.

Military Judge Colonel Vicki L. Marcus clearly and indisputably erred when ruling that violations under Article 130, UCMJ, do not constitute sexual misconduct. *Ruling: Victims' Counsel Motion for Appropriate Relief—Military* Rules of Evidence 412, dated 6 August 2025, Attachment IV. The Military Judge also clearly and indisputably erred in violating S.D.'s rights under Article 6b, Uniform Code of Military Justice (UCMJ) when she denied S.D.'s detailed VC the opportunity to advocate for her regarding the exclusion of evidence of sexual predispositions and behavior. *Transcript of 39a Hearing of 10 July 2025*[1], Attachment I, at 23-24, 43-45, 78-79, and 82.

[1] The transcript was created in Microsoft Word using the audio provided and the original audio will be transmitted to This Court and Requisite Parties via DoD SAFE as Petition Attachment I.B. The transcript is not authenticated nor was it reviewed for complete accuracy.

Finally, the Military Judge also violated S.D.'s Article 6b rights when she denied a request for a closed hearing to discuss the admissibility of such evidence. *Id.* at 23, 78-79, and 83. Specifically, the military judge violated S.D.'s right to be treated with fairness and with respect for her dignity and privacy. Furthermore, in ruling that Article 130 is not a sexual misconduct offense contemplated under M.R.E. 412, the Military Judge failed to comply with M.R.E. 412 and writ should issue. Of note, a new Military Judge was detailed to the case in interest, the new detailed judge is Lt Col Christine Norton.

ISSUES PRESENTED

WHETHER THE MILITARY JUDGE ERRED IN 1. RULING THAT M.R.E. 412 DOES NOT APPLY TO ALLEGED VIOLATIONS OF ARTICLE 130, UCMJ; 2. DENYING S.D.'S VICTIMS' COUNSEL THE OPPORTUNITY TO ADVOCATE FOR HER PRIVACY RIGHTS UNDER ARTICLE 6b(9), UCMJ; AND 3. DENYING A REQUEST FOR A CLOSED HEARING.

JURISDICTION

This petition seeks a writ of mandamus. S.D. asserts this Court can issue a writ of mandamus pursuant to Article 6b(e)(4)(A) and Article 6b(e)(4)(C) for the Military Judge's violations of the protections afforded her under M.R.E. 412 and under Article 6b(a)(1) and (9). This Court also has jurisdiction to issue a writ of mandamus pursuant to the All Writs Act codified in 28 U.S.C. § 1651, because S.D. has a legal right to her privacy and has no other reasonable means to protect that right from violation by the Military Judge. *See United States v. Curtin*, Misc. Dkt.

No. 95-07, 1995 CCA LEXIS 339, at *3 (A.F. Ct. Crim. App. Dec. 8, 1995) ("Our authority under the All Writs Acts includes the ability to issue a writ of mandamus directed at trial judges." (internal citations omitted)).

STANDARD OF REVIEW

Whether this Court exercises jurisdiction under the Article 6b, UCMJ or the All Writs Act, S.D. must show, "(1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *H.V.Z. v. United States*, 85 M.J. 8, 12 (C.A.A.F. July 18, 2024), (citing *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (citing *Cheney v. United States Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380–81 (2004)).

Under the All Writs Acts, S.D. has no other means to avail herself of the protections afforded her under M.R.E. 412 and under Article 6b(a)(1) and (9), including her right to be reasonably safe from the Accused and her right to be treated with dignity and respect for her privacy. S.D. seeks issuance of a writ of mandamus under Article 6b(e), which *requires* this mode of relief. The issuance of a writ by this Court is the statutorily prescribed method for enforcement of victims' rights, therefore there is no other adequate means of relief and her right to the issuance of a writ is clear and indisputable.

The issuance of a writ is appropriate under the circumstances because, as the arguments hereafter show, the Military Judge's rulings not only deprived S.D. of the protections of M.R.E. 412 but also violated S.D.'s Article 6b, UCMJ right to be

reasonably protected from the Accused and her right to be treated with fairness and respect for her dignity and privacy. In other words, a writ should issue vacating the Military Judge's rulings preventing S.D. from availing herself of the protections under M.R.E. 412 and from defending her privacy rights in court in a closed hearing.

STATEMENT OF THE CASE

On 10 July 2025, the detailed Military Judge made oral rulings on the record during an Article 39a hearing denying S.D.'s detailed Victims' Counsel the opportunity to provide argument regarding the violation of her privacy rights under Article 6(b) of the UCMJ and denying a closed hearing to discuss the protection of those rights. Attachment I, pages 23-24, 78-82. On 30 July 2025, SD filed a petition for extraordinary relief to this court. Relief was denied on 5 August 2025. On 8 August 2025, the Military Judge ruled that M.R.E. 412 does not apply to alleged violations of Article 130, UCMJ, even though such are defined as sex-related offenses in 10 U.S.C. § 1044e. *See* Attachments II, and IV. This case is set for trial to begin on 15 September 2025.

STATEMENT OF FACTS

The facts as best ascertained by the Victims' Counsel through review of the file are that the Accused has a lengthy history of making unwanted contact with S.D. following their separation around April of 2023, which eventually led to S.D.'s expedited transfer and the issuance of a military protection order against the Accused. On 13 February 2025, the Accused went to surprise S.D. with a personal

visit, without regard to the civilian no-contact order and the military protection order then in place. He was intercepted by law enforcement after they observed him walking around S.D.'s apartment, apparently looking for a way to enter by some way other than the front door. When he was apprehended, the Accused had two lock-picking sets in his jacket, and in his vehicle he had boxes of apparently unopened sex toys. *See* Attachment II.1.2 at 16-17.

On 5 May 2025, Colonel Jason Gammons preferred the following charges against the Accused, SrA Gabriel Binkley: one charge and one specification of disrespect to his superior commissioned officer in violation of Article 89, UCMJ; one charge and one specification of disrespect to a noncommissioned officer in violation of Article 91, UCMJ; one charge and two specifications of false official statements, both occurring in February of 2025, in violation of Article 107, UCMJ; one charge and one specification of wrongfully violating a protective order on or about 14 February 2025 with the intent to intimidate an intimate partner in violation of Article 128b, UCMJ; and one charge and one specification of stalking on or about 14 February 2025 in violation of Article 130, UCMJ. *Department of Defense Form 458*, Attachment III. The charges were referred to a general court-martial on 5 June 2025. *Id.* The charges relating to violations of Article 89 and Article 91 of the UCMJ do not pertain to S.D. *Id.*

On 27 June 2025, defense counsel submitted a *Motion in Limine to Exclude Evidence Under Mil. R. Evid. 404(B)* that included references to S.D.'s prior sexual behaviors and predispositions; *See* Attachment II.1.3 at 7-9. On 8 July 2025, S.D.

filed a response, by counsel, to exclude the sexual material and to request a closed 39a session in which to be heard on the same. *Victims' Counsel Response to Defense Motion in Limine to Exclude Evidence Under Mil. R. Evid. 404(B)*. Attachment II.1.

During an Article 39a motions hearing on 10 July 2025, the Military Judge denied S.D.'s detailed VC the opportunity to advocate for her regarding the exclusion of evidence of her sexual predispositions and behavior. Attachment I, at 23-24, 43-45, 78-79, and 82. The Military Judge directed the VC to coordinate with counsel for the Government during a break so that trial counsel could advocate for S.D.'s Article 6b rights instead. *Id.* at 23-24 and 78-79 (The Military Judge stated, ". . .to make sure that the article 6b rights that she [S.D.] has are protected, but in a way that they are authorized to be protected, i.e., through the government and not through party of limited standing, having the opportunity to have their counsel present stuff does that. . ."). The Military Judge also denied a request for a closed hearing to discuss the admissibility of such evidence. *Id.* at pages 23, 78-79, and 83.

During the final portion of the 10 July 2025 hearing, the Government presented an oral motion, prepared by trial counsel during the lunch break, to exclude some, but not all, of the problematic evidence pertaining to S.D.'s prior sexual behaviors and disposition. *Id.* at 195-198. This oral argument was presented using vague terms referencing the problematic evidence to avoid violating S.D.'s Article 6(b) privacy rights in an open session of court. *Id.*

Immediately after the Government's oral motion, the Military Judge indicated that she would not allow a response from Defense out of concern for the

risk of violating S.D.'s Article 6b privacy rights by allowing discussion of the evidence in an open hearing. *Id.* at 198. Instead, the Judge directed the parties to discuss privately, after the conclusion of the hearing, exactly what evidence was at issue and then submit written matters addressing the same so that those matters could be sealed and put into the appellate record. *Id.* at 198-199.

After giving this instruction, the Judge asked whether the parties understood. *Id.* at 199. Defense counsel responded in the affirmative and then expressed that counsel was not going to violate the instructions just given. *Id.* Defense counsel then offered to have oral argument on the issue using "polite terms" instead of following the Judge's directive to submit written matters. *Id.* Trial counsel then asked to be allowed to respond, to which the Judge granted leave for trial counsel and defense counsel to "cross-talk", which was done on the record. *Id.* at 200.

Trial counsel then raised the issue of the risk of such an exchange on the record leading to the disclosure of the material that should be excluded, to which the defense counsel responded by asking whether he could put on the record details about a private interaction of a sexual nature that S.D. and the Accused had before they separated and which predated the charged offenses by over a year and half. *Id.* at 201. Trial counsel again raised the concern that allowing further discussion would risk violating S.D.'s privacy. *Id.* The Judge then reiterated that there would be no further argument, "…because what I don't want to do is stumble into something that should have been closed or something that should have been

sealed." *Id.*

Defense counsel responded by expressing his frustration that the "404(b) stuff" was already discussed in open court and that he wanted to argue that the materials found in the Accused's possession at the time he was caught violating the military protection order (i.e. the boxes of sex toys) were new and unopened and that extrapolations could be drawn from that fact. *Id.* at 201-202. The Judge, instead of reprimanding the Defense for violating the directive she had given twice not to make argument on the issue, then turned to trial counsel and asked whether there was any objection to the nature of the items being disclosed. Trial counsel answered in the negative but then explained that the "extrapolations" Defense wanted to talk about would inevitably drift into disclosure of "invasive personal details about the relationship" that would be too far removed from the elements of the charged offenses and would be prejudicial to S.D.'s rights. *Id.* at 202-203.

At that time Defense proceeded to do exactly what the Judge had twice directed him not to do, and disclosed, in open court, the exact evidence that the Government's motion to exclude was intended to exclude. Defense's argument disclosed the content of private communications within the marriage regarding each spouse's sexual preferences that went far beyond what could have possibly been extrapolated from the simple existence of boxes of unopened sex toys in the Accused's car at the time he violated the protection order. *Id.* at 203-204.

On 23 July 2025, S.D.'s detailed victims' counsel submitted a motion for appropriate relief under M.R.E. 412 arguing an alternative avenue for S.D.'s

standing to defend her Article 6b, UCMJ, rights before the trial court. Attachment II. The Military Judge then allowed argument on the issues presented via email. Attachment IV. On 6 August, the Military Judge ruled that M.R.E. 412 does not apply to violations of Article 130, UCMJ, concluding that the inclusively broad phrase "any sexual misconduct" invoked by M.R.E. 412 somehow fails to include "sex-related offenses".

SUMMARY OF ARGUMENT

A writ should issue vacating the Military Judge's ruling that M.R.E. 412 does not apply in cases with an alleged violation of Article 130, UCMJ, because under the plain language of M.R.E. 412, "any sexual misconduct punishable under the [UCMJ], federal law, or state law" means exactly what it says. By employing the determiner "any" in the phrase "any sexual misconduct", the President plainly established M.R.E. 412 to apply to an unlimited scope of criminal misconduct qualified only by the word "sexual". S.D. must, therefore, be afforded protections under M.R.E. 412 because a violation of Article 130, UCMJ, is defined both by 10 U.S.C. § 1044e and RCM 306A(d)(1) as a "sex-related offense", and because M.R.E. 412(c)(2) specifically cites to 10 U.S.C. § 1044e in discussing victims' standing to be heard under M.R.E. 412.

A writ should issue directing the Military Judge to honor S.D.'s standing to argue and advocate, including through her detailed victims' counsel, for her own privacy rights at the court-martial, because the plain language of § 1044e(b) of Title 10, U.S.C. authorizes it, Article 6b(a) requires it, and because a crime victim's prior

sexual behavior and predisposition is exactly the kind of evidence that, when inappropriately disclosed, is likely to result in unnecessary damage to the victim's dignity and privacy protected by Article 6b(a)(9), UCMJ and allow an accused to exploit the criminal proceedings to the degradation and embarrassment of his victim, violating S.D.'s right to be protected from the accused under Article 6b(a)(1).

Furthermore, Article 6b(e)(1) and (4) provide a victim the ability to petition the Court of Criminal Appeals for a writ to direct a court-marital to remedy violations of privacy rights under Article 6b if a victim believes that a ruling violated those rights. Article 6b(e)(1). As a matter of logic, justice, and judicial economy, Article 6b(e)(1) and (4) necessarily require, *ab initio*, both that a victim's Article 6b rights existed at the time of the initial court-martial proceeding and that the victim was, at that moment, also vested with the standing to petition the lower court for protection of those rights.

Additionally, a writ should issue directing the Military Judge to hold a closed hearing to consider arguments and evidence subject to challenge under Article 6b(a)(9), consistent with the provisions of R.C.M. 806(b)(4), to avoid further inappropriate disclosures of prejudicial and embarrassing information on the public record.

ARGUMENT

I.

THE MILITARY JUDGE ERRED IN RULING THAT M.R.E. 412 DOES NOT APPLY IN CASES INVOLVING ALLEGED SEX-RELATED OFFENSES.

Under the plain language of M.R.E. 412, "any sexual misconduct punishable under the [UCMJ], federal law, or state law" must necessarily apply to criminal offenses that are defined as sex-related. By employing the determiner "any" in the phrase "any sexual misconduct", the President plainly established an unlimited scope of criminal misconduct qualified only by the word "sexual". The common usage of the word "sexual", by definition, includes that which is sex-related.

As the term "sexual" is not defined in M.R.E. 412, the analysis turns to the term's common usage. Merriam-Webster[2] defines "sexual" as

1: of, relating to, or associated with sex or the sexes

2: having or involving sex

Therefore, by employing the word "sexual," as it is commonly used, the President expressly included any misconduct that is "sex-related" or in other words, "relating to" sex.

Congress could have limited the scope of "sexual misconduct" to consist only of enumerated offenses, such as the approach in 10 U.S.C. § 1044e and in RCM 306A(d)(1). M.R.E. 413 also enumerates a list of qualifying "sexual offenses". Using

[2] https://www.merriam-webster.com/dictionary/sexual

the plain and more expansive language of "any sexual misconduct," without a corresponding list of qualifying offenses, however, Congress clearly provided for M.R.E. 412 to include a broader scope of misconduct than the terms "sex-related offense" used in 10 U.S.C. § 1044e and RCM 306A(d)(1) and the term "sexual offense" used by M.R.E. 413.

A violation of Article 130, UCMJ, is defined both by 10 U.S.C. § 1044e and RCM 306A(d)(1) as a "sex-related offense". Article 130, UCMJ, clearly establishes that violations of that Article are punishable by court-martial. By virtue of the plain language of M.R.E. 412, then, violations of Article 130 are categorically within the scope of "**any** sexual misconduct punishable under the [UCMJ], federal law, or state law" (emphasis added).

Furthermore, as the Government noted, M.R.E. 412(c)(2) specifically cites to 10 USC 1044e as the authority for victims to be heard by victims' counsel in cases involving "any sexual misconduct". Such a direct reference to the authority of 10 USC 1044e, which defines violations under 130 as a "sex-related offense", should not be dismissed as coincidental. 10 USC 1044e, in turn, establishes the obligation for victims' counsel to represent their clients in any proceeding connected with the prosecution of a "sex-related offense," including alleged violations of Article 130.

Because M.R.E. 412 does not enumerate a list of specific offenses that qualify as "any sexual misconduct," and because it does not exclude any misconduct that could be categorized as sexual, and because Congress and the President have explicitly categorized all violations of Article 130 as "sex-related offenses," the plain

language of M.R.E. 412 categorically applies to any violation of Article 130.

Therefore, a writ should issue vacating the Military Judge's order that M.R.E. 412 does not apply in this case.

II.

THE MILITARY JUDGE ERRED IN DENYING S.D. THE OPPORTUNITY TO DEFEND HER OWN ARTICLE 6B RIGHTS THROUGH HER DETAILED VICTIMS' COUNSEL.

a. The plain language of Section 1044e(b) of Title 10, U.S.C. authorizes a crime victim to be represented by detailed Victims' Counsel at any proceeding in connection with the prosecution of a stalking offense under 130, UCMJ.

Congress specifically designated legal counsel to serve the purpose of providing legal assistance to victims of sex-related offenses. 10 U.S.C. § 1044e. The National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA), Section 548, further expanded the scope of the Victims' Counsel program, by mandating that the Secretary of Defense carry out a program to provide legal counsel to victims of alleged domestic violence.

In conformance with the applicable statutes, Department of Defense Instruction 1030.04 (DoDI 1030.04) establishes policies and provides guiding principles for the military services' Victims' Counsel programs. DoDI 1030.04 states that "(Victims' Counsel) will provide representation, legal consultation, and assistance to their clients pursuant to Section 1044e(b) of Title 10, U.S.C., subject to the rules of professional conduct governing the practice of law." Under 10 U.S.C. §

1044e(b)(6), Victims' Counsel are expressly authorized to "represent[] the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense." This includes alleged violations of Article 130, UCMJ under subsection (h) of 10 U.S.C. § 1044e.

The term "represent" in 10 U.S.C. § 1044e(b) of Title 10, U.S.C., within the context of an attorney whose clients' rights are threatened by litigation, must be interpreted as being distinct from providing legal consultation. This is because under 10 U.S.C. § 1044e(b)(8) victims are already granted the opportunity to have Victims' Counsel attend any military justice proceeding that the victim can attend and to have legal consultation and assistance connected with the same.

Therefore, if "represent" in 10 U.S.C. § 1044e(b)(6) merely means the ability to attend a proceeding and consult with clients in the gallery, with no opportunity to meaningfully advocate for the protection of victims' rights before a military judge, then the term is surplusage and of no consequence. The canon of statutory interpretation that militates against surplusage thus requires that a Victims' Counsel be allowed to actually represent their clients' interests through advocacy at bar in all proceedings involving sex-related offenses to the extent that those interests are at issue.

