

Dissenting Views of JPP Panel Member Victor D. Stone, Esq., Supporting Limited Appellate Participation for Crime Victims When Their Rights Are Already At Issue.

The JPP has decided to recommend that military sexual assault victims who previously have been allowed trial court standing and have successfully asserted and defended their UCMJ 6b victims' rights in military trial courts, may not defend on appeal the successful trial court rulings that upheld their UCMJ 6b victims' rights, after specific challenges to the victims' rights have been raised on appeal. Paradoxically, at the same time, the JPP has decided to recommend that military sexual assault victims with trial and appellate court standing who have unsuccessfully attempted to defend their rights before and during military trials, should have the right to petition the military's highest appeal court, the U.S. Court of Appeals for the Armed Forces ("CAAF"), to review on an interlocutory basis, lower court adverse rulings. I agree with the JPP recommendation that the CAAF should be given jurisdiction to entertain victim requests for review, and for similar reasons, dissent from the JPP recommendation not to endorse appellate jurisdiction so victims have a right to be heard on appeal, if they wish, by filing a written pleading after the trial has been completed and limited to the victim's rights that have already been raised on appeal. Not allowing a litigant to defend their rights on appeal, after a conviction and limited to questions about a victim's right that has already been identified as an error on appeal, is contrary to the rule of law and the Fifth Amendment of the Constitution of the United States.

There is no jurisdiction in the country of which I am aware, and this Panel has heard of none from the experts before it, that denies appellate standing to a court litigant to defend their previously successful assertion of statutory rights when it is challenged by another party on appeal. This amounts to a denial of due process of law to the victim litigants. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2597 (the Constitutional Due Process Clause protection extends "to choices central to individual dignity"); *Hoile v. State*, 404 Md. 591, 609 (2008)(crime victims are statutorily granted full appellate rights to defend their victories as it would lead to "potentially anomalous results" if the level of appellate participation afforded victims who won their rights at the trial court level were less than the level of participation afforded when victims were denied their rights at the trial level, and victims were left unable to fully defend their meritorious claims on appeal); *State v. Rice*, 447 Md. 594, 615 (2016)(a non-party can appeal "decisions affecting the party's direct and substantial interests.") The JPP report recounts that 10 states already provide victims explicit appellate jurisdiction in these circumstances. This problem is particularly acute in the military appellate context where defense counsel can obtain for the first time on appeal under R.C.M. 1103A access to a victim's privileged and sealed documents, and then fashion new arguments on appeal that the victim has never previously heard or had any opportunity to rebut when the victim had standing, in the trial court. In this circumstance, the military appeals courts function more like a *de novo* court of first impression than like an appellate court, and the victims' prior opportunity at trial to defend against unwarranted invasions of their privacy are of no avail, since binding law of the case can be made at this appeal, governing any future retrial due to this ruling, without ever hearing from the victim on a new legal argument made by defense counsel.

It is also no answer that prosecutors will always defend victims' rights on appeal, because that did not occur in *EV v. United States*, 75 M. J. 331 (C.A.A.F. 2016), the recent case explicitly overruling *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013), or in many other cases when the prosecutors' obligation to protect their sovereign does not entirely align with a victim's personal privacy interest, which if overturned on appeal, is irretrievably lost since an appellate ruling against the victim becomes the law of the case and cannot be considered anew at any retrial that follows the appellate reversal. This misunderstanding – that a prosecutor who represents the sovereign and not the individual victim, will always support the victim's legal position -- was the rationale that was given for decades, now rejected everywhere, for not allowing victims' their own counsel at any stage of court proceedings. See, *Paroline v. United States*, 134 S.Ct. 1710, 1719 -1720 (2014)(crime victim defending her restitution judgment below allowed by the Supreme Court to defend her victim's right to restitution); *United States v. Laraneta*, 700 F.3d 983, 986 (7th Cir. 2012), certiorari denied, 134 S.Ct. 235 (2013)(crime victims can participate on appeal "without causing any problems at all that we can see." \* \* \* "Participation as *amici curiae* would not be an adequate substitute, for as nonparties they could not seek [further review], should our decision go against them." \* \* \* "The crime victims, having prevailed in the district court, are not trying to appeal. They are seeking only to intervene in this court and to defend the award they received in the district court" so full appellate participation is warranted, including oral argument). Indeed, as the JPP Report on Victims' Appellate Rights acknowledges, former Chief Judge James Baker of the United States Court of Appeals for the Armed Forces, the military justice system's highest court, opined about this issue, "victims already have standing to protect their M.R.E. 412, 513, and 514 interests in the military justice [appellate] system." There is therefore, no reason not to put an end to any confusion about a victim's Due Process standing on appeal, and instead I recommend opening the door to standardizing it, i.e., by setting reasonable page limits, time deadlines, and a right to participate other than as an amicus only after an issue involving the victim's rights has been raised by others on appeal.

