

5 March 2013

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,

Respondent

v.

Airman First Class (E-3)
NICHOLAS E. DANIELS,
USAF,

Real Party in Interest

v.

Airman First Class (E-3)
[REDACTED]
USAF,
Petitioner

OUT-OF-TIME *AMICUS CURIAE* BRIEF
ON BEHALF OF ARMY DEFENSE
APPELLATE DIVISION IN OPPOSITION
TO L.R.M.'S PETITION FOR
EXTRAORDINARY RELIEF IN THE
NATURE OF A WRIT OF MANDAMUS

Misc Dkt. No. 2013-05

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

COME now *amicus curiae* the United States Army Defense Appellate Division, in support of Party in Interest Airman First Class (E-3) Nicholas E. Daniels. It is the position of the Army Defense Appellate Division that this Court has no jurisdiction to hear the writ of mandamus of the purported victim in this case, and the Air Force Special Victim's Counsel Program fundamentally alters military justice in the Air Force, and eventually would inflict severe damage on this Court and any surviving notion of military justice. Accordingly, the petition for a writ of mandamus must fail.

This Court has no jurisdiction over the Petition. Petitioner seeks to establish jurisdiction via a statute, 18 U.S.C. § 3771, that has no applicability to courts-martial. Even if this Court determines 18 U.S.C. § 3771 is in some way applicable, the statute does not afford Petitioner the

remedy she seeks. Finally, as established in the brief of *Amicus* Navy-Marine Corps Appellate Defense, the application of longstanding constitutional and jurisdictional traditions must result in denial of the writ of mandamus.

In criminal proceedings in United States district courts, 18 U.S.C. § 3771 affords a “crime victim” the following:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a)(1-8)(2012). If a crime victim is denied these enumerated rights in United States district court, the victim may petition a United States court of appeals for a writ of mandamus. *Id.* at (d)(3). It is upon this statute Petitioner’s claim of jurisdiction rests in asserting a right to be represented and participate as a party-equivalent in Airman Daniels’ court-martial.

Petitioner maintains a “holistic reading exhorts all federal agencies comply” with 18 U.S.C. § 3771. Petitioner’s Petition at 21. However, the statute, as was true with its predecessors, is a statute of general applicability, with no applicability to courts-martial.

In *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999), the Court of Appeals for the Armed Forces (CAAF) examined whether 42 U.S.C. § 10606, a predecessor statute to the one at

issue here, applied to courts-martial. That statute, in pertinent part, gave crime victims “the right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.” *Id.* at (b)(4). The military judge in *Spann* determined the federal statute prohibited him from sequestering the victim and her mother from Spann’s court-martial. 51 M.J. at 90. On appeal, Spann claimed 42 U.S.C. § 10606 should not apply to courts-martial. *Id.*

The CAAF agreed with Spann. The CAAF noted its “great caution” in overlaying generally applicable statutes onto the military justice system. *Id.* at 92, quoting *United States v. Dowty*, 48 M.J. 102, 106 (C.A.A.F. 1998). The CAAF refused to apply 42 U.S.C. § 10606 to courts-martial for two reasons. First, CAAF found the effect of the application of the federal statute in U.S. district court anything but clear, specifically in its effect on Federal Rule of Evidence (Fed.R.Evid.) 615. 51 M.J. at 92. Because of this ambiguity, CAAF refused to apply the statute to courts-martial.

Second, CAAF found significant the President had not amended Military Rule of Evidence 615 since passage of the two renditions of the applicable statute. *Id.* at 92-93. The Court identified two possible reasons for the President’s inaction --He was at yet undecided whether the federal statute should apply, and if so, whether it should be modified to fit military practice. *Id.* at 93. The CAAF emphasized Congress established a system by which the Manual for Courts-Martial is amended through a deliberative process, and not through the application of statutes outside the UCMJ. *Id.* “If government counsel or others involved in the administration of military justice believe such rules should apply in courts-martial, the appropriate route is not through litigation involving statutes outside the UCMJ that are subject to interpretive uncertainties, but through amendments to the Manual for Courts-Martial or, if necessary, through

legislative changes.” *Id.*

Similarly, CAAF found the statute of limitations in the Victims of Child Abuse Act (VCAA), applicable in federal district courts, inapplicable to courts-martial. *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000). That statute of limitations stated:

No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years.