Additionally, because the term "represent" is not otherwise defined and is unambiguous, it must be given its ordinary meaning in the context of military criminal litigation as clearly expressed under 10 U.S.C. § 1044e(b)(6). Any other interpretation of 10 U.S.C. § 1044e(b)(6) beyond the plain statutory language

allowing Victims' Counsel to represent their client's interests at criminal proceedings through trial advocacy violates the canon of statutory interpretation establishing the supremacy of statutory text as well as the ordinary meaning canon. Additionally, any other interpretation of victims' counsel representation under 10 U.S.C. § 1044e(b) wrongly produces the absurd result of establishing rights for victims under 10 U.S.C. § Article 6b that they are powerless to defend.

Moreover, 10 U.S.C. § 1044e originally stated legal assistance was for victims' counsel "***accompanying*** the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense." *National Defense Authorization Act for Fiscal Year 2014,* 113 P.L. 66, § 1716(a)(1)(b)(6) (2013). Then in the National Defense Authorization Act for Fiscal Year 2015, in a section titled "Enhancement of victims' rights in connection with prosecution of certain sex-related offenses," Congress modified 1044e(b)(6) by changing the word "accompanying" to "representing". *National Defense Authorization Act for Fiscal Year 2015*, 113 P.L. 291, § 534 (2014). ("(a) Representation by Special Victims' Counsel.— Section 10 USCS § 1044e(b)(6) of title 10, United States Code, is amended by striking 'Accompanying the victim' and inserting 'Representing the victim'.…").

Article 130 is a sex-related offense as stated in statute at 10 U.S.C. § 1044e(h) requiring detailing of a victim's counsel. S.D. is an active-duty servicemember eligible for legal assistance under 10 U.S.C. § 1044.

b. The plain language of Article 6b, UCMJ, establishes a set of victims' rights

that are rendered invalid without the ability to personally defend them.

When a right is established by law, there is also a legally justiciable interest established. *See generally Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Standing to pursue a judicial remedy for a violation of one's right is *sine qua non* to the very existence of a legal right and cannot be alienated from it. *See Id.* In other words, there can be no such thing as a legal right if the holder of the right, or their legal representative, has no ability to petition a court of law to remedy the right's violation.

It is unclear what is meant by "standing" in the context of the Military Judge's denial of S.D.'s opportunity to advocate for her legal rights, as the notion of Article III standing—Constitutional standing—as a necessity to ensure separation of powers is inapplicable to military justice as courts-martial are Article I tribunals where a case and controversy arises when statutory provisions allow; however, S.D. acknowledges C.A.A.F.'s declaration that "[C.A.A.F.] follows the principles of standing that apply to Article III courts." *B.M. v. United States*, 84 M.J. 314, 317 (C.A.A.F. 2024) (internal citation omitted). C.A.A.F. goes on to state in *B.M.*, "[i]n accordance with these principles, this Court [C.A.A.F.] only addresses claims raised by parties who can show an injury in fact, causation, and redressability." *Id.* (internal citations and quotations omitted). C.A.A.F. acknowledged in *B.M.* that B.M. had a statutory right to proceedings free from unreasonable delay, but she could not challenge an abatement order because she did not have a "a judicially cognizable interest in the ultimate question of whether the government will or will

not prosecute the accused." *Id.* at 319 (internal quotations omitted). S.D. is not seeking to effectuate the prosecution but to assert and defend her statutory rights before the court-martial that could afford and defend those very same rights.

In 2004, the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, was passed, permitting victims in federal court to seek enforcement of their rights. Article 6b, UCMJ, which was based upon the CVRA and was enacted to extend victims' rights to victims of offenses under the UCMJ, provides certain rights to victims, including the right to be protected from the accused (Article 6b, UCMJ(a)(1)) and the right to be treated with fairness and with respect for their dignity and privacy (Article 6b, UCMJ(a)(9)). To establish standing for judicial remedy of an injury to one's rights, the Supreme Court in *Lujan* has stated that,

> the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, [citations omitted]; and (b) 'actual or imminent, not 'conjectural' or 'hypothetical,' [citation omitted]. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not . . . the result [of[the independent action of some third part not before the court. [Citation omitted]. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [Citation omitted]. "

Id. The *Lujan* Court further articulated that the injury element can be established solely by the invasion of a right created by statute. *Id.* at 578, 2145. C.A.A.F. adopted this language and standard in *B.M.*. *See B.M. supra.*

In this case, S.D. is an individual described in Article 6b, UCMJ and therefore has a right to be reasonably protected from the accused and a right to be

treated with fairness and respect for her dignity and privacy. The violation of these rights is an injury in fact that is concrete and particularized in the form of public disclosure of embarrassing and degrading information pertaining to her alleged sexual behavior and predispositions. The harm can also fairly be described as S.D. not being allowed to defend herself through detailed counsel when her rights were under attack, which is an abrogation of her statutory right to counsel under 10 U.S.C. § 1044e.

The harm extended to an incomplete and conflicted representation of S.D.'s rights by the Government, at the Military Judge's direction, which in turn contributed to much of the degrading information at issue being disclosed in open court during the 10 July 2025 hearing, as documented by Attachment I (*see* pages 190-197) and Attachment II.

The second element of standing under *Lujan* is a causal connection between the injury and the conduct complained of. In this case, the conduct being complained of initially includes disclosures by the Defense and Government of information protected by S.D.'s privacy rights in open court. The other conduct at issue includes the Military Judge's denial of standing and S.D.'s request to discuss the problematic evidence in a closed session.

Thus, the Military Judge's denial of S.D.'s standing was harmful in violation S.D.'s inherent right to defend herself in court, and it directly led to an incomplete and conflicted representation of her rights at the 10 July 2025 hearing. This deprivation then directly led to the harm of being embarrassed and degraded by the

public disclosure of S.D.'s alleged sexual predisposition and behaviors.

The third element is that a favorable court decision will likely redress the injury. While many of the offensive disclosures have already been made on the record at the 10 July 2025 hearing, the Military Judge retains the ability to seal the parts of the record in which privacy materials were disclosed and to hold a closed hearing in which S.D.'s detailed victims' counsel may fully represent her interests to advocate against further improper disclosures at trial. Thus, proper advocacy may still happen during a closed hearing to avoid the kind of disclosure the Military Judge sought to avoid when she unsuccessfully directed the parties not to discuss on the record the facts underlying the Government's oral Motion to Exclude during the 10 July hearing. Attachment I, at 190-197. Therefore, S.D.'s harm is concrete, particularized, and will foreseeably continue to be imposed at trial without judicial intervention.

Standing is a constitutional principle that cannot be reduced further than the three elements articulated in *Lujan*. Accordingly, any interpretation of Article 6b, UCMJ that seeks to invalidate a crime victim's standing for the absence of statutory language granting the right to be heard must be disregarded as unconstitutional.

c. Denial of an opportunity to object and to have detailed victim's counsel advocate for client's Article 6b rights renders those rights meaningless in contravention of Congressional intent.

The Air Force Court of Criminal Appeals has ruled that victims do not have a statutory right to be heard under Article 6b, UCMJ other than under Article 6b,

UCMJ(a)(4); however, "…absence of a specific statutory right to be heard does not mean that a military judge is *prohibited* from considering a victim's effort to exercise Article 6b, UCMJ, rights." *In re VM*, No. 2023-04, 2023 CCA LEXIS 290, at *7 (A.F. Ct. Crim. App. July 11, 2023) (unpublished). This holding is paradoxically incorrect and correct at the same time and logically untenable.

In *VM*, the victim filed an objection to the accused's motion for a continuance, but the trial judge declined to consider it for lack of standing. The *VM* court indicated that the military judge erred in concluding that he was prohibited from considering a victim's effort to exercise her Article 6(b), UCMJ, rights—even though it agreed with the military judge that she lacked standing under Article 6b, UCMJ. One must wonder what the exercise of a legal right looks like without standing to present facts and argument before a court-martial, and perhaps just as puzzling is discerning how a military judge is to consider such an exercise absent standing?

The *VM* Court apparently viewed the grant of an opportunity to be heard under Article 6b(a)(4) at certain types of hearings as indicative that those were the *only* times a crime victim could be heard. This is supposedly because all the other rights under Article 6b failed to similarly use the words "right to reasonably be heard". In other words, the argument appears to conclude that Congress' intent was to provide crime victims with a house with nine rooms but only gave them the key to open one of them. This interpretation is contrary to the plain language and clear intent of Article 6b(a), UCMJ.

The plain language of Article 6b(a)(4), UCMJ, uniquely gives crime victims

forum-specific rights to be reasonably heard in specific types of proceedings without regard to what issues may arise. The plain language of the other Article 6b, UCMJ(a) provisions under subparagraphs (1)-(3), and (5)-(9), UCMJ, however, establishes substantive and procedural rights—regardless of the forum or type of proceeding in which related issues may arise. In other words, the distinctive nature of the forum right in Article 6b(a)(4) is fundamentally different than that of the other rights under Article 6b(a) and uniquely requires language pertaining to a right to be heard as part of the definition of the right granted.

The plain language of Article 6b(a)(4) conveys that the right consists of two constituent parts: 1. A victim has an inherent right to be reasonably heard, 2. at any of the following: a public pretrial confinement hearing, a sentencing hearing, or a public proceeding on clemency and parole board. Unlike the other rights under Article 6b, UCMJ(a), without the "right to be heard" language, there exists no right at all under 6b(a)(4). Thus, the inclusion of the right to be heard could not be surplusage as employed in this provision, regardless of whether it is employed elsewhere. Additionally, there is no text within Article 6b(a)(4) that operates to restrict or limit a victim's right to be heard in any other context. It simply provides the "indefeasible" right to be heard in those three specific forums. *See Kenna v. United States Dist. Court*, 435 F.3d 1011, 1016-17 (9th Cir. 2006) (Describing victims' right to be heard at sentencing under the C.V.R.A., the 9th Circuit found "[v]ictims now have an indefeasible right to speak. . . ").

The rights granted to victims under Article 6(a)(1)-(3), and (5)-(9), UCMJ, on

the other hand, are tied to specific substantive and procedural rights that could arise at any point during an investigation or prosecution under the UCMJ. Unlike Article 6b(a)(4), the rights under subsections (1)-(3) and (5)-(9) are complete rights as written—without the necessity of referring to a victim's right to be heard. By classifying these provisions as "rights," the statute inherently established a justiciable harm when any such right is violated. *See Lujan,* 504 U.S. 555, 560-61. Accordingly, adding the "right to be reasonably heard" language, though essential for 6b(a)(4), would be superfluous language if added to subsections (1)-(3) or (5)-(9).

For example, under Article 6b(a)(2), UCMJ, a victim has a right to timely notice regarding specific litigation events throughout the course of a court-martial. For the sake of this argument, consider that there are two options for interpreting the provision. The first interpretation requires surplusage language granting a right to be reasonably heard before a victim could directly petition a trial court for relief from violations. Under this analysis, if the Government were not providing adequate notice, the illogical reasoning requires the victim to ask the offending agents of the Government, if they please, to advocate on the victim's behalf to seek the trial court's intervention—contrary to the interests of the Government.

Alternatively, though not much less absurd, the victim could petition the Air Force Court of Criminal Appeals to force the trial court to act on behalf of the victim—even though the issue had never even been raised at the trial court level. And then with the onerous standard of review argue for a finding that the Military Judge somehow clearly and indisputably erred without a record. *See generally*

H.V.Z. supra. This would lead to an unnecessary multiplicity of writs and an upending of the entire judicial economy, where victims are forced to start with the Appellate Court for relief that ultimately lies with the trial court in the first place.

The alternative interpretation of Article 6b, UCMJ, on the other hand, acknowledges that clearly defined substantive and procedural rights do not require the same "right to be reasonably heard" language as do forum rights. Under this analysis, the interpretive canon disfavoring surplusage is brought to square with the plain language of Article 6b(a), UCMJ, the constitutional principles of standing, and the clear intent of Congress to allow crime victims the ability to personally challenge all Article 6b rights violations at the trial court level.

It may be contended that in some situations a victim's Article 6b, UCMJ, rights are protected "well enough" by trial counsel. However, "Congress determined that military victims, as defined, should be afforded a right to counsel different from others within the military justice system, at every proceeding." *United States v. Deremer supra* 553); TJAG certificate filed *United States v. Deremer*, No. 25-0158/MC, 2025 CAAF LEXIS 350 (C.A.A.F. May 5, 2025). Victims' counsel "represent" the victim's interests instead of the government's. *See* 10 U.S.C. § 1044e(c) ("The relationship between a Special Victims' Counsel and a victim in the provision of legal advice and assistance shall be the relationship between an attorney and client."). "Although the interests of victims and the Government often align, we note that this is not always the case." *United States v. Harrington*, 83 M.J. 408, 419 (C.A.A.F. 2023).

d. Detailed victim's counsel must represent S.D.

S.D. likewise has a Victims' Counsel who has been specifically designated by statute to act as her legal counsel. However, at the 10 July 2025 Article 39(a) session, the Military Judge did not allow S.D.'s Victims' Counsel the opportunity to advocate for her privacy rights, and instead improperly directed the Victims' Counsel to coordinate with trial counsel for the Government during a break, so that trial counsel could instead advocate for S.D.'s rights. Attachment I at 23-24, 43-45, 78-79, and 82.

This decision by the Military Judge to detail the Government to represent S.D.'s Article 6b rights cuts against C.A.A.F.'s ruling in *Harrington*, and improperly places S.D.'s rights in the hands of government counsel, who have no attorney-client relationship with her or duty to act in her interests, and who, in this case, actually have a conflict of interest in supporting the admission of evidence suggesting that S.D. may have been unfaithful to the Accused over S.D.'s objection. *See* Attachment I, at 190.

Accordingly, by denying S.D.'s Victims' Counsel the ability to object or be heard regarding violations of S.D.'s rights under Article 6b, UCMJ, the Military Judge directly undermined both S.D.'s rights and the Victims' Counsel program as set forth in federal statute and military service regulations. **Ironically, the Military Judge suggesting Government counsel should advocate for S.D.'s rights is a concession of S.D.'s legal interests – standing – in this matter**.

Regardless of the Military Judge's ultimate ruling on the admissibility of the

evidence in dispute, S.D. was entitled to meaningful advocacy from her statutorily designated counsel when her Article 6b, UCMJ rights were violated by the parties and the Military Judge. Here, the actions of the Military Judge effectively ignored the intent of Congress, the Department of Defense, and the Department of the Air Force, which specifically designated counsel to support and represent victims such as S.D. To deny a Victims' Counsel the ability to advocate for their client at a court-martial regarding an issue directly implicating the client's rights not only violates those rights, but reimagines the role of Victims' Counsel as passive advisors instead of statutorily authorized legal representatives.

III.

THE MILITARY JUDGE VIOLATED S.D.'S ARTICLE 6B, UCMJ, PRIVACY RIGHTS IN FAILING TO GRANT A CLOSED HEARING UNDER RCM 806(B)4) AS THE MATERIAL AT ISSUE CONSTITUTES THE SAME TYPE OF EVIDENCE PROTECTED UNDER M.R.E. 412

The language of M.R.E. 412 provides for a process by which military courts can determine if other sexual behavior or predisposition evidence of a victim of any sexual misconduct should be admitted or excluded from the record. This includes the requirement of a closed hearing so that such private information can be discussed with candor and without the risk of violating a crime victim's Article 6b, UCMJ, rights while in the process of determining whether or not they warrant protection.

RCM 806(b)(4) provides that,

> Courts-martial shall be open to the public unless (A) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (B) closure is no broader than necessary to protect the overriding interest; (C) reasonable alternatives to closure were considered and found inadequate; and (D) the military judge makes case-specific findings on the record justifying closure.
>
> *Discussion* The military judge must ensure that the dignity and decorum of the proceedings are maintained and that the other rights and interests of the parties and society are protected. Public access to a session may be limited, specific persons may be excluded from the courtroom, and, under unusual circumstances, a session may be closed.

During the 10 July 2025 motions hearing, the Military Judge denied a request for a closed hearing to discuss the admissibility of other sexual behavior and sexual predisposition evidence pertaining to S.D. Attachment I, at 23-24, 78-82. The Military Judge initially dismissed out of hand the notion that the evidence in question could merit a closed hearing. *Id.* After the Government's oral motion to exclude the evidence, using abundantly vague terms, the Military Judge changed course and called for submission of written materials to avoid inadvertent disclosure of improper evidence on the record. *Id.* at 190-197. The Military Judge then acquiesced to oral argument anyway, and part of the material sought to be excluded was mentioned on the record. *Id.*

For the same reason M.R.E. 412 provides for a closed hearing when discussing a victim's other sexual behavior and predispositions, S.D. has a compelling privacy interest that will be prejudiced by discussing this information on the record. Closing the proceedings for a discussion limited to the admissibility of such evidence is no broader than necessary to protect that interest. There are no reasonable alternatives to requiring closure of the proceedings when this evidence

arises during proceedings, because Defense counsel has violated the Military Judge's instructions on the record to avoid discussing that evidence. Notwithstanding the Military Judge's ability to call for written materials addressing the admissibility of the private material, it is anticipated that additional disclosures are likely to happen on the record at trial. When this occurs, a closed hearing will be required to address proper limits and boundaries to the disclosure of such prejudicial evidence.

Addressing the final element of RCM 806(b)(4), the Military Judge can cite to the case-specific considerations above on the record to support closure. The circumstances of this case, taken together, constitute an abundantly sufficient basis to close the proceedings whenever a discussion is needed about evidence that clearly implicates S.D.'s privacy rights under Article 6b, UCMJ.

Furthermore, there is no prejudice to the Accused in providing a closed hearing for the limited purpose of addressing evidence that may violate a victim's privacy rights. This is because the result is the same. Whether the Military Judge rules the evidence admissible or inadmissible at trial, the Accused will still have the same opportunity to present argument and be heard. The proceeding will still be recorded, and the recording can be obtained and used as the basis for appellate actions. Whether or not members of the public are able to hear about a crime victim's sexual behavior or predispositions during an evidentiary hearing will ultimately have no impact on the verdict or sentence at trial.

CONCLUSION

The Military Judge clearly and indisputably erred in failing to apply M.R.E. 412 in this case and in denying S.D. standing to defend herself against the violations of her Article 6b, UCMJ rights to protection from the Accused and her right to privacy and dignity. The Military Judge also clearly and indisputably erred in failing to grant a closed session in which to address a violation of her privacy rights.

