



Judicial Proceedings Panel  
Minutes of October 14, 2016 Public Meeting

**AUTHORIZATION:** The Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP) is a federal advisory committee established pursuant to Section 576(a)(2) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, as amended by section 1731(b) of the NDAA for FY 2014 and section 546 of the NDAA for FY 2015, and in accordance with the Federal Advisory Committee Act of 1972, the Government in Sunshine Act of 1976, and governing federal regulations.

**EVENT:** The JPP held a public meeting on October 14, 2016 from 9:04 a.m. to 11:51 a.m. The focus of this meeting was on victims' appellate rights and proposed legislative changes to the Uniform Code of Military Justice related to these rights. The Panel heard perspectives from civilian legal experts and attorneys on criminal appellate practice and victim involvement at the appellate stage. The topics discussed included: 1) victim notice of appellate matters; 2) victim privacy interests during appellate counsel review of records of trial; 3) victim participation at the appellate stage; and 4) victims' right to appeal adverse interlocutory rulings to the United States Court of Appeals for the Armed Forces (CAAF).

**LOCATION:** The meeting was held in the Bobby Junker Executive Conference Center, One Liberty Center, 875 North Randolph Street, Arlington, Virginia 22203.

**MATERIALS:** A verbatim transcript of the meeting, as well as preparatory materials provided to the JPP members prior to and during the meeting, are incorporated herein by reference and listed individually below. The meeting transcript and materials received by the Panel are available on the JPP website: <http://jpp.whs.mil>.

## PARTICIPANTS

### Participating JPP Members:

The Honorable Elizabeth Holtzman, Chair  
The Honorable Barbara Jones  
Mr. Victor Stone  
Professor Thomas W. Taylor  
Vice Admiral (Retired) Patricia Tracey

### Attending JPP Staff:

Captain Tammy Tideswell, U.S. Navy, Staff Director  
Lieutenant Colonel Patricia H. Lewis, Deputy Staff Director  
Mr. Dale Trexler, Chief of Staff  
Ms. Julie Carson, Legislative Liaison and Staff Attorney  
Ms. Nalini Gupta, Staff Attorney  
Ms. Stayce Rozell, Senior Paralegal and Meeting Recorder

### Other Participants:

Ms. Maria Fried, Designated Federal Official (DFO)

Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute  
Mr. Don Christensen, President, Protect Our Defenders  
Mr. Ryan Guilds, Counsel, Arnold & Porter LLP  
Mr. Jason Middleton, Supervising Deputy State Public Defender, Appellate Division, Colorado  
State Public Defender  
Ms. Ann Vallandingham, Senior Policy Advisor to the Director, Office for Victims of Crime,  
U.S. Department of Justice  
Mr. Chris Johnson, Chief, Appellate Defender for the State of New Hampshire (via telephone)

## MEETING MINUTES

The DFO opened the public meeting at 9:04 a.m. The Honorable Elizabeth Holtzman provided opening remarks and announced the agenda for the meeting.

### Civilian Attorneys' Perspectives on Victims' Appellate Rights

#### Ms. Meg Garvin

Ms. Garvin asserted that military appellate counsel should not have full access to the record of trial. Instead, she suggested that the same procedure that is in place at the trial level, which requires *in camera* reviews of privileged mental health records prior to disclosure to counsel, should be put in place at the appellate level. This would protect both victims' privacy interests and the right to a fair trial. She added that it is rarely necessary to pierce private information in order to have a fair trial.

On the issue of victim participation on appeal, Ms. Garvin noted that state jurisdictions have different rules on victim participation on appeal. She reported that between seven and ten states provide victims with appellate rights, and victims in at least six states have asserted standing in appellate courts.

Ms. Garvin urged the Panel to consider the fundamental concept of legal standing, rather than focusing on the specific language in the statute that would allow for victim participation on appeal. She noted that if a person has an injury or a potential injury to a right that is caused by an actor, and that injury is redressable in a proceeding, then the person can and must be heard before the court. She stated that standing should not be limited to privilege holders, but should be afforded to anyone who meets the three-pronged test. She emphasized that standing is different from party status. Ms. Garvin recommended that victims should have standing whenever their Article 6b rights, privileges, or federal constitutional rights are implicated on appeal.

Ms. Garvin noted that affording victims the right to file *amicus* briefs is not a sufficient substitute for standing. She added that courts can choose whether or not to take an *amicus* brief into consideration, and therefore *amicus* is not appropriate for someone who has an individual right at stake.

With respect to victim standing at CAAF, Ms. Garvin emphasized that there should be a focus on uniformity in the military and that similarly situated victims should be treated similarly. She advocated that victims should be able to seek appellate review of writ-denials at CAAF.

Ms. Garvin also noted the federal Crime Victims' Rights Act (CVRA) specifies that appellate courts should apply ordinary standards of appellate review, while Article 6b, UCMJ requires the victim to prove that the right to a writ is clear and disputable.

With respect to victim notice, Ms. Garvin emphasized that procedural due process for victims requires notice that is clear, transparent, and predictable. She stated that victims should be notified anytime a victim has a right that may be put at risk; otherwise, victims are left in the dark and the decision-maker does not get to hear all relevant voices on an issue.

