Airman First Class (E-3) LRM v. Lieutenant Colonel Kastenberg, No. 13-5006 (C.A.A.F. July 18, 2013).

Defendant was charged with raping a female Airman.  As part of a larger Air Force program to combat sexual assault, the Air Force JAG Corps had implemented a special victims’ counsel (SVC) program that affords legal counsel to victims of sexual assault.  The victim was appointed an SVC, who entered a formal appearance in the case and asked the military judge to direct the parties to provide him with copies of motions filed under Military Rules of Evidence 412 (the military’s rape shield law), 513 (psychotherapist-patient privilege), and 514 (victim advocate-victim privilege).  SVC argued that as the Military Rules of Evidence expressly gave the victim the “right to be heard,” she must be provided copies of the motions so that she can understand the arguments being made regarding her privacy interests and thereby be afforded a “meaningful opportunity” to be heard in response.  In making this request, SVC acknowledged that the victim is not a party to the case, but contended that she had standing to participate in the proceeding regarding any issues that implicated her rights under Rules 412, 513, and 514.  The government did not object to the victim being heard, either personally or through counsel, on factual matters, but argued that neither the victim nor SVC had the right to file motions or make legal arguments; defendant argued that the victim and SVC lacked standing to be heard and that permitting SVC to present legal arguments would unfairly burden the defense and create “an appearance problem.”  The military judge held that the victim had no standing to move for copies of motions, to be heard through SVC, or to seek any exclusionary remedy during any portion of the trial.  The military judge further held that the victim was only authorized to be heard personally, through counsel for the government in pretrial hearings, or—in the event she became incompetent—through a guardian, representative, or conservator.  The military judge explained that “to hold otherwise would make [the victim] a ‘de facto party’ to the court-martial, with a degree of influence over the proceedings akin to a private prosecution, which is antithetical to American criminal law jurisprudence.”

 Victim’s appellate counsel filed a petition with the Air Force Court of Criminal Appeals for a writ of mandamus challenging the decisions of the military judge, but the court concluded that it lacked jurisdiction to review the victim’s petition.  After the court denied the victim’s motion for reconsideration en banc, victim’s appellate counsel filed a petition for a writ of mandamus with the United States Court of Appeals for the Armed Forces, certifying three issues for review by that court:

1.  Whether the Air Force Court of Criminal Appeals Erred by Holding that It Lacked Jurisdiction to Hear A1C LRM’s Petition for a Writ of Mandamus.

2. Whether the Military Judge Erred By Denying A1C LRM the Opportunity to be Heard Through Counsel Thereby Denying Her Due Process Under the Military Rules of Evidence, the Crime Victims’ Rights Act and the United States Constitution.

3. Whether This Honorable Court Should Issue a Writ of Mandamus.

 Upon review, the court answered the first two questions in the affirmative, holding that the Air Force Court of Criminal Appeals erred in finding that it lacked jurisdiction to hear the victim’s petition for a writ of mandamus, and that the military judge erred in denying the victim the opportunity to be heard through counsel.  As to the first question, the court explained that the issue of whether the victim has limited standing to be heard through counsel in M.R.E. 412 and 513 hearings was ripe and that the harm alleged by the victim has “the potential to directly affect the findings and sentence” in the case.  The court concluded that this potential existed because the military judge’s ruling “precluding [the victim] from presenting the basis for a claim of privilege or exclusion, with or without counsel, during an ongoing court martial[,]” had “a direct bearing” on the guilt or innocence determination, which would then “form the very foundation of a finding and sentence.”  The court dismissed the contention that the victim’s position as a nonparty to the court martial precluded standing, relying instead on “long-standing precedent that a holder of a privilege has a right to contest and protect the privilege[,]” and recognition by numerous courts, including the United States Supreme Court, that limited participant standing is permissible.

As to the second question addressing the substantive merits of the military’s judge’s decision denying the victim the right to be heard through counsel, the court concluded that the military judge erred in so deciding, as “[s]tatutory construction indicates that the President intended, or at a minimum did not preclude, that the right to be heard in evidentiary hearings under M.R.E. 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness.”  The court found that this interpretation was consistent with case law and that although “the military judge suggests that LRM’s request is novel, there are many examples of civilian federal court decisions allowing victims to be represented by counsel at pretrial hearings.”  The court further found that although the victim’s right to be heard through counsel is not absolute, the victim “has a right to have the military judge exercise his discretion on the manner in which her argument is presented based on a correct view of the law.”  The court also concluded that the military judge erred in finding that judicial partiality was at stake, finding instead that “[i]t is not a matter of judicial partiality to allow a victim or a patient to be represented by counsel in the limited context of M.R.E. 412 or 513 before a military judge, any more than it is to allow a party to have a lawyer.”

On the issue of the appropriate remedy, the court declined to issue a writ of mandamus, instead returning the matter to the military judge for reconsideration of his ruling in light of the court’s holding.