RELIEF SOUGHT

Wherefore, S.D. respectfully requests that this Honorable Court vacate the trial court's ruling that M.R.E. 412 does not apply in this case and that S.D. lacks standing to be heard in matters impacting her Article 6b, UCMJ, rights. S.D. also requests that this Court direct the trial court to hold a closed hearing to allow S.D. to be heard in a manner which is consistent with her privacy rights in accordance with RCM 806(b)(4). S.D. is further requesting, pursuant to S.D.'s Article 6b, UCMJ, privacy right, that the trial court be directed to seal all records containing evidence of her alleged sexual behaviors and predispositions, and that this Honorable Court likewise seal the attachments to this filing as well.

RESPECTFULLY SUBMITTED this 21st day of August, 2025.

[redacted]
4, DAF CIVILIAN
Chief, Appellate and Outreach, Victims' Counsel
Military Justice and Discipline Directorate
Department of the Air Force
[redacted]

/s/ *David J. Brown*
DAVID J. BROWN, Capt, USAF
Counsel for S.D.
Victims' Counsel
Military Justice and Discipline Directorate
Department of the Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that on 15th day of August, the foregoing was electronically filed with the Court and served on the following addresses:

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DEVON A. R. WELLS, GS-14, DAF CIVILIAN
Chief, Appellate and Outreach, Victims' Counsel
Military Justice and Discipline Directorate
Department of the Air Force

[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re SD	)	**Misc. Dkt. No. 2025-09**
Petitioner	)	
	)	
	)	
	)	
	)	**NOTICE OF**
Gabriel A. BINKLEY	)	**DOCKETING**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Real Party in Interest	)	

On 21 August 2025, the court received a petition for extraordinary relief under Article 6b, UCMJ, 10 U.S.C. § 806b, captioned as a "Petition for Extraordinary Relief in the nature of a Writ of Mandamus" in the above-styled case.*

Accordingly, it is by the court on this 22d day of August, 2025,

ORDERED:

The petition is assigned Misc. Dkt. No. 2025-09 and referred to Panel 2.

No briefs in response to this petition will be filed unless ordered by the court. *See* JT. CT. CRIM. APP. R. 19(g).

FOR THE COURT

[redacted]

JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner

* The Petitioner did not request a stay of the proceedings. *See* JT. CT. CRIM. APP. R. 19(b)(2)(F).

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re SD	)	**Misc. Dkt. No. 2025-09**
Petitioner	)	
	)	
	)	
	)	
	)	**ORDER**
Gabriel A. BINKLEY	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Real Party in Interest	)	**Panel 2**

A petition for extraordinary relief in the nature of a writ of mandamus under Article 6b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b, in the above-styled case was docketed with this court on 21 August 2025. The petition pertains to the pending court-martial of *United States v. Senior Airman Gabriel A. Binkley*, currently scheduled to reconvene on 15 September 2025, at Shaw Air Force Base, South Carolina. Petitioner, the alleged victim in this case, asks this court to vacate the military judge's ruling which held violations of Article 130, UCMJ, 10 U.S.C. § 930, do not constitute sexual misconduct, and the military judge's decision to deny Petitioner's detailed victims' counsel the opportunity to advocate for her privacy rights under Article 6b(9), UCMJ, and the military judge's decision denying Petitioner's request for a closed hearing.

Accordingly, it is by the court on this 27th day of August, 2025,

ORDERED:

The United States and the Real Party in Interest shall file an answer to the petition not later than **12 September 2025**. The United States and the Real Party in Interest shall include in their briefs an answer to the following question: Is the charged Article 130, UCMJ, offense a "sexual offense" for purposes of applying Mil. R. Evid. 412 under the circumstances of this case?

Petitioner may then file a reply within seven days of 12 September 2025, or seven days from the date of the last answer filed should both answers be filed before 12 September 2025.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re SD,	)	**NOTICE OF APPEARANCE**
Petitioner	)	
	)	Before Panel 2
Senior Airman (E-4)	)	
Gabriel A. Binkley,	)	Misc. Dkt. No. 2025-09
United States Air Force,	)	
Real Party in Interest	)	28 August 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 12(a) of the Joint Rules of Appellate Practice for Courts of Criminal Appeals, the undersigned enter their appearance as counsel for Senior Airman Gabriel A. Binkley, United States Air Force, the real party in interest.

Respectfully submitted,

[redacted]
Dwight H. Sullivan
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

[redacted]
P
Air Force Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division and counsel for SD on 28 August 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re SD *Petitioner* **United States** *Real Party in Interest A* **SrA GABRIEL A. BINKLEY** 77 FGS (ACC) Shaw AFB, South Carolina *Real Party in Interest B*	**MOTION FOR LEVE TO SUPPLEMENT PETITION FOR EXTRAORDINARY RELIEF** *in the nature of a* **WRIT OF MANDAMUS** Misc. Dkt. No. 2025-XX

COMES NOW S.D. by and through her undersigned Victims' Counsel (VC), pursuant to Air Force Court of Criminal Appeals Rule of Practice and Procedure 23, motioning for leave to supplement her Petition for Extraordinary Relief with the following to be inserted at the end of the first paragraph:

"S.D. does not request of stay of proceedings at this time."

RESPECTFULLY SUBMITTED this 21st day of August, 2025.

[redacted]

DEVON A. R. WELLS, GS-14, DAF CIVILIAN
Chief, Appellate and Outreach, Victims' Counsel
Military Justice and Discipline Directorate
Department of the Air Force
[redacted]

/s/ *David J. Brown*
DAVID J. BROWN, Capt, USAF
Counsel for S.D.
Victims' Counsel
Military Justice and Discipline Directorate
Department of the Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that on 15th day of August, the foregoing was electronically filed with the Court and served on the following addresses:

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Chief, Appellate and Outreach, Victims' Counsel
Military Justice and Discipline Directorate
Department of the Air Force

[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re SD,	)	**REAL PARTY IN INTEREST'S**
	)	**ANSWER TO PETITION FOR**
	)	**EXTRAORDINARY RELIEF IN THE**
Petitioner,	)	**NATURE OF A WRIT OF MANDAMUS**
	)	
	)	
	)	Before Panel 2
Senior Airman (E-4)	)	
Gabriel A. BINKLEY,	)	Misc. Dkt. No. 2025-09
United States Air Force,	)	
Real Party in Interest.	)	12 September 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Real Party in Interest Senior Airman (SrA) Gabriel A. Binkley, United States Air Force, by and through his undersigned counsel, files this answer to the petition for extraordinary relief in the nature of a writ of mandamus in accordance with this Court's order of 27 August 2025.

Decisional Issues

I.

Is mandamus relief available where a new trial judge has been detailed to the case and Petitioner has not sought reconsideration of the previous judge's ruling?

II.

Did the military judge clearly and indisputably err by concluding that stalking is not a "sexual offense" for purposes of applying Military Rule of Evidence 412 in this case?

III.

Is mandamus relief available to order the military judge to hold a closed hearing to allow Petitioner to be heard concerning her purported privacy rights in derogation of: (1) the accused's Sixth Amendment right to a public trial; (2) the public's First Amendment right to attend criminal trials; and (3) Rule for Courts-Martial 806's command that, except as otherwise provided by that rule, "courts-martial shall be open to the public"?

IV.

Is mandamus relief available to compel the military judge to seal certain portions of the record in derogation of the public's First Amendment right to access judicial records?

Jurisdiction

Petitioner mistakenly cites the All Writs Act, 28 U.S.C. § 1651, as a source of jurisdiction. Pet. at 2. It is not.

Petitioner argues that in addition to having jurisdiction under Article 6b(e), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b(e), this Court "has jurisdiction to issue a writ of mandamus pursuant to the All Writs Act codified in 28 U.S.C. § 1651, because S.D. has a legal right to her privacy and has no other reasonable means to protect that right from violation by the Military Judge." Pet. at 2. As the Court of Appeals for the Armed Forces has repeatedly emphasized, "[T]he All Writs Act is not an independent grant of jurisdiction, nor does it expand a court's existing statutory jurisdiction." *M.W. v. United States*, 83 M.J. 361, 367 (C.A.A.F. 2023) (quoting *Randolph v. HV*, 76 M.J. 27, 31 (C.A.A.F. 2017) (quoting *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013))). *See also Clinton v. Goldsmith*, 526 U.S. 529, 534–35 (1999) ("[T]he express terms of the [All Writs] Act confine the power of the CAAF to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction."). Thus, contrary to Petitioner's claim, this Court's extraordinary relief jurisdiction for purposes of this petition is limited to that established by Article 6b(e), UCMJ, 10 U.S.C. § 806b(e).

Statement of the Case

SrA Binkley is charged with one specification of violating Article 89, UCMJ, 10 U.S.C. § 889; one specification of violating Article 91, UCMJ, 10 U.S.C. § 891; two specifications of violating Article 107, UCMJ, 10 U.S.C. § 907; one specification of violating Article 128b, UCMJ, 10 U.S.C. § 928b; and one specification of violating Article 130, UCMJ, 10 U.S.C. § 930. Charge Sheet (PDF 286, 288).[1] A special trial counsel referred the charges and specifications to a general court-martial on 5 June 2025. *Id.*, Block V (PDF 287).

Defense counsel moved in limine to exclude evidence under Military Rule of Evidence (MRE) 404(b) on 27 June 2024. Defense Motion in Limine to Exclude Evidence under Mil. R. Evid. 404(b), June 27, 2025 (PDF 275). Petitioner's counsel replied to that motion on 8 July 2025, asking the military judge to exclude evidence under MREs 401, 403, and 608—but not MRE 412. Victims' Counsel Response to Defense Motion in Limine to Exclude Evidence under Mil. R. Evid. 404(b), 8 July 2025 (PDF 244). The military judge held three Article 39(a) sessions on 10 July 2025. Unofficial Trial Tr. at PDF 34–113, PDF 113–160, PDF 161–237. The military judge arraigned SrA Binkley during that day's proceedings. *Id.* at PDF 54, 231. The military judge also heard argument on motions.

On 23 July 2025, Petitioner's counsel filed a motion for appropriate relief under MRE 412. Victims' Counsel Motion for Appropriate Relief Military Rules [sic] of Evidence 412, July

[1] The attachments to the petition are not Bates stamped or otherwise sequentially numbered. To help identify the particular page that is being cited, when citing the petition's attachments, this answer provides the page number of the 338-page PDF on which the document appears. *See also infra* note 4. The charge sheet appears on pages 286–88 of 338 in the PDF that includes the petition and attachments thereto. That PDF violates Rule 17.2(c) of this Court's Rules by including many third parties' names, as well as Petitioner's name. For example, Petitioner's name appears unredacted in attachments to the petition forty-eight times. Pet. at PDF 259 (seven times), 260 (four times), 266 (once), 267 (thirteen times), 268 (seven times), 269 (fourteen times), 272 (two times).

23, 2025 (PDF 239). Petitioner did not ask the military judge to exclude evidence; rather, the motion requested only that the military judge "issue a ruling that MRE 412 applies in this case and that therefore S.D. has standing to oppose the publication and admissibility of evidence of her prior sexual behavior and predisposition, and that the procedural requirements under MRE 412, including notice, must be followed." *Id.* at 3 (PDF 241).

On 30 July 2025, Petitioner submitted a petition for extraordinary relief to this Court. *In re SD*, Misc. Dkt. No. 2025-07, 2025 CCA LEXIS 369, at *1 (A.F. Ct. Crim. App. Aug. 5, 2025) (order). This Court denied that petition without prejudice, noting that Petitioner had failed to exhaust her avenue for relief from the trial court because "Petitioner's motion for relief with regard to excluding evidence of her alleged prior sexual behavior and predispositions pursuant to Mil. R. Evid. 412 remains pending before the military judge." *Id.* at *6.

On 6 August 2025, the military judge issued a written ruling denying the "Motion for Appropriate Relief Military Rules of Evidence 412" filed by Petitioner's counsel. RULING: Victims' Counsel Motion for Appropriate Relief—Military Rules of Evidence 412, Aug. 6, 2025 (PDF 290) [hereinafter Military Judge's 6 Aug. 2025 Ruling].[2]

On 15 August 2025, Petitioner's counsel attempted to file another petition for extraordinary relief with this Court. However, on 18 August 2025, this Court's Chief Commissioner notified Petitioner's counsel that the Clerk of Court directed that the "filing be RETURNED WITH NO ACTION because it is improperly filed."[3]

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[2] The petition's statement of the case erroneously states that the military judge ruled on 8 August 2025. Pet. at 4.

[3] Email from Captain Jacob B. Hoeferkamp, USAF, Chief Commissioner, United States Court of Criminal Appeals, to Devon A. Wells, Esq., and Captain David J. Brown, USAF, Aug. 18, 2025. This Court may take judicial notice of its own records to establish that Petitioner's counsel attempted to file the petition on 15 August 2025 and that this Court returned it without action on

On 21 August 2025, Petitioner submitted another petition for extraordinary relief to this Court. Pet. The petition's certificate of filing and service erroneously certified that Petitioner's counsel "electronically filed" the petition "with the Court" and "served" it on the military judge and the parties' trial-level counsel "on 15th day of August." Pet. at 30. On the same day she filed her mandamus petition, Petitioner filed a motion asserting that she "does not request a stay of proceedings at this time." Petitioner's Motion for Leve [sic] to Supplement Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, Aug. 21, 2025, *granted* (A.F. Ct. Crim. App. Sep. 3, 2025).

On 27 August 2025, this Court ordered the United States and the Real Party in Interest to file answers to the petition. *In re SD*, Misc. Dkt. No. 2025-09 (A.F. Ct. Crim. App. Aug. 27, 2025) (order).

On 11 September 2025, the military judge issued a ruling granting in part and denying in part a Prosecution motion in limine to exclude evidence concerning whether Petitioner committed adultery and concerning sex toys SrA Binkley had in his possession when apprehended.

Also on 11 September 2025, Petitioner filed with this Court a motion for leave to file a motion to stay proceedings. Motion for Leave to File Motion to Stay Proceedings, Sep. 11, 2025. SrA Binkley opposed a stay on the same day. The motion remains pending before this Court as of this filing.

Trial in SrA Binkley's general court-martial is scheduled to commence on 15 September 2025. Pet. at 4.

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18 August 2025. *See United States v. Lovett*, 23 C.M.R. 168, 172 (C.M.A. 1957) ("An appellate court . . . can take judicial notice of its own records.").

Reassertion of Right to Speedy Trial

SrA Binkley is in pretrial confinement. *See* Unofficial Trial Tr. at PDF 115.[4] He expressly reasserts his rights to speedy trial under the Sixth Amendment; Article 10, UCMJ, 10 U.S.C. § 810; and Rule for Courts-Martial (R.C.M.) 707, *Manual for Courts-Martial, United States* (*MCM*) (2024 ed.).

Petitioner's Failure to Seek Extraordinary Relief Diligently

This Court should deny the petition for extraordinary relief without further consideration because Petitioner failed to diligently pursue mandamus relief, resulting in this petition remaining pending on the eve of trial. Issuance of a writ is, therefore, not appropriate "under the circumstances." *H.V.Z. v. United States*, 85 M.J. 8, 12 (C.A.A.F. 2024) (quoting *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012)).

The responsibility for the petition remaining undecided so close to trial lies with Petitioner. Despite filing an earlier petition seeking much the same relief, Petitioner waited nine days after the military judge issued her 6 August 2025 ruling to attempt to file a petition for extraordinary relief. *See supra* note 3 and accompanying text. That filing, however, was "improperly filed," causing its rejection. *Id.* Petitioner's counsel bear responsibility for the resulting delay. Even after that petition was returned without action, Petitioner's counsel inexplicably waited another three days before filing the corrected petition. Petitioner's counsel thus have not operated with the urgency expected when seeking extraordinary relief. As the United States Court of Appeals for the Second Circuit has warned, "[D]elay in seeking

[4] Attachment I of the petition, which provides an unofficial transcript of the 10 July 2025 Article 39(a) session in this case, is unpaginated. The reference to "115" is to page 115 of the 338-page PDF that includes the petition and attachments thereto rather than to page 115 of the unpaginated unofficial transcript. This answer will follow the convention of identifying pages from that document as PDF XX.

mandamus may itself prove fatal to the petition." *In re Rappaport*, 558 F.2d 87, 90 n.9 (2d Cir. 1977). This is such a case where the petitioner's delay should prove fatal to her claim. The United States Court of Appeals for the Third Circuit has explained that "[a]s with all remedies that are governed by equitable principles, mandamus must be sought with reasonable promptness. There is no inflexible rule on timeliness and we hesitate to create any. Rather, the question in each case is whether under all the circumstances the remedy was pursued with reasonable dispatch." *United States v. Olds*, 426 F.2d 562, 565–66 (3d Cir. 1970). In this case, where Petitioner finally filed a compliant petition for extraordinary relief only fifteen business days before the start of trial, mandamus relief has not been "pursued with reasonable dispatch."

Had Petitioner filed a compliant petition for extraordinary relief sooner, resolution would have been possible before SrA Binkley's trial commences on 15 September 2025. But that is no longer practicable. This Court should, therefore, deny the petition for extraordinary relief without further consideration under the third test for issuance of an Article 6b(e) writ of mandamus: whether "the issuance of the writ is appropriate under the circumstances." *H.V.Z.*, 85 M.J. at 12 (quoting *Hasan*, 71 M.J. at 418).

Statement of Facts

SrA Binkley is charged with six specifications, two of which name Petitioner as the alleged victim. Charge Sheet, PDF 287–88. Charge IV's specification alleges that SrA Binkley violated Article 128b, UCMJ, by violating a protection order "with the intent to intimidate" Petitioner. *Id.*, PDF 288. Charge V's specification alleges a violation of Article 130, UCMJ:

> In that SENIOR AIRMAN GABRIEL A. BINKLEY, United States Air Force, did, within the continental United States, between on or about 1 February 2025 and on or about 14 February 2025, engage in a course of conduct directed at [Petitioner] that would cause a reasonable person to fear bodily harm to herself, that SENIOR AIRMAN GABRIEL A. BINKLEY knew or should have known that the course of conduct would place [Petitioner] in reasonable fear of bodily harm to herself, and

> that SENIOR AIRMAN GABRIEL A. BINKLEY's conduct placed [Petitioner] in reasonable fear of bodily harm to herself.

Id.