54 M.J. at 125, quoting 18 U.S.C. § 3283 (1994). The CAAF noted the “military and civilian justice systems are separate as a matter of law.” 54 M.J. at 124. The Court observed Congressional intent was to “separate military justice from the federal system. 54 M.J. at 124, quoting *United States v. Dowty*, 48 M.J. 102, 111 (C.A.A.F. 1998).

The Court found the VCAA inapplicable in part because the text of the statute indicated is applied to federal courts, and not courts-martial. 54 M.J. at 125. The statute referred to the Department of Justice and used terms familiar to federal district courts, not courts-martial, such as “jury,” “guardian *ad litem*, and “clerk of court.” *Id.* “None of the foregoing terms apply in the military justice system, where courts-martial are convened by military officers for the trial of a single case, the prosecution function is performed by judge advocates appointed as trial counsel, verdicts are rendered by the members of the court-martial, and the proceedings are governed by the Military Rules of Evidence.” *Id.* at 126.

For the same reasons, 18 U.S.C. § 3771 does not apply to courts-martial. The terms employed in the statute indicate its application to federal district courts, and not courts-martial. A motion for relief must be filed “in the district court in the district in which the crime occurred,” and the “district court” must decide the motion. 18 U.S.C. § 3771(d)(3). Additionally, the “court of appeals may issue the writ on the order of a single judge pursuant to

circuit rule or the Federal Rules of Appellate Procedure.” *Id.* This and other terms in the statute establish the statute applies in U.S. district courts, but not courts-martial. *McElhaney*, 54 M.J. at 126.

Additionally, the applicability of the statute to federal district court cases is unclear (*see Spann*, 51 M.J. at 92), although it is clear none have afforded a victim the right to participate in the proceedings that Petitioner seeks. Additionally, the President has not amended procedural or evidentiary rules to allow the non-party participation Petitioner seeks. *Id.* at 93.

18 U.S.C. § 3771 has no applicability to courts-martial. Because that statute appears to be the thin reed on which Petitioner relies for the jurisdictional hook for her writ, *amicus* submit her Petition must be denied.

Even if 18 U.S.C. § 3771 had applicability to courts-martial, the rights afforded to crime victims by the statute do not entitle Petitioner to be accorded the equivalence of party status at Airman Daniels’ court-martial. The statute affords crime victims a number of rights, but these rights appear geared toward attendance, sentencing, protection, and restitution. The victim has a right to be “reasonably heard,” but that right is limited to proceedings “involve[ing] release, plea, sentencing, or any parole proceeding.” 18 U.S.C. § 3771(a)(3). Further, a victim has a right to notice of proceedings, and may not be excluded unless the trial court determines the victim’s attendance would materially alter the victim’s testimony. *Id.* at (a)(2) & (3). Additionally, a victim has a right to be “reasonably protected,” and a “reasonable right to confer with the attorney for the government.” It is *amicus*’ understanding none of these rights, if the statute were applied, have been violated in this case.

Nonetheless, Petitioner claims she has a right to be heard through counsel when the victims’ rights afforded by 18 U.S.C. § 3771 are cobbled together with Mil. R. Evid. 412 and

513. However, Petitioner presents no support from either the U.S. district courts hearing cases applying Fed. R. Evid. 412 or 513 for that proposition, nor has *amicus*' research revealed such support. Furthermore, the language employed in those Rules of Evidence do not support Petitioner.

Mil. Rule Evid. 412 provides that a party seeking to admit evidence pursuant to that rule must file a motion and serve the motion on the court and opposing party "and notify the alleged victim or, when appropriate, the alleged victim's representative." Mil. R. Evid. 412(c)(1)(B). Thus, the purported victim is given notice, but has no "right" to service of the motion. *Id.* Additionally, the term "representative" is undefined, and is absent from the remainder of Rule 412. While the rule affords the purported victim "a reasonable opportunity to attend and be heard," the term representative is significantly absent from Rule 412(c)(2). Thus, the plain language of the Rule does not contemplate legal representation for the purported victim at the hearing, and only contemplates notification to a representative in "appropriate" cases, most likely in the event of minority or disability. "Unless ambiguous, the plain language of a statute will control unless it leads to an absurd result." *U.S. v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012), *citing* *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F.2007); *see generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-75 (2012) (if possible every word and provision should be given effect).