It is no answer that a justice system, military or civilian, cannot afford the time to allow such a litigant appellate participation, given that policy oriented *amicus* briefs by non-litigants are often, though not always, allowed, and since military appellate courts rarely allow any oral argument. In testimony before the Panel on September 23, 2016, the "Appellate Military Defense Counsel Panel" did not object to giving victims limited appellate standing as participants when victims' rights are at issue, and former Chief Judge James Baker of the United States Court of Appeals for the Armed Forces, disagreed with the concern expressed by some retired military judges about having to read too many pleadings. See *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970)("The fundamental requisite of due process of law [before a benefit is lost] is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). That hearing must be 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)"); *Kenna v. U.S. Dist. Court for C.D.Cal.*, 435 F.3d 1011, 1013 (9<sup>th</sup> Cir. 2006). ). Moreover, Article 6b already allows certain unsuccessful interlocutory victim appellate litigants to petition for appellate review, and the JPP is in favor of allowing similar petitions that would obligate CAAF to consider victims' interlocutory appeal pleadings when time is of the essence. It is certainly less disruptive and less objectionable to have appellate courts consider victims' written pleading

after conviction (if there is a conviction, and only after a victim's right is raised by others) and when there is no exigency due to any possible delay, distraction, or disruption of the military trial court.

It is no answer to claim that defendants might be denied due process of law if a victim is allowed to defend its position (to which argument a defendant is free to reply) after a convicted defendant decides to attack the victim's position on appeal. The JPP Report does not identify any domestic or international court that has ever held that allowing a victim to be heard denied a defendant due process of law, and the same argument has been rejected in conjunction with victim's interlocutory appeals and now with respect to the JPP recommendation to allow victim petitions to CAAF.

Recommending modifications to the *status quo* handling of victims' rights in military sexual assault cases, which this Panel is doing with respect to victim petitions to CAAF, was an underlying rationale and premise for this Panel and its experts -- -- as an alternative to broad Congressional amendments that may be less nuanced. If we are to staunch the flow of sexual assault victims, mostly female, who regrettably are leaving the military in great numbers after their experiences with the way the military processes their sexual assault complaints, then the military must, as Article 6b of the UCMJ now requires, make meaningful strides to respect their dignity. Not allowing sexual assault victims to file appellate pleadings as a matter of right after a military trial court conviction when a victim's right is challenged on appeal, and binding the victim at any retrial to a possible adverse appellate ruling concerning their rights without ever letting the victim be heard, is an affront to their Due Process rights, to basic fairness, and to their dignity that Article 6b was enacted to protect.

As the Ninth Circuit said in commenting upon the 2004 civilian law statute upon which Article 6b of the UCMJ was based, "The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process." *Kenna v. U.S. Dist. Court for C.D.Cal.*, 435 F.3d 1011, 1013 (9<sup>th</sup> Cir. 2006). Not respecting the dignity and fairness that is due to sexual assault victims, to the same extent that we respect defendants, will not only not change the climate of sexual harassment in the military, but it will perpetuate not ameliorate the climate of sexual harassment by the few "rotten apples" who will remain in the military if sexual assault victims predominantly file "restricted reports" and resign at their first opportunity.

For the above reasons, I agree with the Panel's recommendation to provide express authority for sexual assault victims to file written pleadings to CAAF to take up questions involving victim's rights before a trial has concluded, but I respectfully dissent from what I believe is the Panel's inconsistent recommendation not to recommend that victim's be given express appellate standing to defend, typically limited to post trial written pleadings, their Article 6b UCMJ rights, and limited to the situations where challenges have already been raised on appeal to the victim's rights.

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