Prior to an Article 32 preliminary hearing in the case, Petitioner's counsel requested a closed hearing "to discuss sealing portions of the evidence IAW Article 6b(a)(9) to protect the privacy of the Victim." Finding of Fact 12, Military Judge's 6 Aug. 2025 Ruling at 2 (PDF 291). Both the prosecution and the defense asserted that MRE 412 did not apply. Finding of Fact 12a, *id.*

A special trial counsel referred the charges and specifications to a general court-martial on 5 June 2025. Charge Sheet, Block V (PDF 287).

On 27 June 2025, SrA Binkley's counsel filed a motion in limine to exclude evidence under MRE 404(b). Defense Motion in Limine to Exclude under Mil. R. Evid. 404(b), June 27, 2025 (PDF 275). That motion reproduced two prosecution notices identifying nineteen "crimes, wrongs, or other acts of the Accused, which the prosecution intends to admit for a non-propensity purpose," almost all of which referenced Petitioner. *Id.* at 2–5 (PDF 276–79). For most of the noticed acts, the prosecution said the evidence would be presented at trial in whole or in part through Petitioner's testimony. *Id.* The military judge found as fact that the defense's motion "made two assertions regarding S.D.'s sexual predisposition and prior sexual behavior." Finding of Fact 14, Military Judge's 6 Aug. 2025 Ruling at 2 (PDF 292).

On 8 July 2025, Petitioner's counsel submitted a response to the defense's motion to exclude evidence under MRE 404(b). Victims' Counsel Response to Defense Motion in Limine to Exclude Evidence under Mil. R. Evid. 404(b), July 8, 2025 (PDF 244) [hereinafter Victims' Counsel Response, 8 July 2025]. That response did not cite MRE 412. *Id.*; Finding of Fact 15,

Military Judge's 6 Aug. 2025 Ruling at 2 (PDF 292). The response requested the following relief:

> 1. Rule as inadmissible the proffered evidence of S.D.'s alleged infidelity and interest in bondage-type sexual experiences,
> 2. Issue an order in limine that such material should not be discussed on the record including in cross examination,
> 3. Order the sealing of any unredacted records containing said information, and
> 4. Hold a closed 39a session to allow oral argument on the same.

Victims' Counsel Response, 8 July 2025, at 6 (PDF 249).

During an Article 39(a) session conducted on 10 July 2025, the military judge addressed Petitioner's filing concerning Petitioner's MRE 404(b) motion:

> Pursuant to Article 6B(a)(9) a victim has the right to be treated with fairness and with respect for the dignity and privacy of the victim. However, nothing in that provision or in any other statutory provision this court is aware of gives the named victim the right to a closed hearing outside certain specific rules, such as military rule for evidence 412. Additionally, this court is not aware of any authority that permits victims counsel to be heard on the admissibility of evidence pursuant to [MRE 404(b).] [T]o the extent victim counsel, and by extension, their client, have concerns, those should be addressed with the government, a party to this case.

Unofficial Trial Tr. at PDF 57.

On 17 July 2025, the prosecution filed a motion to exclude certain evidence concerning Petitioner. Finding of Fact 17, Military Judge's 6 Aug. 2025 Ruling at 2 (PDF 292). The defense filed a response on 23 July 2025. *Id.* The military judge ruled on that motion on 11 September 2025, granting it in part and denying it in part.

On 23 July 2025, Petitioner's counsel filed a motion for appropriate relief with the trial judge in SrA Binkley's general court-martial. Victims' Counsel Motion for Appropriate Relief, Military Rules [sic] of Evidence 412, July 23, 2025 (PDF 239). That motion argued:

> Evidence of S.D.'s past sexual behavior or predisposition has been filed in this case and presented in open court by both parties without proper notice and due process under MRE 412. This information is protected by both MRE 412 and Article 6b, Uniform Code of Military Justice (UCMJ). S.D. has standing under MRE 412

> because 10 U.S.C.S. § 1044e defines any alleged violation of Article 130, UCMJ, as a "sex-related offense" triggering the inclusive language of MRE 412(a). Accordingly, S.D. is entitled to be heard on the issue in a closed proceeding as directed under MRE 412.

Id. at 1 (PDF 239).

Ninety-four minutes later, SrA Binkley's counsel sent an email to the military judge opposing that motion. Attachment 1 to Military Judge's 6 Aug. 2025 Ruling (PDF 299). That submission argued:

> [T]here has been no sexual assault alleged and most importantly charged in this matter. Understanding that 10 U.S.C.S. § 1044e includes Art130 as an alleged sex-related offense, it is the defense[']s position that the defendant must be put on notice that the Art130 offense includes sexual assault. I would refer the parties to review the elements of Art130 pulled from the electronic benchbook below. As you can see, the "including sexual assault" is found nowhere on the charge sheet. If it is the government's intention that sexual assault [is] to be included, it is the defense's position that a major change to the charges sheet would be required, and the defense would not consent to that. Overall, MRE 412 does not apply to this case, because the government never charged a sex-related offense. Additionally, since MRE 412 does not apply, S.D. does not have standing to raise this issue so a closed 39(a) session would not be appropriate.

Id.

The prosecution offered inconsistent views. One of the special trial counsel detailed to SrA Binkley's general court-martial initially sent an email to the military judge acknowledging that the prosecution had previously taken the position that MRE 412 did not apply to stalking offenses. Attachment 3 to Military Judge's 6 Aug. 2025 Ruling (PDF 308). The prosecution followed that acknowledgement by stating:

> However, upon further research, the Government finds the law cited by the VC persuasive and agrees with the VC that Congress seems to have envisioned Art 130 being a "sex related offense" despite it not being specifically enumerated in MRE 412 itself. In terms of whether Art 130 is a sex related offense, only if the Government is alleging the victim was in fear of a sexual assault - the Government has no position on the matter. To be clear, the Government's theory of liability for this Art 130 offense is accurately captured on the charge sheet as drafted.

Id. MRE 412 does not use the term "sex related offense." Mil. R. Evid. 412.

The military judge then sent an email with directions to counsel for the parties and Petitioner's counsel:

> I want each of you to provide me a written response addressing the following (email will suffice).
>
> RCM 306A(d)(1) states: "For the **purposes of this subsection** (R.C.M. 306A(d)), a ['']sex-related offense['] means any allegation of a violation of Article 120, 120b, 120c, or 130, or any attempt thereof under Article 80." (emphasis added).
>
> MRE 412(d) states: "**For the purposes of this rule**, the term ['']sexual offense['] includes any sexual misconduct punishable under the [UCMJ], federal law, or state law" (emphasis added).
>
> Based on the content in bold, are you asking the Court to abandon the plain language of these rules and apply the same definition to "sexual offense", using the broader definition under RCM 306A(e)? If so, on what authority?
>
> 10 U.S.C. § 1044e specifically deals with eligibility for Victims' Counsel services. While that statute includes Article 130 as a "sex-related offense" for VC coverage, on what authority would I apply that definition to MRE 412, when MRE 412 provides its own internal definition?

Attachment 4 to Military Judge's 6 Aug. 2025 Ruling (PDF 315) (fifth alteration in original).

One of the detailed special trial counsel responded:

> **BLUF –** Your Honor, because the Government is not alleging the victim was specifically in fear of a sexual assault for the Art 130 offense charged, the Government is not asking the Court to abandon the plain language of the rule.
>
> Were fear of sexual assault the Government's charged theory, our position would be that the MRE 412 definition of sexual offense seems intentionally more broadly drafted (as compared to MRE 413, for example, which enumerates specific acts/offenses) that it would be appropriate to consider the enumerated offenses in 1044e, which is otherwise referenced in MRE 412(c)(2)'s discussion of standing to be heard.

Attachment 5 to Military Judge's 6 Aug. 2025 Ruling (PDF 314).

SrA Binkley's counsel replied:

> [T]he Defense maintains and the Government has agreed that there is no sexual misconduct charged or alleged in this case. Art 130 could include sexual misconduct, but in this case it wasn't. It would be completely nonsensical to apply MRE 412 to [a] case that is devoid of an actual sexual misconduct charge and/or allegation.

Attachment 6 to Military Judge's 6 Aug. 2025 Ruling (PDF 328).

Petitioner's counsel sent an email to the military judge responding to the defense counsel's submission. Attachment 7 to Military Judge's 6 Aug. 2025 Ruling (PDF 333).

On 5 August 2025, Petitioner's counsel withdrew his request for an Article 39(a) hearing on the applicability of MRE 412 to the stalking charge in this case. Attachment 8 to Military Judge's 6 Aug. 2025 Ruling (PDF 337).

On 6 August 2025, the military judge issued a written ruling denying Petitioner's motion. Military Judge's 6 Aug. 2025 Ruling (PDF 290). The analysis portion of her ruling provided:

> 32. A trial court's role is to apply the law as it exists, not to create new law. After a complete review of the applicable law, NDAA provisions outlined herein, and the history of Mil. R. Evid. 412, the Court finds that there is no legal support for the Victims Counsel's position as it relates to the applicability of Mil. R. Evid. 412 in the present case. The Court could find no case law wherein the Rule has been applied to an Article 130 offense of stalking (either with or without the fear of bodily harm, including sexual assault language).
>
> 33. By its express terms, Mil. R. Evid. 412 applies to alleged "sexual offenses" and the definition "includes sexual misconduct punishable under the [UCMJ], federal law or state law." By comparison, both 10 U.S.C. 1044e((h) and R.C.M. 306A refer to "sex-related offenses" and include Article 130, stalking.
>
> 34. As set forth more fully above, various NDAAs have impacted victims' rights in the military justice system, and Congress has repeatedly included provisions for their protection in the annual Acts. However, Congress has not changed the parameters of the commonly referred to "rape shield law" to extend beyond actual sexual offenses, and this Court declines to do so in this case.
>
> 35. R.C.M. 306A is a recent addition to the M.C.M., setting out requirements for the newly created Office of Special Trial Counsel. That Congress elected to use the term "sex-related offenses" and include Article 130 in that Rule while leaving the term "sexual offense" unchanged in Mil. R. Evid. 412 convinces this Court that the distinction in language was intentional.

> 36. The purpose of Mil. R. Evid. 412 is to protect victims of sexual assault from examination related to their sexual history. While Article 130 is a sex-related offense as determined by the sources herein, it does not qualify as a "sexual offense" and this Court can find no precedent to the contrary.

Id. (PDF 295–96) (footnote omitted).

Standard of Review

"[A] mandamus petition will only be granted where a petitioner demonstrates a clear and indisputable right to relief." *H.V.Z.*, 85 M.J. at 11–12. That standard applies to petitions for extraordinary relief filed under Article 6b(e), UCMJ. *Id.* at 12–13. Thus, to obtain relief, Petitioner must show: "(1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Id.* at 12 (quoting *Hasan*, 71 M.J. at 418).

Analysis

Decisional Issue I

Mandamus relief is not available where a new trial judge has been detailed to the case and Petitioner has not sought reconsideration of the previous judge's ruling.

Petitioner has failed to show that "there is no other adequate means to attain relief." *Id.* On the contrary, her petition states, "Of note, a new Military Judge was detailed to the case in interest . . . ." Pet. at 2. The petition provides no indication that Petitioner has sought the new military judge's reconsideration of the previous military judge's ruling that she asks this Court to review via a petition for writ of mandamus. As this Court's recent opinion in *United States v. Gale* demonstrates, asking a successor military judge to reconsider a predecessor judge's ruling is a meaningful avenue to seek relief. *United States v. Gale*, Misc. Dkt. No. 2025-01, 2025 CCA LEXIS 265 (A.F. Ct. Crim. App. June 12, 2025), *petition filed*, __ M.J. __, No. 25-0237, 2025

CAAF LEXIS 665 (C.A.A.F. Aug. 8, 2025). Petitioner must exhaust that avenue before seeking mandamus relief from this Court. *Heckler v. Ringer*, 466 U.S. 602, 616 (1984) ("The common-law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted *all* other avenues of relief . . . ." (emphasis added)); *see also Herrmann v. Brown*, 8 Vet. App. 60, 63 (1995) ("the petitioner did not file a motion for reconsideration of the [Board of Veterans' Appeals'] decision on remand, and thus has not exhausted the administrative remedies available to him prior to filing his petition for a writ of mandamus").

Additionally, as discussed in greater detail below regarding decisional issue III, to the extent that Petitioner seeks a closed hearing, Pet. at 19, 28, that request should be made to and decided by the trial-level military judge. *See* R.C.M. 806, *MCM* (2024 ed.).

Because Petitioner has failed to carry her burden to show that "there is no other adequate means to attain relief," *H.V.Z.*, 85 M.J. at 12, this Court should deny the petition for writ of mandamus.

Decisional Issue II

Because stalking is not clearly and indisputably a "sexual offense" for purposes of applying Military Rule of Evidence 412 in this case, mandamus is unavailable.

Introduction

If this Court were to reach the merits of this petition, the key decisional issue would not be whether stalking is a "sexual offense" under Military Rule of Evidence (MRE) 412 in general or in this case in particular. Rather, the key decisional issue would be whether the military judge clearly and indisputably erred by holding that stalking is not a "sexual offense" for MRE 412

purposes in this case. Because MRE 412's applicability to Charge III and its specification is not clear and indisputable, mandamus relief is unavailable.

To construe MRE 412 properly, it is important to understand its origin and development. President Carter initially issued MRE 412 as part of the MREs' original adoption in 1980. Exec. Order No. 12198 of March 12, 1980, 45 Fed. Reg. 16932, 16961 (Mar. 14, 1980). Various presidents have amended MRE 412 since, including President George W. Bush, who changed MRE 412(d)'s definition section to its current scope. Exec. Order No. 13447 of September 28, 2007, 72 Fed. Reg. 56179, 56187 (Oct. 2, 2007), *available at* https://jsc.defense.gov/Portals/99/Documents/EO13447.pdf. No substantive changes have been made since.

Congress first enacted stalking as a UCMJ offense in 2006 as Article 120a, with an effective date of 5 July 2006. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109–163, § 551, 119 Stat. 3136, 3256 (2006) (codified as amended at Article 130, UCMJ, 10 U.S.C. § 930). The Military Justice Act of 2016 moved that offense from Article 120a to Article 130, UCMJ. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5443, 130 Stat. 2000, 2955 (2016).[5]

Analysis

A. Petitioner is not entitled to mandamus relief because it is not already clearly and indisputably established that MRE 412's definition of "sexual offense" includes stalking in general or stalking in a case where fear of sexual assault is not alleged in particular.

Mandamus is unavailable in this case because whether stalking is a "sexual offense" for purposes of MRE 412 is a question of first impression. *See* Military Judge's 6 Aug. 2025 Ruling

[5] The Military Justice Act of 2016 is Division E of the National Defense Authorization Act for Fiscal Year 2017. Pub. L. No. 114-328, § 5001, 130 Stat. at 2894.

at ¶ 32 (PDF 295) ("The Court could find no case law wherein [MRE 412] has been applied to an Article 130 offense of stalking (either with or without the fear of bodily harm, including sexual assault language)."). Issuing a writ to address such an issue of first impression would be inappropriate because "[t]he office of mandamus is not to establish a right, but to enforce a clear and complete right already established." *Wean v. Holder*, 47 M.J. 540, 542 (A. Ct. Crim. App. 1997) (quoting Major Thomas M. Rankin, *The All Writs Act and the Military Justice System*, 53 MIL. L. REV. 103, 105-06 (1971)). "That a case raises an issue of unsettled law always weighs against mandamus relief." *PrimeCo Pers. Commc'ns, L.P. v. Vill. of Fox Lake*, 26 F. Supp. 2d 1052, 1066 (N.D. Ill. 1998). Because this issue is "unsettled law" and a "clear and complete right" for stalking to be treated as a sexual offense under MRE 412 is not "already established," mandamus relief is unavailable.

The Supreme Court has cautioned, "Mandamus, it must be remembered, does not run the gauntlet of reversible errors. Its office is not to control the decision of the trial court, but rather merely to confine the lower court to the sphere of its discretionary power." *Will v. United States*, 389 U.S. 90, 104 (1967) (internal citations and quotation marks omitted); *accord*, *e.g.*, *In re United States*, 598 F.2d 233, 236 (D.C. Cir. 1979) (per curiam) ("it is not the office of mandamus to correct erroneous interlocutory orders that are within a trial court's jurisdiction"). The military judge made a ruling on an unsettled issue of law that was well within her discretion to make. Mandamus cannot be used to second-guess her. *See In re United States Dep't of Defense*, 848 F.2d 232, 328 (D.C. Cir. 1988) ("granting mandamus here would expand considerably this extraordinary writ, using it to second-guess trial judges in situations where they have not exceeded their 'prescribed jurisdiction' or failed to exercise their required authority").

B. None of Petitioner's arguments establish that MRE 412's definition of "sexual offense" includes stalking, much less establishing that it does so clearly and indisputably.

Petitioner offers three principal bases for challenging the military judge's ruling that stalking is not a "sexual offense" for purposes of MRE 412's application to this case. Pet. at 9. None of those rationales clearly and indisputably establish that stalking is a sexual offense for MRE 412 purposes.

1. Petitioner has pointed to no legal authority that defines "sexual offense" to include stalking.

Significantly, the petition identifies no definition of "sexual offense" that includes stalking. Petitioner attempts to rely on MRE 413(d)'s definition of "sexual offense," Pet. at 11–12, which actually undercuts her position. That definition provides a list of offenses that fall within the term "sexual offense" for purposes of MRE 413. Mil. R. Evid. 413(d), *MCM* (2024 ed.). That list does not include stalking. *Id.*

MRE 413(d)'s definition of "sexual offense" is not dispositive for purposes of this case because that definition is limited to the use of the phrase "sexual offense" *in that rule*. *Id.* However, stalking's omission from that rule's definition of "sexual offense" is powerful evidence that it is not "clear and indisputable" that MRE 412's use of that term includes stalking.

Petitioner's argument that MRE 412(d)'s definition of "sexual offense" must be broader than MRE 413(d)'s definition because the latter includes a list while the former does not is unpersuasive for two reasons. *See* Pet. at 12. First, when adopting MRE 412(d)'s current scope, the president may have contemplated that the term "sexual offense" would be interpreted under the presumption of consistent usage to have the same meaning as the same term in the very next MRE. *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170–73 (2012) ("Presumption of Consistent Usage"); *see also*

United States v. Lucas, 1 C.M.R. 19, 22 (C.M.A. 1951) (applying rules of statutory interpretation to construe the *MCM*). Second, even if it were contemplated that MRE 412(d) would be applied more broadly than MRE 413(d), that does not support the assumption that a stalking offense, which does not allege any sexual act or contact, is within that broader scope.

