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 form 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 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. 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.

[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 vis DoD SAFE as Petition Attachment I.B. The transcript is not authenticated nor was it reviewed for complete accuracy.

ISSUES PRESENTED

WHETHER THE MILITARY JUDGE ERRED IN DENYING S.D.'S VICTIMS' COUNSEL THE OPPORTUNITY TO ADVOCATE FOR HER PRIVACY RIGHTS AND 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) for the Military Judge's violation of her right to be protected from the accused and her right to be treated with fairness and with respect for her dignity and privacy 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 protect 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 violated but invalidated S.D.'s Article 6b, UCMJ's 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 defending her rights in court and the denial of S.D.'s request for a closed hearing to address violations of her privacy rights.

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 23 July 2025, Victims' Counsel

motioned the Court to rule that M.R.E. 412 applied to the sexual conduct information Defense seeks to introduce, as Article 130 (Stalking) is a sex-related offense as defined in 10 U.S.C. § 1044e. *See* Attachments II and III. The Military Judge has ***not*** ruled on the motion to determine applicability of M.R.E 412 at this time, but to timely file in response to the original oral ruling as to Victims' Counsel standing to advocate for S.D.'s Article 6b rights before the court-martial, S.D. is filing this petition while that ruling is pending. This case is set for trial to begin on 11 August 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 other way 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 IV at 1. 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 MRE 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 III. As of the date of filing this Petition, the Military Judge has not ruled on this outstanding motion.

SUMMARY OF ARGUMENT

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 Section 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. 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. 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 time also vested with 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.

As the Military Judge clearly and indisputably violated Article 6b, UCMJ by failing to allow S.D. to protect her own rights from being violated in open court, and further violations are likely to occur without assistance from this Honorable Court, a writ should issue.

ARGUMENT

I.

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.

II.

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 MRE 412

The language of MRE 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.

<u>There is an outstanding ruling on a MRE 412 motion that may require supplemental filings.</u>

This notice is provided simply to alert the Court that S.D.'s victims' counsel has also filed an MRE 412 motion with the trial court seeking a ruling on the applicability of MRE 412 in cases involving stalking, which is defined as a "sex-related offense" under both U.S.C. § 1044e(h) and under RCM 306(d)(1). The Military Judge's ruling on that may necessitate a supplemental filing on this Petition. The Motion is at Attachment II with the email exchange at Attachment III

CONCLUSION

The Military Judge clearly and indisputably erred in denying S.D. standing to defend herself against the violations of her Article 6b, UCMJ right 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 court vacate the trial court's ruling that S.D. lacks standing to be heard in matters impacting her Article 6b, UCMJ, rights and direct the trial court to hold a closed hearing consistent 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 30th day of July, 2025.

[redacted]
DEVON A. R. WELLS, GS-14, DAF CIVILIAN
Appellate Victims' Counsel
HAF/JAJS
Department of the Air Force
[redacted]

/s/ *David J. Brown*
DAVID J. BROWN, Capt, USAF
Counsel for S.D.
Victims' Counsel
HAF/JAJS
Department of the Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that on July 30, 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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HAF/JAJS
Department of the Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re SD	)	**Misc. Dkt. No. 2025-07**
Petitioner	)	
	)	
	)	
	)	
	)	**NOTICE OF**
Gabriel A. BINKLEY	)	**DOCKETING**
Senior Airman (E-3)	)	
U.S. Air Force	)	
Real Party in Interest	)	

On 30 July 2025, the court received a petition for extraordinary relief under Article 6b, UCMJ, 10 U.S.C. § 806b, in the nature of a "Petition for Extraordinary Relief in the form of a Writ of Mandamus" in the above-styled case.*

Accordingly, it is by the court on this 1st day of August, 2025,

ORDERED:

The petition is assigned Misc. Dkt. No. 2025-07 and referred to a Special Panel. The Special Panel shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge
MCCALL, KRISTIN K.B., Colonel, Appellate Military Judge

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]

AGNIESZKA M. GAERTNER, Capt, USAF
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. 2025-07**
Petitioner	)	
	)	
	)	
	)	
	)	**NOTICE OF**
Gabriel A. BINKLEY	)	**PANEL CHANGE**
Senior Airman (E-3)	)	
U.S. Air Force	)	
Real Party in Interest	)	

It is by the court on this 5th day of August, 2025,

ORDERED:

That the petition is withdrawn from Special Panel and referred to Panel 2.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

AGNIESZKA M. GAERTNER, Capt, USAF
Commissioner