Nor can Petitioner, despite her claim to the contrary, find solace in Mil. R. Evid. 513 or 514. Pursuant to Rule 513, the production or admission of a patient record or communication, if the patient is not the accused, requires service of a motion on the military judge and opposing party, "and, if practicable, notif[ication to] the patient or patient's guardian, conservator, or representative and that the patient has an opportunity to be heard as set forth" by the Rule. Mil.

R. Evid. 513(e)(1). And what is that opportunity to be heard? “The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient’s own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing.” *Id.* at (e)(2).

Similarly, Mil. R. Evid. 514, which directs a limited privilege for victim advocates-victims, requires, upon admission or production of victim advocate-victim communication, the same service on the opposing party and military judge, and “and, if practicable, notif[ication to] the victim or victim’s guardian, conservator, or representative and that the victim has an opportunity to be heard as set forth” by the Rule. Mil. R. Evid. 514(e)(1)(B). The victim is afforded the same right at the hearing, “a reasonable opportunity to attend the hearing and be heard at the victim’s own expense unless the victim has been otherwise subpoenaed or ordered to appear at the hearing.” *Id.* at (e)(2).

The plain language of the applicable Rules simply do not provide the “rights” Petitioner claims she is entitled to. As CAAF noted in *United States v. Custis*, 65 M.J. 366 (C.A.A.F. 2007), the privileges found in the Military Rules of Evidence “are expressly delineated,” not the product of common law evolution, as they are in federal court. 65 M.J. at 370. Rather, in the military system “the policy making branches of government” codify the Rules for Court-Martial and applicable Rules of Evidence, not the Service courts or CAAF. *Id.* at 369. See also Art. 36(a), UCMJ. “When the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” 65 M.J. at 370 citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). Petitioner seeks a quasi-party status that no other United States court affords purported

victims, nor should this Court.¹ Instead, this Court should maintain traditional notions of party status and military justice. This Court can find support for that stand in the Manual. The Manual defines “Party” as:

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

Rule for Courts-Martial [hereinafter R.C.M.] 103(16). This Court has recognized, almost from its inception, the impropriety of accusers serving as trial counsel because of the necessary lack of impartiality. *United States v. Long*, 13 C.M.R. 775, 777-78 (A.F.B.R. 1953). This Court should stake a similar position in denying the purported victim, the ultimate accuser, a position in Air Force court-martials not permitted in any other court in America.

¹ In *amicus curiae* National Crime Victim Law Institute’s brief, *amicus* claims it is “not uncommon for victims to be granted standing for limited purposes in connection with criminal proceedings.” *Amicus* is apparently relying upon a different definition of “common” than that in common usage. The cases *amicus* relies upon indicate how uncommon, and limited, standing is. For example, *In re Dean*, 527 F.3d 391 (5th Cir. 2008), involved the criminal charges and trial of British Petroleum following an explosion where fifteen people were killed. *Id.* The Court mentions that “[a]ll victims who wished to be heard, personally or through counsel, were permitted to speak.” *Id.* at 393. However, the victims challenged the district court’s decisions in that case pursuant to 18 U.S.C. § 3227, and it is not surprising some of the victim’s attorneys were allowed to address the court. After all, some of the victims were dead. *Id.* at 391. *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981), is not only long in the tooth, limited to Rule of Evidence 412 motions, but has been called into question by other circuits. *United States v. Alcatel-Lucent France, S.A.*, 688 F.3d 1301, 1307 (11th Cir. 2012); *United States v. Monzel*, 641 F.3d 528, 542 (D.C. Cir. 2011).

Conclusion

Based upon the foregoing, *amicus* United States Army Defense Appellate Division asserts this Court lacks jurisdiction to review Petitioner's writ and the writ should be denied.

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