2. Other statutes and regulations that define the term "alleged sex-related offense" or "sex-related offense" do not establish a clear and indisputable definition of "sexual offense," which is a different term.

Petitioner attempts to rely on 10 U.S.C. § 1044e's definition of "alleged sex-related offense" and R.C.M. 306A(d)(1)'s definitions of "sex-related offense," but both are inapposite. As the military judge's ruling emphasized, neither the phrase "alleged sex-related offense" nor "sex-related offense" appears in MRE 412. Rather, MRE 412 uses a different phrase: "sexual offense." *See* Military Judge's 6 Aug. 2025 Ruling at ¶ 33 (PDF 296).

Courts "use well-established principles of statutory construction to construe provisions in the *Manual for Courts-Martial*." *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007). One such "well-established canon of statutory interpretation [is] that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words." *Bare v. Barr*, 975 F.3d 952, 967 (9th Cir. 2020) (quoting *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003)). Thus, there is no reason to assume that the term "sexual offense" in MRE 412 has the same meaning as the different term "sex-related offense" in R.C.M. 306(c)(1) or R.C.M. 306A(d)(1) or "alleged sex-related offense" in 10 U.S.C. § 1044e.

Second, 10 U.S.C. § 1044e, R.C.M. 306(e)(1), and R.C.M. 306A(d)(1) all include language stating that their definition of "alleged sex-related offense" or "sex-related offense" is only for purposes of that particular provision. 10 U.S.C. § 1044e(h) ("In this section, the term 'alleged sex-related offense' means . . . ."); R.C.M. 306(e)(1) ("For purposes of this subsection

(R.C.M. 306(e)), a 'sex-related offense' means . . . ."); R.C.M. 306A(d)(1) ("For purposes of this subsection (R.C.M. 306A(d)), 'sex related offense' means . . . .").

Third, Petitioner's attempt to parse the term "sexual offense" to mean the same things as "sex-related offense" fails. Pet. at 11–12. Rather than bifurcating the term "sexual offense" and construing its two words independently, the edition of *Black's Law Dictionary* that was current when President Bush adopted MRE 412's definition of "sexual offense" provided: "***sexual offense***. An offense involving unlawful sexual conduct, such as prostitution, indecent exposure, incest, pederasty, and bestiality."[6] *Sexual offense*, BLACK'S LAW DICTIONARY 1112 (8th ed. 2004). That definition does not clearly and indisputably include stalking.

Fourth, the same statute that enacted Article 6b(e), UCMJ, included a section that did not include stalking in its definition of the term "sex-related offense." *See* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 547(d), 128 Stat. 3292, 3376 (2014). Thus, there is no standard definition of the term "sex-related offense" even if that term were relevant to construing the different term "sexual offense" that appears in MRE 412.

3. Executive Order 13696's insertion of a reference to 10 U.S.C. § 1044e into MRE 412(c)(2) carries no implication concerning the meaning of "sexual offense" in MRE 412(d), which was not affected—or even quoted—by Executive Order 13696.

Petitioner attempts to give 10 U.S.C. § 1044e's definition of "alleged sex-related offense" extra weight because MRE 412 cites that statute. Pet. at 12. That citation in MRE 412(c)(2), however, is merely a reference to special victims' counsel; it is not offered as an interpretative

[6] The current edition of *Black's Law Dictionary* provides a similar definition: "**sexual offense**. (1868) An offense involving unlawful sexual conduct, such as prostitution, indecent exposure, incest, pederasty, and bestiality.—Also termed *sex crime*; *sex offense*; *sexual crime*." *Sexual offense*, BLACK'S LAW DICTIONARY 1299 (12th ed. 2024).

aid to the term "sexual offense," which is defined by a different paragraph of the rule, MRE 412(d). *Compare* Mil. R. Evid. 412(c)(2), *with* Mil. R. Evid. 412(d). Moreover, as discussed above, MRE 412's current definition of "sexual offense" was adopted in 2007. Exec. Order No. 13447, 72 Fed. Reg. at 56186. At that time, MRE 412(c)(2) did not cite 10 § U.S.C. 1044e; nor could it have, since that statute had not yet been enacted. Executive Order 13696 of June 17, 2015, inserted the reference to 10 U.S.C. § 1044e into MRE 412(c)(2). Exec. Order No. 13696, Annex, § 2(b), 80 Fed. Reg. 35783, 35818 (June 22, 2015), *available at* https://jsc.defense.gov/Portals/99/Documents/EO13696.pdf. Significantly, that executive order did not touch MRE 412(d), which does not appear in the order. *Id.* Thus, there is no reason to believe President Obama was attempting to alter the interpretation of MRE 412(d) when he modified MRE 412(c)(2) to cite 10 U.S.C. § 1044e. Executive Order 13696 certainly does not make it "clear and indisputable" that MRE 412's definition of "sexual offense" includes stalking. President Obama or any subsequent president could have amended MRE 412(d) to incorporate 10 U.S.C. §1044e, but none has.

4. Petitioner offers no other basis for concluding that MRE 412's use of "sexual offense" clearly and indisputably includes stalking.

The arguments discussed above are all the petition offers as justification for the extraordinary relief of a writ of mandamus. Regardless of the strength or weakness of those arguments if this issue were before this Court on direct review, they do not come close to satisfying the "clear and indisputable" mandamus standard. This Court should, therefore, deny the petition.

C. The common position of the parties to SrA Binkley's court-martial that "there is no sexual misconduct charged or alleged in this case" further indicates that stalking is not clearly and indisputably a sex offense for purposes of MRE 412 in this case.

Although the prosecutors' position on whether stalking is a sexual offense for purposes of MRE 412's applicability to this case vacillated,[7] their final answer appears to be that it is not because, as SrA Binkley's counsel wrote, "the Defense maintains and the Government has agreed that there is no sexual misconduct charged or alleged in this case." Attachment 6 to Military Judge's 6 Aug. 2025 (PDF 328); *see also* Attachment 5 to Military Judge's 6 Aug. 2025 Ruling (PDF 314); Military Judge's 6 Aug. 2025 Ruling at ¶ 36 n.32 (PDF 296) ("This ruling does not opine on whether [the conclusion that stalking does not qualify as a 'sexual offense' for purposes of MRE 412] would have been different if the Government had alleged 'fear of bodily harm, including sexual assault' in the relevant Charge. That issue is not before this Court."). The agreement of the parties to SrA Binkley's court-martial that "no sexual misconduct" is "charged or alleged in this case" is significant because the actual definition of "sexual offense" from MRE 412 states that a "[f]or purposes of [MRE 412], the term 'sexual offense' includes *any sexual misconduct* punishable under the Uniform Code of Military Justice, federal law or state law." Mil. R. Evid. 412(d) (emphasis added).

The parties' position that the factual context alleged by the charge sheet influences whether stalking qualifies as a sexual offense in this case is consistent with the United States Court of Appeals for the Sixth Circuit's approach in *United States v. Carter*, 463 F.3d 526 (6th Cir. 2006). The issue there was whether stalking was a sexual offense for purposes of requiring that a convict participate in a sexual offender treatment program and evaluation as a special

[7] That very vacillation suggests that Petitioner's entitlement to relief is not clear and indisputable.

condition of supervised release. *Id.* at 528. The Sixth Circuit observed that the Tennessee statute Carter had been convicted of violating "plainly encompasses both sexual and nonsexual conduct." *Id.* at 532. "Thus," reasoned the court, "the mere fact of conviction is insufficient to establish that Carter committed a recent sex offense. The question is whether Carter actually committed the offense of stalking in a sexual manner." *Id.* at 532–33. While the government claimed in that case that the offense was committed in a sexual manner, the Sixth Circuit found the record insufficient to draw a conclusion and, therefore, vacated the special condition while directing the United States District Court for the Western District of Tennessee "to determine whether the nature and circumstances of the 2004 stalking offense justify reimposition of the special condition." *Id.* at 533. The Sixth Circuit's reasoning and that case's outcome reinforce that neither stalking *per se* nor the particular stalking offense alleged by Charge III and its specification is clearly and indisputably a sexual offense for MRE 412 purposes. On the contrary, *Carter* suggests that the prosecution's decision not to charge SrA Binkley with committing stalking in a sexual manner excludes this case from MRE 412's reach. This Court should, therefore, deny the mandamus petition.

Decisional Issue III

Mandamus relief is not available to order the military judge to hold a closed hearing to allow Petitioner to be heard concerning her purported privacy rights in derogation of: (1) the accused's Sixth Amendment right to a public trial; (2) the public's First Amendment right to attend criminal trials; and (3) Rule for Courts-Martial 806's command that, except as otherwise provided by that rule, "courts-martial shall be open to the public."

A. If this Court were to conclude that Petitioner has failed to clearly and indisputably establish that stalking is a sexual offense for purposes of MRE 412, Petitioner's entitlement to a closed hearing would not be clear and indisputable.

"In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . ." U.S. Const. amend VI. "Without question, the sixth amendment right to a public trial is applicable to courts-martial." *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985) (internal footnote omitted). The public also has a qualified First Amendment right to attend criminal trials. U.S. Const. amend. I; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion). "The right to public access to criminal trials extends to courts-martial." *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987).

An accused's constitutional right to a public trial is not absolute. Closure is constitutionally permissible provided the four-factor standard from the Supreme Court's *Waller v. Georgia* decision is met:

> [(1)] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [(2)] the closure must be no broader than necessary to protect that interest, [(3)] the trial court must consider reasonable alternatives to closing the proceeding, and [(4) the trial court] must make findings adequate to support the closure.

467 U.S. 39, 48 (1984). The Supreme Court has noted that the *Waller* test must be satisfied "before excluding the public from *any stage of a criminal trial*." *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam) (emphasis added).

R.C.M. 806(a) states, "Except as otherwise provided in this rule, courts-martial shall be open to the public." R.C.M. 806(a), MCM (2024 ed.). Mirroring the *Walker* test, Rule 806(b)(4) specifies when a court-martial may be closed:

> Courts-martial shall be open to the public unless (A) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (B) closure is no broader than necessary to protect the overriding interest; (C) reasonable alternatives to closure were considered and found inadequate; and (D) the military judge makes case-specific findings on the record justifying closure.

R.C.M. 806(b)(4), *MCM* (2024 ed.).

Given that highly case-specific inquiry, it is not clear and indisputable that closure is required in this case if MRE 412 is inapplicable. On the contrary, such closure would be constitutionally disfavored because, if MRE 412 is inapplicable, there is no rule, statute, or other legal authority purporting to require the proceeding's closure. In *United States v. Hershey*, the then-named Court of Military Appeals expressly rejected embarrassment of an alleged victim in a sexual assault case as a per se basis to close a proceeding. 20 M.J. 433, 436–37 (C.M.A. 1985). Rather, a case-by-case determination must be made. *Id.* at 436.

Here, the stringent standards for closing a court-martial have not been satisfied, much less clearly and indisputably established. Mandamus relief is, therefore, unavailable.

B. Even if this Court were to conclude that MRE 412 applies to this case, Petitioner would still not be clearly and indisputably entitled to a closed hearing because MRE 412's automatic closure provision is currently pending review by the Court of Appeals for the Armed Forces.

Even a ruling for Petitioner on the stalking-as-an-MRE-412-sexual-offense would not entitle Petitioner to mandamus relief in the form of an order for the military judge to conduct a closed hearing for at least two reasons. First, as noted in the discussion of Decisional Issue I, above, Petitioner has failed to demonstrate exhaustion of other forms of relief. Second, MRE 412(c)(2)'s automatic closure provision is currently the subject of litigation before the Court of

Appeals for the Armed Forces, which demonstrates that its applicability is not clear and indisputable.

Initially, there is no need for mandamus relief because there has been no showing that the trial judge will decline to order a closed hearing on her own. The original trial judge indicated that if she concluded stalking is a sexual offense for purposes of MRE 412's applicability to this case, she would hold a closed hearing pursuant to that rule to discuss the admissibility of evidence purportedly involving Petitioner's sexual behavior or sexual predisposition. Attachment 8, Military Judge's 6 Aug. 2025 Ruling at 2 (PDF 337). That military judge is no longer presiding over this case. Pet. at 2. Nevertheless, her stated intention to hold a closed hearing if stalking were determined to be a sexual offense for MRE 412 purposes helps demonstrate that if this Court were to resolve the stalking issue in Petitioner's favor, the correct remedy would be to return the case to the new military judge for further proceedings in light of that ruling rather than prescribing how such further proceedings should be conducted. Mandamus relief is inappropriate before the trial judge has been given an opportunity to rule initially.

Additionally, even a ruling that stalking is a sexual offense for MRE 412 purposes would not make Petitioner's right to a closed hearing clear and indisputable. The Court of Appeals for the Armed Forces is currently considering whether MRE 412(c)(2)'s automatic closure rule is invalid under either the Sixth Amendment or R.C.M. 806(a). *See United States v. Miller*, 85 M.J. 375 (C.A.A.F. 2025) (mem.) (granting review); *United States v. Miller*, __ M.J. __, No. 25-0025/AR, 2025 CAAF LEXIS 469 (C.A.A.F. May 21, 2025) (hearing). That ongoing litigation establishes that Petitioner would not have a clear and indisputable right to a closed hearing even if MRE 412 were implicated. Accordingly, mandamus relief is unavailable to order such a closed hearing. *H.V.Z.*, 85 M.J. at 11–12.

Decisional Issue IV

Mandamus relief is not available to compel the military judge to seal certain portions of the record in derogation of the public's First Amendment right to access judicial records.

Petitioner has not established a clear and indisputable right to the sealing of any portion of the record. "Under the First Amendment, the press and the public have a presumed right of access to court proceedings *and documents*." *Civ. Beat L. Ctr. for Pub. Int. v. Maile*, 117 F.4th 1200, 1204 (9th Cir. 2024) (emphasis added) (internal quotation marks omitted). As the Supreme Court has observed, "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978) (internal footnote omitted). The Army Court of Criminal Appeals has opined that "[t]his qualified right of access to materials entered into evidence may apply with equal validity to exhibits that were presented in public at a trial by court-martial." *United States v. Scott*, 48 M.J. 663, 666 (A. Ct. Crim. App. 1998). That qualified right of public access should also apply to transcripts of open court-martial sessions.

The public's right of access to criminal trial records is not absolute. *Nixon*, 435 U.S. at 598. Court "documents may be sealed if 'specific, on the record findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."'" *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (quoting *Press Enterprise Co. v. Superior Court* (*Press Enterprise II*), 478 U.S. 1, 9 (1986) (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984))). "A party moving to place documents under seal bears the burden of showing that higher values overcome the presumption of public access." *Samsung Elecs. Co. v. Microchip Tech. Inc.*, 748 F. Supp. 3d 257, 259 (S.D.N.Y. 2024) (internal quotations omitted). Significantly, the Supreme Court has emphasized

that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Nixon*, 435 U.S. at 599.

In a case arising from the *United States v. Manning* general court-martial, *see United States v. Manning*, 78 M.J. 501 (A. Ct. Crim. App. 2018), Judge Hollander of the United States District Court for the District of Maryland provided a helpful primer on the right of public access to judicial records. *Ctr. for Constitutional Rights v. Lind*, 954 F. Supp. 2d 389 (D. Md. 2013). A "judicial record" is "subject to a *presumption* of public access under the common law." *Id.* at 401 (D. Md. 2013). "The common law presumption of public access can be rebutted if 'the public's right of access is outweighed by competing interests.'" *Id.* (quoting *In re Knight Publ'g Co.*, 743 F.2d 231, 235 (4th Cir. 1984)). However, a class of court documents narrower than those covered by the common law right of access is subject to a "'more rigorous' right of access provided by the First Amendment." *Id.* "If a court record is subject to the First Amendment right of public access, the record may be withheld from the public 'only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest.'" *Id.* (quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988)). "The test for whether a document is subject to a First Amendment right of public access is sometimes called the test of 'experience and logic.'" *Id.* (quoting *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, 707 F.3d 283, 291 (4th Cir. 2013)). That test "asks: '(1) "whether the place and process have historically been open to the press and general public,'" and (2) '"whether public access plays a significant positive role in the functioning of the particular process in question."'" *Id.* (quoting *In re Application*, 707 F.3d at 291 (quoting *Press-Enterprise II*, 478 U.S. at 8–10))).

In *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994), the United States Court of Appeals for the Third Circuit reversed a United States district judge's order sealing the transcript of an open jury-selection process in a criminal trial. The court held that "the right of access to voir dire examinations encompasses equally the live proceedings and the transcripts which document those proceedings." *Id.* at 1359. The court emphasized "that documentary access is not a substitute for concurrent access, and vice versa. The right encompasses both forms, and both are vitally important." *Id.* at 1360 n.13. The Third Circuit continued, "It would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?" *Id.* at 1360.

In *Scott*, the Army Court of Criminal Appeals held that a military judge abused his discretion by sealing a stipulation of fact without conducting an Article 39(a) session to discuss his concerns. 48 M.J. at 666–67. Without such an Article 39(a) session, the record was unclear as to whether the military judge considered reasonable alternatives to sealing the stipulation of fact. *Id.* at 666. Nor did the military judge make adequate findings supporting the sealing. *Id.* at 667. The Army Court raised similar concerns about the sealing of an expert's testimony in *United States v. Pulver*, No ARMY 20210670, 2023 CCA LEXIS 298 (A. Ct. Crim. App. July 13, 2023), *petition denied*, 84 M.J. 262 (C.A.A.F. 2024), and the sealing of a prosecution exhibit including video clips depicting an alleged victim clad in underwear and a t-shirt in *United States v. Lewis*, No. ARMY 20210434, 2023 CCA LEXIS 96 (A. Ct. Crim. App. Feb. 24, 2023).

In light of all that case law—especially the Supreme Court's emphasis that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case," *Nixon*, 435 U.S. at 599—

Petitioner's entitlement to sealing a portion of the trial transcript and associated materials is not clear and indisputable. Mandamus is no substitute for the trial judge's application of the case law to "the relevant facts and circumstances of [this] particular case." *Id.*

Conclusion

For the foregoing reasons, this Court should deny the petition for extraordinary relief in the nature of a writ of mandamus.

Respectfully submitted,

[redacted]
Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

[redacted]
Paige F. Markley Denton, Capt, USAF
Air Force Appellate Defense Counsel
[redacted]

Counsel for Real Party in Interest

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on Petitioner's counsel and the Government Trial and Appellate Operations Division on 12 September 2025.

Respectfully submitted,
[redacted]
Dwight H. Sullivan
Air Force Appellate Defense Division

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re SD	)	**Misc. Dkt. No. 2025-09**
Petitioner	)	
	)	
	)	
	)	
	)	**ORDER**
Gabriel A. BINKLEY	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Real Party in Interest	)	**Panel 2**

On 21 August 2025, Petitioner filed with this court a petition requesting relief in the form of a writ of mandamus pursuant to Article 6b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b, in the above-styled case. The petition was docketed on 22 August 2025 and pertained to the pending court-martial of *United States v. Senior Airman Gabriel A. Binkley*, scheduled to reconvene on 15 September 2025, at Shaw Air Force Base, South Carolina.

Petitioner, the alleged victim in this case, asks this court to vacate the military judge's ruling which held violations of Article 130, UCMJ, 10 U.S.C. § 930, do not qualify as "sexual offenses" contemplated under Mil. R. Evid. 412, and the military judge's decision to deny Petitioner's detailed victims' counsel the opportunity to advocate for her privacy rights under Article 6b(9), UCMJ, and the military judge's decision denying Petitioner's request for a closed hearing. The petition did not include a request for a stay of the proceedings.

Later, under separate filing, Petitioner moved for leave to file a supplement petition to inform the court that Petitioner "does not request [a] stay of the proceedings at this time." The court granted Petitioner's motion on 3 September 2025.

On 11 September 2025, Petitioner filed a Motion for Leave to File Motion to Stay Proceedings, with the court-martial still scheduled to reconvene on 15 September 2025. The Real Party in Interest opposes the motion to stay proceedings.

Accordingly, it is by the court on this 12th day of September, 2025,

ORDERED:

Petitioner's Motion for Leave to File is **GRANTED**. Petitioner's Motion to Stay Proceedings is **DENIED**.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re SD *Petitioner* **United States** *Real Party in Interest A* **SrA GABRIEL A. BINKLEY** 77 FGS (ACC) Shaw AFB, South Carolina *Real Party in Interest B*	**MOTION FOR LEAVE TO FILE MOTION TO STAY PROCEEDINGS** Misc. Dkt. No. 2025-09

COMES NOW S.D. by and through her undersigned Victims' Counsel (VC) to request leave to file her motion to stay the above proceedings, with trial scheduled to begin on 15 September 2025, to allow this Honorable Court the time necessary to issue a ruling on Petitioner's Petition for Relief, filed on 21 August 2025. RPI Gabriel Binkley remains in pretrial confinement.

JURISDICTION

This motion seeks a stay of court-martial proceedings to allow this Honorable Court the time necessary to issue a ruling on Petitioner's Petition for Relief filed on 21 August 2025. This Honorable Court has jurisdiction to issue a writ of mandamus pursuant to Article 6b(e)(4)(A) and Article 6b(e)(4)(C), U.C.M.J., for the violations of the protections afforded S.D. under M.R.E. 412 and under Article 6b(a)(1) and (9), U.C.M.J.

This Court also has jurisdiction to issue a writ of mandamus pursuant to the All Writs Act codified in 28 U.S.C. § 1651, because S.D. has a legal right to her privacy and has no other reasonable means to protect that right from violation by the Military

Judge. *See United States v. Curtin*, Misc. Dkt. No. 95-07, 1995 CCA LEXIS 339, at *3 (A.F. Ct. Crim. App. Dec. 8, 1995) ("Our authority under the All Writs Acts includes the ability to issue a writ of mandamus directed at trial judges." (internal citations omitted)).

Because this Honorable Court has jurisdiction to rule on the underlying Petition, it also has jurisdiction to issue a stay under Rule 7(e) of the United States Air Force Court of Criminal Appeals Rules of Practice, which specifically provides that "…a judge on the panel or Court considering a matter may, acting alone, issue all necessary orders, to include temporary orders or stays, provided the orders do not finally dispose of a petition, appeal, or case. A Court may delegate to its Clerk of the Court or other designated staff the authority to act on motions regarding procedural matters."

U.S. A.F.C.C.A. Rules of Practice Rule 23.3(c) also establishes the authority for parties with standing to file a motion to stay proceedings.

STANDARD OF REVIEW

"Appellants (or petitioners) are always free to ask the lower court or to petition the appellate court for a stay of the proceeding below, and of course the Government can refrain from continuing the prosecution pending resolution of the interim appeal." *United States v. Boudreaux*, 35 M.J. 291, 295 (C.A.A.F. 1992). The *Boudreaux* Court identified that interim appeals do not stop lower courts from issuing rulings on a case, but rather that a stay must be granted to prevent such actions from being taken pending resolution at the appellate level.

STATEMENT OF FACTS

On 30 July 2025, Petitioner filed her first petition for extraordinary relief to this Honorable Court seeking interlocutory relief from the rulings made on the record during an Article 39a motions hearing on 10 July 2025. At that time, a related motion pursuant to Mil. R. of Evid. 412 was still pending at the trial court, and as a result this Honorable Court issued an order on 5 August 2025 determining that the issue was not yet ripe for appellate review.

On 6 August, the Military Judge denied the above motion, and on 21 August 2025 Petitioner once again filed a Petition for Extraordinary Relief requesting appellate review of the trial court's rulings of 10 July 2025 and 6 August. In this new Petition, Petitioner did not request a stay of proceedings given the amount of time remaining before trial and RPI Binkley's ongoing pretrial confinement.

On 27 August 2025, this Honorable Court ordered the United States and the Real Party in Interest to file answers to the petition not later than 12 September 2025, three days prior to the date trial is set to begin.

ARGUMENTS

I.

PETITIONER HAS STANDING AND AUTHORIZATION TO SEEK A STAY OF THE PROCEEDINGS.

Under U.S. A.F.C.C.A. Rules of Practice Rule 19.2 (f)(1), "The respondent may not file a response to a writ petition unless the Court issues an order directing the

respondent to show cause or granting leave to file a response. In such cases, unless otherwise specified, the respondent may file an answer within 20 days of receipt of the order and the petitioner may file a reply to the answer within 7 days of receipt of the answer."

It was reasonable for Petitioner to conclude that, pursuant to the above cited rule, no further responses would be forthcoming unless directly ordered by this Honorable Court and therefore this Honorable Court would have sufficient time to issue a ruling. Furthermore, it was reasonable for the petitioner to conclude that, should this Honorable Court require responses, it would also be within the Court's power and discretion to modify the time to file responses to allow for sufficient time thereafter to issue a ruling before trial. Therefore, Petitioner's decision not to seek a stay when she filed her petition on 21 August 2025 should not be construed as a waiver of such opportunity.

U.S.A.F.C.C.A. Rules of Practice Rule 19(b)(2)(F) requires a petition for extraordinary relief include a statement whether a stay is being sought, however it does not foreclose on any subsequent motion for a stay under Rule 23.3(c). U.S. A.F.C.C.A. Rules of Practice Rule 23.3(c) expressly establishes the authority for parties with standing to file a motion to stay proceedings without requesting leave to do so. This motion is styled as one seeking leave to file only in an abundance of caution to avoid any further delays in the event this Honorable Court deems it proper, considering that the petition indicated no stay was being sought.

Regarding standing, Petitioner has standing to file her petition under Article

6b(e)(4)(A) and Article 6b(e)(4)(C), U.C.M.J., and she also has standing to petition this Honorable Court to issue a writ of mandamus pursuant to the All Writs Act codified in 28 U.S.C. § 1651. Since she has standing for the limited purpose of seeking mandamus relief, that standing must of necessity extend to seeking a stay so that this Honorable Court will have sufficient time to resolve the petition for mandamus relief.

Therefore, the above-cited authority allows Petitioner to seek a stay of the proceedings as outlined herein.

II.

THERE IS GOOD CAUSE TO STAY THE PROCEEDINGS

At the time of S.D.'s filing her second Petition on 21 August 2025, there was no indication that any responses would be called for or that there may be insufficient time for this Honorable Court to issue a ruling on the petition. As of the filing of this motion, however, neither of the responses required from both the government and the accused have been filed, and both parties still have until Friday, 12 September 2025, to file such. If both parties wait until 12 September to file responses, then that leaves zero duty days for this Honorable Court to issue a ruling on the petition before trial starts on Monday, 15 September 2025.

There is a distinct possibility that at any point during the trial proceedings evidence offensive to Petitioner's Article 6b, U.C.M.J., rights may arise in the questioning of witnesses or in the presentation of argument. There is no portion of the trial that may safely proceed without the resolution of the issues laid out in the

petition—specifically the need to protect Petitioner's rights under Article 6b U.C.M.J. Therefore, because the offensive evidence may be introduced as early as Monday, 15 September 2025, there is insufficient time for a ruling on the petition and the petition itself would be rendered moot without a stay of the proceedings.

RELIEF SOUGHT

Wherefore, S.D. respectfully requests that this Honorable Court stay the proceedings until such time as it can issue a ruling on the petition filed with this Honorable Court on 21 August 2025.

RESPECTFULLY SUBMITTED this 11th day of September 2025.

[redacted]4, DAF CIVILIAN
Chief, Appellate and Outreach, Victims' Counsel
Military Justice and Discipline Directorate
Department of the Air Force
[redacted]

/s/ *David J. Brown*
DAVID J. BROWN, Capt, USAF
Counsel for S.D.
Victims' Counsel
Military Justice and Discipline Directorate
Department of the Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that on 11th day of September 2025, the foregoing was electronically filed with the Court and served on the following addresses:

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DEVON A. R. WELLS, GS-14, DAF CIVILIAN
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Department of the Air Force

[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re SD,	)	**REAL PARTY IN INTEREST'S**
	)	**OPPOSITION TO PETITIONER'S**
	)	**MOTION FOR LEAVE TO FILE**
Petitioner	)	**MOTION TO STAY PROCEEDINGS**
	)	
	)	
	)	Before Panel 2
Senior Airman (E-4)	)	
Gabriel A. BINKLEY,	)	Misc. Dkt. No. 2025-09
United States Air Force,	)	
Real Party in Interest	)	11 September 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Comes now Real Party in Interest, Senior Airman (SrA) Gabriel A. Binkley, United States Air Force, by and through his undersigned counsel, and pursuant to Rule 23(c) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, opposes Petitioner's motion to stay proceedings.[1]

Introduction

Petitioner reverses her position and seeks a stay ***two business days before SrA Binkley's general court-martial is scheduled to commence***. This Court should deny that dilatory switcheroo out of hand.

[1] Petitioner captioned her filing as a "Motion for Leave to File Motion to Stay Proceedings" despite thrice citing Rule 23.3(c) of this Court's rules, which allows a party to file a motion for a stay without an accompanying motion for leave to file. Motion at 3–4. SrA Binkley does not oppose Petitioner's unnecessary motion for leave to file. However, he opposes Petitioner's underlying motion to stay proceedings.

Invocation of Right to Speedy Trial

SrA Binkley is in pretrial confinement. Unofficial Trial Tr. (PDF 115).[2] He expressly invokes his rights to speedy trial under the Sixth Amendment; Article 10, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 810; and Rule for Courts-Martial (R.C.M.) 707, *Manual for Courts-Martial, United States* (*MCM*) (2024 ed.). He opposes any stay of his court-martial, which has been scheduled to commence on Monday, 15 September 2025, throughout the pendency of the petition.

This Court Should Deny Petitioner's Dilatory Request for a Stay

On the same day she filed her mandamus petition, Petitioner expressly asserted that she "does not request a stay of proceedings at this time." Petitioner's Motion for Leve [sic] to Supplement Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, Aug. 21, 2025, *granted* (A.F. Ct. Crim. App. Sep. 3, 2025). Yet today—twenty-one days after taking that position and only two business days before SrA Binkley's general court-martial is scheduled to commence—Petitioner reverses her position. Petitioner seeks to justify that reversal based solely on this Court's 27 August 2025 order directing briefing. Petitioner's Motion at 4–5. Yet Petitioner does not even attempt to explain why she waited **fifteen days** after this Court issued that order to reverse her position. This Court should reject Petitioner's untimely reversal of her previous position.

Petitioner is not a party to SrA Binkley's general court-martial. A non-party should not be permitted to derail the careful planning of the parties to bring the case to trial, especially given

[2] This citation refers page 115 of the 338-page PDF Petitioner submitted in this matter. The PDF includes the mandamus petition and all its attachments. This citation is to the unofficial transcript of the 10 July 2025 Article 39(a) session that is within that PDF. The unofficial transcript itself is unpaginated.

SrA Binkley's ongoing deprivation of liberty. *See* Article 10(b)(1), UCMJ, 10 U.S.C. § 810(b)(1) ("When a person subject to this chapter is ordered into . . . confinement before trial, immediate steps shall be taken . . . to try the person or to dismiss the charges and release the person.").

Delaying the trial would prejudice SrA Binkley's rights. If the trial does not begin as scheduled on 15 September 2025, it will probably be delayed approximately three months, thereby subjecting SrA Binkley to an additional three months of pretrial confinement. This is particularly unfair to SrA Binkley, the Real Party in Interest, when Petitioner could have sought relief with far greater speed at every phase of this process. Additionally, SrA Binkley's military defense counsel has already traveled from his duty station at Moody Air Force Base, Georgia, to the trial location at Shaw Air Force Base, South Carolina, roughly 300 miles away. Granting a stay would not be judicially efficient—both in general and specifically because it would result in a senseless waste of Government funds resulting from the military defense counsel's travel. These factors counsel strongly against a stay of proceedings.

The fault for the briefing schedule being so close to, and overlapping with, the scheduled general court-martial lies with Petitioner. Petitioner filed an earlier petition seeking much the same relief as the current petition. *See In re SD*, Misc. Dkt. No. 2025-07, 2025 CCA LEXIS 369, at *1 (A.F. Ct. Crim. App. Aug. 5, 2025) (order). This Court denied that petition because the military judge had not yet ruled on the issue for which Petitioner sought relief. Once the military judge issued her ruling on 6 August 2025 (which was unfavorable to Petitioner), Petitioner waited nine days to attempt to file her then-ripe petition for extraordinary relief. That filing, however, was "improperly filed" on 15 August 2025, causing its rejection by this Court on 18

August 2025.[3] Petitioner then inexplicably waited another three days before filing the corrected petition on 21 August 2025.

Petitioner has not operated with the urgency required and expected when seeking extraordinary relief. *See, e.g.*, *In re Rappaport*, 558 F.2d 87, 90 n.9 (2d Cir. 1977) ("delay in seeking mandamus may itself prove fatal to the petition"). Petitioner's dilatoriness provides compelling justification to deny the requested stay, which would violate SrA Binkley's right to speedy trial. Consider, for example, the United States District Court for the District of Delaware's approach to a stay request made **eleven days** before trial: "[Defendant] has chosen to reveal its desire to stay litigation only after the issuance of the memorandum opinion, a mere eleven days before trial. A request at this late stage is prejudicial to [plaintiff's] investment in trial preparation and does not comport with the notion of judicial efficiency." *Belden Techs. Inc. v. Superior Essex Communs. LP*, Civ. No. 08-63-SLR, 2010 U.S. Dist. LEXIS 90960, at *8 (D. Del. Sept. 2, 2010). The court accordingly denied the defendant's stay request. *Id.* at *12. Here, where Petitioner first revealed her desire to stay litigation a mere four days (and only two business days) before trial, a stay is even less appropriate.

Had Petitioner filed a compliant petition for extraordinary relief sooner, resolution would have been possible before SrA Binkley's trial is scheduled to commence on 15 September 2025. The extraordinary remedy of a stay of a lower court's proceedings is inappropriate where the

[3] Email from Captain Jacob B. Hoeferkamp, USAF, Chief Commissioner, United States Court of Criminal Appeals, to Devon A. Wells, Esq., and Captain David J. Brown, USAF, Aug. 18, 2025. This Court may take judicial notice of its own records to establish that Petitioner's counsel attempted to file the petition on 15 August 2025 and that this Court returned it without action on 18 August 2025. *See United States v. Lovett*, 23 C.M.R. 168, 172 (C.M.A. 1957) ("An appellate court . . . can take judicial notice of its own records.").

individual seeking that stay is both responsible for any race against the clock and affirmatively disclaimed any desire for a stay at the outset.

Finally, a stay would be particularly inappropriate because, as SrA Binkley will establish in his answer to the underlying mandamus petition, Petitioner has not come close to carrying her burden of establishing a clear and indisputable right to the relief she seeks in that petition.

Conclusion

For the foregoing reasons, this Court should deny Petitioner's dilatory motion for a stay.

Respectfully submitted,

[redacted]
Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

[redacted]
Air Force Appellate Defense Counsel
[redacted]

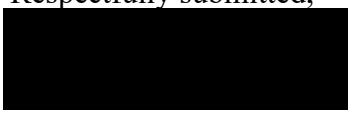
[redacted]
Michael P. Eagan, Capt, USAF
Area Defense Counsel
[redacted]

Counsel for Real Party in Interest

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on Petitioner's counsel and the Government Trial and Appellate Operations Division on 11 September 2025.

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

IN RE SD,	)	UNITED STATES' ANSWER TO
Petitioner,	)	PETITION FOR
	)	FOR EXTRAORDINARY RELIEF
	)	OUT OF TIME
	)	Before Special Panel
	)	
Senior Airman (E-4)	)	Misc. Dkt. No. 2025-09
GABRIEL A. BINKLEY	)	
United States Air Force	)	15 September 2025
Real Party in Interest	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

The United States provides this answer to Petitioner's petition for extraordinary relief. Petitioner requests a writ of mandamus vacating the military judge's ruling that held that violation of Article 130, UCMJ did not constitute "sexual misconduct" for purposes of Mil. R. Evid. 412. Although Petitioner makes compelling arguments as to why Article 130, Stalking, constitutes "sexual misconduct" under the UCMJ, in the end, the law is ultimately unsettled. Since the law is unclear, the military judge in this case could not have clearly and indisputably erred. Petitioner has failed to meet her heavy burden to establish a clear and indisputable entitlement to extraordinary relief. Thus, the petition should be denied.

This response is being filed out of time for the reasons explained in the accompanying motion for leave to file out of time.

STATEMENT OF CASE

The United States accepts Petitioner's statement of the case.

STATEMENT OF FACTS

The United States accepts Petitioner's statement of facts.

ARGUMENT

Standard of Review

The All Writs Act authorizes "all courts established by an Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (LexisNexis, Lexis Advance through Public Law 117-214, approved 19 October 2022). This Court is among the courts authorized under the All Writs Act to issue "all writs necessary and appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a); *see* also L.R.M. v. Kastenberg, 72 M.J. 364, 367 (C.A.A.F. 2013).

"The writ of mandamus is a drastic and extraordinary remedy reserved for really extraordinary cases." EV v. United States, 75 M.J. 331, 332 (C.A.A.F. 2016) (citations and quotations omitted). To justify the issuance of a writ, a military judge's decision "must amount to more than even 'gross error'; it must amount 'to a judicial usurpation of power.'" United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983) (quoting United States v. DiStefano, 464 F.2d 845, 850 (2d Cir. 1972)).

Under this standard, Appellant must satisfy three conditions before a writ of mandamus may be issued. Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012) (citing Cheney v. United States Dist. Court, 542 U.S. 367, 380-81 (2004)). Specifically: (1) Appellant "must have no other adequate means to attain the relief [she] desires"; (2) Appellant "must satisfy the burden of showing that [her] right to issuance of the writ is clear and indisputable"; and (3) "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." Cheney, 542 U.S. at 380-81 (citations, quotations, and alterations omitted).

ARGUMENT

This Court may grant extraordinary relief if (1) the requested writ is "in aid of the court's existing jurisdiction," and (2) the requested writ is "necessary or appropriate." Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008) (internal quotations omitted). Assuming this Court has jurisdiction, the writ is not "necessary or appropriate" because the right to issuance of the writ is not clear and indisputable.

"[I]n any proceeding involving an alleged sexual offense," Mil. R. Evid. 412(1)(a) prohibits the introduction of "evidence offered to prove that a victim engaged in other sexual behavior." Mil. R. Evid. 412(c) allows a victim to be heard counsel on such matters. A "sexual offense" is defined under Mil. R. Evid. 412(d) as including "any sexual misconduct punishable by the Uniform Code of Military Justice, federal and state law."

Article 130, UCMJ, Stalking, prohibits, per its statutory language, a certain course of conduct that reasonably induced fear of death or bodily harm, including sexual assault. The offense maybe charged as occurring against an immediate family member or intimate partner.

10 U.S.C. 1044c, which is mentioned in Mil. R. Evid. 412(c)(2) as the statute authorizing the representation by victim's counsel, also lists offense under Article 130, UCMJ as a "sex-related offense."

With regard to Article 130, UCMJ, Stalking, the Real Party in Interest was charged as follows:

> **CHARGE V: Violation of UCMJ, Article 130**
>
> **Specification: In that SENIOR AIRMAN GABRIEL A. BINKLEY, United States Air Force, did, within the continental United States, between on or about 1 February 2025 and on or about 14 February 2025, engage in a course of conduct directed at First Lieutenant S.D. [redacted] that would cause a reasonable person to fear bodily harm to herself, that SENIOR AIRMAN GABRIEL A. BINKLEY knew or should have known that the course of conduct would place First Lieutenant S.D. [redacted] in reasonable fear of bodily harm to herself, and that SENIOR AIRMAN GABRIEL A. BINKLEY's conduct placed First Lieutenant S.D. [redacted] in reasonable fear of bodily harm to herself.**

Given the way the specification was charged, the military judge did not clearly and indisputably err in finding that Article 130 was not "sexual misconduct" under Mil. R. Evid. 412(d). An offense that is "sex-related" would appear to be broader than "sexual misconduct." "Stalking" could be sex-related, because it could involve a sexual connotation or motive. But an individual incident of stalking might not be "sexual misconduct" because there is no sexual component to it. Here, the stalking offense was not charged with SD being identified as an intimate partner, nor did the specification allege that the conduct would cause a reasonable person to fear sexual assault. On the face of the charge sheet, there is no indication that the misconduct was "sexual" in nature.

This would perhaps be a different case if the Real Party in Interest had been charged with a stalking offense that named SD as an intimate partner on the charge sheet, or if the Real Party in Interest was specifically charged on the charge sheet with causing fear of bodily harm: to wit, sexual assault. But in light of the dearth of controlling case law on the issue and the way the case was charged, the military could not have clearly and indisputably erred.

SD is not completely without recourse in facing this issue. Under Article 6b(a)(5) she has the reasonable right to confer with trial counsel. SD and her victim's counsel can express to trial counsel why they believe the evidence should be excluded on other grounds, such lack of relevance or undue prejudice. Assuming those arguments are sound, trial counsel can incorporate them into a motions hearing or a motion for reconsideration.

CONCLUSION

This Court should deny Petitioner's request for extraordinary relief since the military judge's ruling did not rise to the level of being clear and indisputable error.

[redacted]
MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, Petitioner's counsel, the Air Force Appellate Defense Division, the Respondent on 15 September 2025.

[redacted]
MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re SD,	)	**REAL PARTY IN INTEREST'S**
	)	**MOTION FOR LEAVE TO FILE**
	)	**AND MOTION TO DISMISS**
Petitioner	)	**PETITION**
	)	
	)	
	)	Before Panel 2
Senior Airman (E-4)	)	
Gabriel A. BINKLEY,	)	Misc. Dkt. No. 2025-09
United States Air Force,	)	
Real Party in Interest	)	17 September 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Comes now the Real Party in Interest, Senior Airman (SrA) Gabriel A. Binkley, United States Air Force, by and through his undersigned counsel and, pursuant to Rule 23.3 of this Court's rules, moves for leave to file this motion and moves to dismiss the petition that Petitioner filed with this Court on 21 August 2025.

The petition arises from the general court-martial of SrA Binkley. Following earlier motions sessions, trial in that case began at Shaw Air Force Base, South Carolina, on Monday, 15 September 2025. Both parties to that court-martial rested their cases in chief on Wednesday, 17 September 2025. The prosecution elected not to present a case in rebuttal.

The conclusion of the parties' cases renders moot the portions of the petition: (1) regarding the applicability of Military Rule of Evidence 412 to evidence concerning the stalking charge in SrA Binkley's court-martial, and (2) seeking a closed hearing. For the reasons discussed in the Real Party in Interest's answer, mandamus relief is not available for the portion of the petition seeking a writ directing the military judge "to seal all records containing evidence

of [Petitioner's] alleged sexual behaviors and predispositions." Pet. at 28; Real Party in Interest's Answer at 26–30.[1]

Accordingly, this Court should dismiss the petition.

Respectfully submitted,

[redacted]
Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

[redacted]
P
Air Force Appellate Defense Counsel
[redacted]

[redacted]

Michael P. Eagan, Capt, USAF
Area Defense Counsel
[redacted]

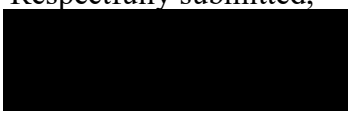
Counsel for Real Party in Interest

[1] Petitioner's argument that the Real Party in Interest's answer addressed the sealing issue "in violation of this Honorable Court's order dated 27 August 2025," Petitioner's Reply at 5, is incorrect. This Court's order of 27 August 2025 provided that the "United States and the Real Party in Interest shall file an answer to the petition not later than **12 September 2025**." *In re SD*, Misc. Dkt. No. 2025-09 (A.F. Ct. Crim. App. Aug. 7, 2025) (order). That language ordered the Real Party in Interest to file an answer to the entire petition, not merely one portion of it. The order continued that the "United States and the Real Party in Interest shall include in their briefs an answer" to whether the stalking allegation in SrA Binkley's court-martial constitutes a "sexual offense" for Military Rule of Evidence 412 purposes. *Id.* That language clearly conveyed that the answer must include a response to that question but may contain other content as well.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on Petitioner's counsel and the Government Trial and Appellate Operations Division on 17 September 2025.

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re SD *Petitioner* **United States** *Real Party in Interest A* **SrA GABRIEL A. BINKLEY** 77 FGS (ACC) Shaw AFB, South Carolina *Real Party in Interest B*	**PETITIONER'S OBJECTION TO REAL PARTY IN INTEREST'S MOTION TO DISMISS** Before Panel No. 2 Misc. Dkt. No. 2025-09 19 September 2025

COMES NOW S.D. by and through her undersigned Victims' Counsel (VC), to object to Real Party in Interest SrA Gabriel A. Binkley's Motion to Dismiss.

SUPPLEMENTAL FACTS

On 18 September 2025 RPI SrA Binkley was found guilty of violating Articles 89, 107, and 90 of the Uniform Code of Military Justice. The Article 90 violation was for violating a protective order issued to protect S.D. RPI SrA Binkley was found not guilty of stalking under Article 130. RPI SrA Binkley was sentenced to 7 months confinement, reduction to E-1, forfeitures of all pay and allowances, and a bad-conduct discharge. The Statement of Trial Results is attached to the Real Party in Interest's Motion to Attach, filed on 19 September 2025. Since RPI Binkley is sentenced to a bad-conduct discharge, his case qualifies for automatic appellate review under Article 66, U.C.M.J.

ARGUMENT

Since M.R.E. 412 demands sealing of all papers associated with M.R.E 412 evidence, and demands a showing by appellate counsel to examine on appeal, S.D.'s petition is not moot.

M.R.E. 412 not only requires a closed hearing, but it also requires "[t]he motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1113 and remain under seal unless the military judge, the Judge Advocate General, or an appellate court orders otherwise." M.R.E. 412(c)(2), Manual for Courts-Martial (2024). Since the Military Judge ruled M.R.E. 412 inapplicable to the case, the motions and papers S.D. asserts that M.R.E. 412 is applicable to are not under seal, and S.D. does not get the protections of R.C.M. 1113 as the case is appealed.

R.C.M. 1113 outlines a process and an additional step before appellate counsel get to examine sealed materials. "Materials presented or reviewed at trial and sealed, as well as materials reviewed in camera, released to trial counsel or defense counsel, and sealed, may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities . . ." R.C.M. 1113, Manual for Courts-Martial (2024).

The requisite sealing under M.R.E. 412 did not occur. If this court issues a writ vacating the Military Judge's ruling and declaring M.R.E. 412 applicable, then those papers would be sealed as necessary for the protection of S.D.'s privacy. Therefore, the writ-petition is not moot.

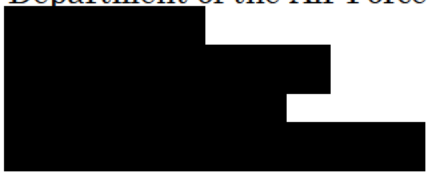
RELIEF SOUGHT

Wherefore, S.D. respectfully requests this Court deny RPI Binkley's motion to dismiss S.D.'s writ-petition to ensure S.D.'s rights under Article 6b are afforded to

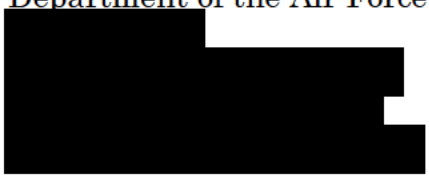
her during the pendency of her offender's appeal.

RESPECTFULLY SUBMITTED this 19th day of September 2025.

DEVON A. R. WELLS, GS-14, DAF CIVILIAN
Chief, Appellate and Outreach, Victims' Counsel
Military Justice and Discipline Directorate
Department of the Air Force



/s/ *David J. Brown*
DAVID J. BROWN, Capt, USAF
Counsel for S.D.
Victims' Counsel
Military Justice and Discipline Directorate
Department of the Air Force



CERTIFICATE OF FILING AND SERVICE

I certify that on 19th day of September, the foregoing was electronically filed with the Court and served on the following addresses:

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/s/ David J. Brown
DAVID J. BROWN, Capt, USAF
Counsel for S.D.
Victims' Counsel
Military Justice and Discipline Directorate
Department of the Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re SD *Petitioner* **United States** *Real Party in Interest A* **SrA GABRIEL A. BINKLEY** 77 FGS (ACC) Shaw AFB, South Carolina *Real Party in Interest B*	**PETITIONER'S REPLY TO REAL PARTY IN INTEREST'S and THE UNITED STATES' ANSWER TO PETITION FOR EXTRAORDINARY RELIEF** *in the nature of a* **WRIT OF MANDAMUS** Misc. Dkt. No. 2025-09

COMES NOW S.D. by and through her undersigned Victims' Counsel (VC), to reply to the answers filed by the United States and the Real Party in Interest to the petition for extraordinary relief in the nature of a writ of mandamus.

ISSUES PRESENTED

IS THE CHARGED ARTICLE 130, UCMJ, OFFENSE A "SEXUAL OFFENSE" FOR PURPOSES OF APPLYING MIL. R. EVID 412 UNDER THE CIRCUMSTANCES OF THIS CASE?

JURISDICTION

Defense concedes that S.D. has standing under Article 6b(e), UCMJ, 10 U.S.C. § 806b(e). Defense erroneously indicated, however, that "…this Court's extraordinary relief jurisdiction for purposes of this petition is limited to that established by Article 6b(e), UCMJ, 10 U.S.C. § 806b(e)." Real Party in Interest's Answer to Petition for Extraordinary Relief in the Nature of a Writ of Mandamus (hereinafter "Defense Answer), at 2. This Honorable Court is authorized to issue a writ under the All Writs Act codified in 28 U.S.C. § 1651 because Petitioner has a constitutional right to be

heard independent of any statutory scheme, because she satisfies the three elements of standing articulated in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). As stated in the original petition, S.D. has suffered an injury in fact that is concrete and particularized, it was actual with a causal connection from the Military Judge's rulings, and finally the harm is likely to be redressed by a favorable decision from this Honorable Court.

The United States Supreme Court ruled that a constitutional right to standing arises when these elements are met and that such right is "irreducible". *Id.* That means that a party's standing to be heard cannot be curtailed or limited in any way by statute. Furthermore, C.A.A.F. has ruled that subject matter jurisdiction is established whenever the issue at bar directly impacts findings or the sentence—including evidentiary matters related to victim privacy rights. *See LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013); *cf. M.W. v. United States*, 83 M.J. 361 (C.A.A.F. 2023)

Therefore, this Court has independent authority to issue a writ of mandamus pursuant to the All Writs Act codified in 28 U.S.C. § 1651 because S.D. has a legal right to her privacy and has no other reasonable means to protect that right from violation by the Military Judge other than the issuance of a writ. *See United States v. Curtin*, Misc. Dkt. No. 95-07, 1995 CCA LEXIS 339, at *3 (A.F. Ct. Crim. App. Dec. 8, 1995); *cf. supra M.W.*

ARGUMENT

I
The issue of Petitioner's diligence in filing the petition was raised in violation of this Court's order dated 27 August 2025.

On 27 August 2025 this Honorable Court issued a very clear order directing that "The United States and the Real Party in Interest shall file an answer to the petition not later than **12 September 2025**. The United States and the Real Party in Interest shall include in their briefs an answer to the following question: Is the charged Article 130, UCMJ, offense a "sexual offense" for purposes of applying Mil. R. Evid. 412 under the circumstances of this case?" [Emphasis in the original.] Rule 19(f)(1) of this Honorable Court's Rules prohibits a response to petitions for extraordinary relief filed pursuant to Article 6b, UCMJ, unless otherwise directed by this Honorable Court.

Missing from this Honorable Court's order is leave to complain about timeliness of the Petitioner's filings. On this basis alone Defense's arguments should be disregarded. Furthermore, this Honorable Court may take judicial notice that Petitioner complied with all relevant time requirements for filing. Petitioner avers that any delays that may be mischaracterized as dilatory were reasonable under the circumstances; however, Petitioner does not have leave to argue this issue which is not properly before this Honorable Court. Should this Honorable Court require further explanation regarding timeliness of filings, Petitioner will promptly provide such.

II

The impact of A New Military Judge being detailed in this case was raised in violation of this Court's order dated 27 August 2025.

Missing from this Honorable Court's order dated 27 August 2025 was leave to complain about the impact, if any, of the detailing of a new military judge to this case. Accordingly, this complaint should be disregarded.

To correct critical omissions in the record, however, Petitioner is obligated to note that the Defense's Answer curiously omits the date that the new military judge was detailed to the case, which was on 20 August 2025—less than a month before trial. Defense also omits that the new military judge was detailed under the supervision and observation of the previously detailed military judge, who continues to actively engage in correspondence with the parties and to issue rulings in this case.

Paradoxically, Defense argues that Petitioner's failure to be quicker in filing her petition, making a corrected re-filing, and then filing a new petition with new arguments based on a new ruling—all within less than a month—is fatal to the case. Defense then argues that failure to take a substantial amount of *additional* time for another round of motions and responses following the new judge's detailing on 20 August is also fatal to the petition.

Again, Petitioner is ready to respond more substantively to this improperly raised issue should this Honorable Court grant leave to do so. Nevertheless, the law-of-the-case doctrine would seem to apply to rulings of the previous military judge when a new military judge is detailed unless good cause leads to seeking reconsideration. *See generally United States v. Schelmetty*, No. ARMY 20150488, (A.

Ct. Crim. App. June 30, 2017). S.D. posits a change in Military Judge does not constitute good cause shown.

III

The issue of whether Petitioner is entitled to a closed hearing was raised in violation of this Honorable Court's order dated 27 August 2025.

Defense argues that a closed hearing is not required if this Honorable Court determines that Military Rule of Evidence (hereafter M.R.E.) 412 is inapplicable and, alternatively, that the automatic closure provision of M.R.E. 412 is currently being challenged at the Court of Appeals for the Armed Forces and therefore it is in dispute and not appropriate for mandamus relief. Again, this argument is non-responsive to this Honorable Court's 27 August 2025 order restricting responses to the narrow question to the applicability of the term "sexual offense" to M.R.E. 412.

Defense's misapprehension of the clear and indisputable standard is more specifically addressed below, but again, Petitioner is ready to respond more substantively to this improperly raised issue should this Honorable Court grant leave to do so.

IV

The issue of sealing any portion of the record was raised in violation of this Honorable Court's order dated 27 August 2025.

Continuing on the theme of disregard for this Honorable Court's 27 August 2025 order, Defense's Answer raises the above issue without leave. Accordingly, Petitioner asks this Honorable Court to disregard this argument as non-responsive. If directed by this Honorable Court, Petitioner is ready and willing to make a

substantive response to this argument justifying the sealing of only those parts of the record containing material that would typically be sealed under M.R.E. 412.

V

Stalking is clearly and indisputably a "sexual offense" as applied to Military Rule of Evidence 412.

Defense's apprehension of the clear and indisputable standard is inconsistent with case law and is untenable in practice. Requiring that an issue be free from any meaningful dispute *and* requiring that the issue be previously resolved by an appellate court would eviscerate any basis for a writ to be issued. Furthermore, Defense's frolic through the history of M.R.E. 412 fails to alter the reality that the term "sexual offense", as defined under M.R.E. 412(d), clearly and indisputably includes "sex-related offenses". Finally, the argument that Government gets to decide whether an offense under Article 130, U.C.M.J. constitutes a "sexual offense" by the way it charges the offense is wrong because it contradicts Congress' clearly articulated structure for protecting victims' rights in court-martial proceedings.

A. Defense's misapprehension of the clear and indisputable standard is inconsistent with case law and is untenable in practice.

Defense suggests that a writ of mandamus should not be issued for legal issues that have not already been resolved. For support, Defense relies upon *Wean v. Holder*, however in that Army case the petitioner asked that court to recognize and protect novel rights for which there was no basis in law or fact. *See* 47 M.J. 540, 543-44 (A. Ct. Crim. App. 1997). In the case at bar, Article 6b, Uniform Code of Military Justice, 10 U.S.C. § 806b (hereafter Article 6b, U.C.M.J.) clearly

establishes a victim's right to privacy that must be protected—either directly under Article 6b or through the provisions of M.R.E. 412. Thus, the case is inapplicable because the Petitioner does not seek to establish a new right but the protection of an established right that has clearly been violated.

Defense also relies upon *Will v. United States* for the position that a writ of mandamus should not be used to correct trial court errors that lie within its own discretion. 389 U.S. 90, 104-07, 88 S. Ct. 269 (1967). In *Will*, however, the trial court ordered the government to provide a bill of particulars that required the government to disclose some of its witnesses before trial, and the government refused and sought a writ to vacate the order. *Id.* at 71-73. The appellate court granted the writ and ordered the judge to vacate its order without explanation. *Id.*

The Supreme Court found that ordering a bill of particulars was within the discretion of the trial court, but more problematic was that the appellate court failed to justify why a writ was being issued. *Id.* at 278-80. There simply was no explanation provided. The Court stated, "[a] mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court upon which the Government rests its attempt to justify the action below." *Id.* at 280.

Unlike the trial court's decision in *Will* to order a bill of particulars, whether a trial court gives due regard to Petitioner's rights under Article 6b, U.C.M.J. is not discretionary. Also, unlike the appellate court in *Will*, this Honorable Court will be able to positively identify the propriety of issuing a writ to address clear violations

of victims' rights under Article 6b and under M.R.E. 412 as expressly provided for in Article 6b(e)(4), U.C.M.J.

Defense also cites a nonbinding federal district court opinion where the district court declined to issue a writ of mandamus to a local government primarily due to federalism and comity issues wholly inapplicable to the case at bar. *See PrimeCo Pers. Commc'ns, L.P. v. Vill. of Fox Lake*, 26 F. Supp. 2d 1052, 1066 (N.D. Ill. 1998). In that case, as with the prior cited cases, mandamus relief was not withheld because of a lack of prior caselaw on the specific question at bar, but primarily for other reasons such as the absence of a legal right or a federal court compelling local government action where federal authority was questionable.

The only novel aspect in the case at bar is in the application of M.R.E. 412 to offenses under Article 130, U.C.M.J., 10 U.S.C. § 930. If appellate courts are estopped from issuing writs of mandamus in the absence of existing caselaw on the specific point at issue, then it begs the question of when *can* appellate courts issue a writ? If the precise question had already been fully litigated and resolved at the appellate level, then there would be no reason to seek a writ. Under Defense's theory, the proper scope for a writ of mandamus appears to be relegated to instances when military judges declare open rebellion to incontrovertible case law.

Requiring that trial judges first take leave of their senses and solemn duty in rejecting clear precedent is not the standard for issuing a writ of mandamus, neither should it be. Rather, interpreting and applying the law as it pertains to well-established rights is squarely within this Honorable Court's purview. The

issuance of a writ of mandamus is the proper mechanism for how rights are protected, particularly where further harm may be done before the conclusion of trial without such relief. This applies particularly to issues of victim rights as established by the express terms of Article 6b(e), U.C.M.J.

Additionally, Defense appears to argue that because the issue is subject to reasonable debate or disagreement a writ of mandamus is foreclosed for failing the indisputable requirement. *See* Defense Answer, at 21. However, requiring that the issue in question is free of reasonable debate is also not the standard for issuing a writ of mandamus, nor should it be.

In *Hasan v. Gross*, the chief circuit judge declined to recuse himself after, among other things, having confrontations with the accused regarding his grooming. The accused sought a writ of mandamus. In that case, the C.A.A.F. found that a reasonable person could question the trial judge's impartiality and then issued the writ. 71 M.J. 416, 417 (C.A.A.F. 2012). In issuing a writ, however, C.A.A.F. did not require that the issue be one where reasonable minds could not differ. That Court held that, "[h]aving concluded that Appellant has shown a clear and indisputable right to removal of the military judge, we further determine that there is no other adequate means for Appellant to attain relief and that removal is appropriate under the circumstances." *Id.* at 19.

Importantly, C.A.A.F. established that it is the right to relief itself that must be "clear and indisputable", not whether anyone has actually disputed the issue or whether one could reasonably dispute it. *See Id.* Certainly, the chief circuit judge's

arguments had some degree of merit, but ultimately the petitioner's right to relief was clear and indisputable in the assessment of the C.A.A.F.

Similarly, in *H.V.Z.* the C.A.A.F. denied a writ to vacate the military judge's M.R.E. 701 ruling because there was sufficient factual support for the military judge's conclusion that 701 applied to military medical provider records. *H.V.Z. v. United States*, 85 M.J. 8, 13 (C.A.A.F. 2024). However, the C.A.A.F. did issue a writ of mandamus on the novel legal question of the applicability of 513(e) to non-privileged mental health treatment and diagnosis records based on the inclusion of the word "records" in that provision which the C.A.A.F. determined was dispositive of the issue. *Id.* at 17.

In *H.V.Z.* the defense and military judge's arguments were not unreasonable, especially considering the C.A.A.F.'s precedent under *U.S. v. Mellette* to render mental health diagnoses and treatment records not otherwise protected under M.R.E. 513. *See* 82 M.J. 374, 380 (C.A.A.F. 2022). Ultimately, the C.A.A.F. issued a writ of mandamus because, "[g]iven the plain language of M.R.E. 513(e), we believe that H.V.Z. had a clear and indisputable right to be heard with respect to the accused's motion to compel". *H.V.Z. v. United States*, 85 M.J. 8, 16 (C.A.A.F. 2024). Again, in articulating its rationale, the C.A.A.F. spoke only of the persuasiveness of the evidence—in this instance the plain language of M.R.E. 513—regarding the issuance of a writ but importantly made no analysis of or even reference to the objective reasonableness of the military judge's analysis or conclusions.

Therefore, as applied, the clear and indisputable standard describes the high

level of confidence in the minds of the appellate courts that the petitioner has a right to mandamus relief based on the evidence. It does not fail because the issue is one upon which reasonable minds could differ or if there is an actual dispute regarding the issue.

B. Defense's discourse on M.R.E. 412's history and a Black's Law definition of the term "sexual offense" do not diminish M.R.E. 412's applicability to stalking offenses.

Defense suggests that the timing of when M.R.E. 412(c)(2) was revised to reference to 10 U.S.C. § 1044e is significant because M.R.E. 412(d) was not updated at that time to include the term "stalking" or the definition used in 10 U.S.C. § 1044e for "sex-related offense". This argument is a logical non-sequitur considering the plan language of M.R.E. 412(d), which unlike M.R.E. 413(d) and 10 U.S.C. § 1044e, 412(d) intentionally does not employ any list of specific offenses. Rather M.R.E. uses the much broader and inclusive language, "any sexual misconduct punishable under the Uniform Code of Military Justice", which by its clear terms necessarily includes sex-related offenses. Thus, the fact that M.R.E. 412(d) fails to reference any specific violation of the U.C.M.J. only reinforces Congress' intent that it be broadly inclusive.

Defense cites a 2004 Black's Law Dictionary definition of "sexual offense" that includes a non-exhaustive list of some examples of "unlawful sexual conduct". Defense Answer, at 19. For the purpose of applying M.R.E. 412, even that definition could still reasonably include a stalking offense as Congress has defined it for the purpose of defining and protecting victims' rights in courts-martial. More to the

point, the use of legal dictionaries, while potentially insightful in understanding legal terms of art, is not instructive on the ordinary use of language. Thankfully, however, the term "sexual offense" is specifically defined by M.R.E. 412(d).

Accordingly, looking outside M.R.E. 412(d) for a definition of the term "sexual offense" is not only unnecessary but impermissible. By defining the term and distilling it down to commonly used words, the President put violators on clear notice that *any sexual misconduct* that is punishable under the U.C.M.J. will trigger the protections of M.R.E. 412. It should go without saying, then, that the commonly used word "sexual" included in the President's definition, is ordinarily used to refer to something that is "of, relating to, or associated with sex or the sexes".[1] That is why it is clear and indisputable that the term "sexual offense," as broadly defined in M.R.E. 412(d), necessarily includes all violations that Congress has defined as "sex-related offenses" punishable by court-martial.

Additionally, the 2015 National Defense Authorization Act, 113 P.L. 291; 128 Stat. 3292, Sec. 534(c) (hereinafter 2015 N.D.A.A.) establishes the systematic use of the term "sex-related offense" when referring to victims' rights in court-martial proceedings. This includes victims' rights on issues of input on venue, notice of proceedings, and exercising a right to be heard through victims' counsel. Subsection (d) of 534(1) provides that "[t]he term "alleged sex-related offense" has the meaning given that term in section 1044e(g) of title 10, United States Code."

It appears clear and indisputable from the plain language of the statute,

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[1] https://www.merriam-webster.com/dictionary/sexual

therefore, that Congress intended violations of Article 130, U.C.M.J. to be considered sex-related offenses when victims' rights are at issue. This makes sense in the context of the heightened necessity of protecting victims' rights under Article 6b, U.C.M.J., because stalking offenses often involve intimate relationships and often very personal and potentially embarrassing evidence that would discourage victims from participating in the military justice process. Failure to protect victims from improper disclosure of such bears very similar prejudicial risks in stalking cases as with sex assault cases.

As the record in this case shows, there is personal and prejudicial evidence of the Petitioner's prior sexual behavior that both Defense and Government seek to admit to the record. Congress clearly expressed the intent that victims of "sex-related offenses" be represented by victims' counsel regarding violations of their privacy rights, as that term is defined in Section 1044e(g) of title 10, United States Code.

C. How a stalking case is charged has no impact on its statutory definition as a "sex-related offense".

Defense's citation of a federal district court decision to interpret a Tennessee statute in such a way to avoid requiring a convicted stalker to register as a sex offender bears almost no resemblance to the case at bar. *See United States v. Carter*, 463 F.3d 526 (6th Cir. 2006). That case involves such a drastically different statutory ecosystem that attempting to draw conclusions from it would be akin to concluding that since a fish can swim in the ocean it should be able to swim in Jello. The *Carter* case was not interpreting M.R.E. 412 or working within Congress'

framework of victims' rights in the military justice system.

Defense suggests, without authority, that the way in which stalking offenses are charged can be dispositive in whether the offense constitutes "sexual misconduct" in applying M.R.E. 412. This contradicts the plain text Congress expressed in 10 U.S.C. § 1044e and the 2015 N.D.A.A., which categorically define stalking as a sex-related offense as it relates to victims' rights in court-martial proceedings. There is no such exception given, and none should be read into the law.

VI

S.D.'s statutory rights and protection of privacy are not contingent on the prosecution's language in a specification.

The United Sates' position is S.D.'s rights under M.R.E. 412 as protected by Article 6b, U.C.M.J.– as a named victim of a sex-related offense–are placed at the mercy of discreet prosecutorial decisions. In this case, the Government chose to refer a specification of Stalking – Article 130 – without specifically alleging a theory of harm. The United States argues the broader term "sexual misconduct" in M.R.E. 412(d) is narrower than "sex-related offenses" defined in statute; and that whether it is a case of sexual misconduct is absolutely determined by the words prosecution uses in the specification referred to court-martial. However, in 1994 Congress expanded the rule to apply to all "criminal proceeding[s] involving alleged sexual misconduct" instead of the prior version of F.R.E. 412 applying the rule "in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code". *Violent Crime and Control and Law Enforcement Act 1994*, P.L. 103-322 § 40141(b) (1994). In explaining the change to F.R.E. 412, the drafters

noted,

> The reason for extending the rule to all criminal cases is obvious. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is not confined to cases that involve a charge of sexual assault. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.

Notes of Advisory Committee on proposed 1994 amendment, F.R.E. 412, 28 U.S.C.S. Appx 412. In other words, F.R.E. 412 was amended in 1994 to broaden its applicability, away from reference to specific criminal statutes, to use the term "sexual misconduct" for cases like kidnapping and now stalking. Under M.R.E. 1102, amendments to the F.R.E. automatically ". . . amend parallel provisions of the Military Rules of Evidence by operation of law. . .". In this case, the United States argues the term "sexual misconduct" is narrower than enumerated offenses. This is not consistent with the plain language of M.R.E. 412.

S.D. is a victim of a sex-related offense. The question before this Honorable Court is whether Trial Counsel have the authority to override clear statutory language to convert some stalking violations into non-sex-related offenses simply by how they chose to phrase a specification? Did Congress intend to give such plenary authority to Trial Counsel to veto the procedural safeguards of M.R.E. 412? This would completely undermine the intent of M.R.E. 412, "[b]y affording victims protection in most instances, the rule encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders." *United*

States v. Banker, 60 M.J. 216, 219 (C.A.A.F. 2004) citing supra *Notes of Advisory C'mte* F.R.E. 412 ; criticized on other grounds *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). The *Banker* court continues "M.R.E. 412 was intended to 'safeguard the alleged victim against the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process.'" *Id.* citing *Manual for Courts-Martial, United States* (2002 ed.). This Court, despite the United States' position to deny S.D. those rights, should find the Military Judge clearly and indisputably erred.

CONCLUSION

The Military Judge clearly and indisputably erred in failing to apply M.R.E. 412 in this case under the clear terms of M.R.E. 412, Section 1044e(h) of title 10, United States Code, and the 2015 N.D.A.A.

RELIEF SOUGHT

Wherefore, S.D. respectfully requests that this Honorable Court vacate the trial court's ruling that M.R.E. 412 does not apply in this case.

RESPECTFULLY SUBMITTED this 16th day of September, 2025.

[redacted]

DEVON A. R. WELLS, GS-14, DAF CIVILIAN
Chief, Appellate and Outreach, Victims' Counsel
Military Justice and Discipline Directorate
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[redacted]

/s/ *David J. Brown*

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CERTIFICATE OF FILING AND SERVICE

I certify that on 16th day of September, the foregoing was electronically filed with the Court and served on the following addresses:

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re SD, *Petitioner*	)	**REAL PARTY IN INTEREST'S MOTION TO ATTACH**
	)	Before Panel 2
Senior Airman (E-4) **Gabriel A. BINKLEY**, United States Air Force, *Real Party in Interest*	)	Misc. Dkt. No. 2025-09
	)	19 September 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Comes now the Real Party in Interest, Senior Airman (SrA) Gabriel A. Binkley, United States Air Force, by and through his undersigned counsel and, pursuant to Rule 23.3(b) of this Court's rules, moves to attach a redacted copy of the Statement of Trial Results in the Case of *United States v. Senior Airman Gabriel A. Binkley*.

The attached redacted statement of trial results demonstrates that SrA Binkley's general court-martial concluded on 18 September 2025. The verdict included a finding of not guilty to the charged offense of stalking in violation of Article 130, Uniform Code of Military Justice (the Specification of Charge V). That information is relevant to the Real Party in Interest's pending motion to dismiss the petition.

WHEREFORE, this Court should grant this motion.

Respectfully submitted,

[redacted]
Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

[redacted]
Air Force Appellate Defense Counsel
[redacted]

Counsel for Real Party in Interest

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on Petitioner's counsel and the Government Trial and Appellate Operations Division on 19 September 2025.

Respectfully submitted,

[redacted]
Dwight H. Sullivan
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

IN RE SD,	)	**UNITED STATES' MOTION FOR**
Petitioner	)	**LEAVE TO FILE OUT OF TIME**
	)	**ANSWER TO PETITION FOR**
v.	)	**EXTRAORDINARY RELIEF**
	)	Before Special Panel
Senior Airman (E-4)	)	
GABRIEL A. BINKLEY, USAF	)	Misc. Dkt. No. 2025-09
Real Party in Interest	)	
	)	15 September 2025

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

United States respectfully requests that this Court grant leave to file its brief in this case out of time.

Undersigned counsel attempted to file this brief in a timely manner on Friday, 12 September 2025. However, undersigned counsel missed the deadline by one minute. The original filing was out of time for the following reasons: Undersigned counsel was on Reserve orders on 12 September 2025 at Annual Survey of the Law at Maxwell AFB, Alabama and had two briefings to give on Saturday morning, 13 September 2025. Undersigned counsel also personally had a filing due at Court of Appeals for the Armed Forces on 12 September and had had numerous filings/pleadings to review/edit before the division filed them last week (including 1 CAAF Answer brief, 1 Brief in support an Article 62 appeal at this Court, a Motion for Reconsideration before this Court, and 2 AFCCA Answer to Assignments of Error briefs). Moreover, the Air Force Appellate Operations Division is currently juggling approximately 14 other active AFCCA briefs, plus two AFCCA motions for reconsideration, and 4 CAAF briefs, having recently lost our Deputy Director to PCA and having 2 counsel out of the office performing holdover trial duties from their previous assignments. Undersigned counsel simply ran out of time to complete all of these tasks on time and regrets the late filing. Undersigned

counsel attempted to re-file the brief out of time at 0020 on 13 September, after adding language explaining the out-of-time filing. However, the Court rejected the filing this morning because it was not accompanied by a motion for leave to file.[1]

The Real Party in Interest consents to this out-of-time filing.

WHEREFORE, the United States requests this Honorable Court grant its motion for leave to file and accept this out-of-time filing.

[redacted]
MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations
[redacted]

[1] Rule 18.5 of this Court's Rules for Practice and Procedure does not appear to call for an accompanying Motion for Leave to File. The Rule says: "Any filing that is submitted out of time shall so indicate in the caption and shall articulate good cause for why the filing is out-of-time. A filing is out of time when it is submitted after the deadline for filing."

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 15 September 2025.

[redacted]
MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations
[redacted]