#### Mr. Don Christensen

Mr. Christensen agreed with Ms. Garvin's remarks, including her concern about the current military procedures under Rule for Courts-Martial 1103A. He also expressed support for victim participation on appeal in military courts and noted that affording victims the right to file *amicus* briefs was not a sufficient substitute for standing. In addition, Mr. Christensen stated that he believes the mandamus standard under Article 6b presents too great of a burden for victims to achieve meaningful review and relief on appeal.

With respect to victim standing at CAAF, Mr. Christensen discussed the 2016 case *E.V. v. Robinson*, in which CAAF denied jurisdiction to a victim seeking to appeal a writ-denial by the Service Criminal Court of Appeals (CCA). Mr. Christensen recommended that victims have access to CAAF and Article III courts, noting that the current lack of access serves as a barrier to meaningful relief for victims and inhibits the development of the law.

Mr. Christensen recommended five reforms: 1) give victims and witnesses the right of direct appeal to the CCAs with a discretionary appeal to CAAF; 2) after appeals are exhausted, give victims and witnesses the right to review by an Article III court with an express waiver of sovereign immunity for the purpose of such review; 3) make it clear that military judges should not be represented by Government appellate attorneys, but should instead follow the practice taken in *LRM v. Kastenber*, where the Judge Advocate General appointed a counsel not currently serving as a Government appellate counsel; 4) establish tenure for both trial and appellate judges as was proposed by former CAAF Chief Judge James Baker in his testimony before the JPP at the September 23, 2016 public meeting; and 5) amend Military Rule of Evidence 513 to make it clear that a privilege applies to the communications of a therapist to the patient as well as the therapist's diagnosis.

#### Mr. Ryan Guilds

Mr. Guilds emphasized that it is critical for victims of sexual assault to receive timely and comprehensive notice of all appellate developments. He added that the federal Crime Victims' Rights Act mandates that victims receive notice of all public court proceedings and that neither the CVRA nor the Attorney General's Guidelines for Victim and Witness Assistance

differentiates between trial and appellate proceedings. He explained that the victims in the federal system receive notice through the Victim Notification System employed by the federal government.

In addition to notice, Mr. Guilds asserted that where a victim's rights are directly implicated, they must also have the opportunity to be heard. He explained that the federal CVRA provides victims with a concrete interlocutory process to hear their grievances in the form of mandamus relief. Victims have a right to seek mandamus relief for all nine of the substantive rights guaranteed under the CVRA. Mandamus relief requires action within 72 hours absent party agreement. Federal appellate courts apply ordinary standards of appellate review in deciding issues under the CVRA, and if the court of appeals denies the relief, the reasons for the denial must be clearly stated in a written opinion.

Mr. Guilds noted that the lack of a mandatory review deadline makes the current mandamus process in the military particularly ineffective when the issue at stake occurs during the court-martial proceeding where time is of the essence. Additionally, the fact that the Service courts are not required to issue substantive opinions when they deny relief only serves to undermine victims' trust and respect in the military justice system.

Further, Mr. Guilds expressed concern about a recent CAAF decision that held that CAAF does not have authority to hear victim mandamus petitions. He stated that this decision precludes civilian oversight and the development of consistent and well-established jurisprudence in this area.

Beyond the interlocutory process, Mr. Guilds noted that in federal civilian courts, prosecutors are able to assert victims' rights as part of the direct appeal process, but victims do not have the right to appeal outside of mandamus procedures. Instead, when victims' rights are directly affected by ongoing appellate proceedings, they may move to formally intervene on appeal. While intervention is not always granted, some federal courts have granted such motions to intervene, particularly when the right asserted is a privilege or other privacy interest directly implicating the victim's rights.

#### Mr. Jason Middleton

Mr. Middleton explained that appellate counsel in Colorado are only able to see the records that the parties at trial have access to. Therefore, if a trial court conducts an *in camera* review, appellate counsel are not able to access the materials that were not disclosed at trial, but can ask the appellate court to perform an *in camera* review. Mr. Middleton expressed concerns about this procedure, including: 1) the effectiveness of *in camera* reviews depends on the experience and background of judges; 2) the appellate court is not as familiar with the record as an advocate, and may not be aware of things that happened at trial, such as the victim's testimony, that will make portions of the record relevant; and 3) *in camera* reviews are time-consuming and difficult, but defense counsel cannot make a determination of legitimate appellate issues without forcing the court to do an *in camera* review.

Mr. Middleton discussed victim participation on appeal in Colorado. While Colorado has a Victims Rights Amendment that provides victims with the right to notice, right to be present, and in some situations, the right to be heard, the Colorado Supreme Court has ruled that victims do not have standing on direct appeal and that third party intervention is not appropriate given the public prosecution model.

He advised the Panel that in his experience in Colorado, the issue of victim participation at the appellate stage has not been raised. He expressed concern that the possibility of victim participation on appeal, especially in cases with multiple victims, would impact defense counsel's resources and time and divert attention from the purpose of the direct appeal: to examine the lawfulness of the conviction and sentence. He also noted that victim participation in the appellate process could chill defendants from raising certain types of issues on appeal. Mr. Middleton added that if victims are afforded standing on appeal, the limits of standing will need to be defined. He noted the distinction between victim standing at trial—where judges are seeking input to exercise their discretion in making certain legal decisions—and victim standing on appeal—where the review is based on the existing record.

Mr. Middleton noted that while *amicus* may not be an adequate substitute to standing, as expressed by Ms. Garvin, the courts in which he practices will generally accept and consider an *amicus* brief, though it is discretionary.

Mr. Middleton explained the victim notification system in Colorado, which requires the District Attorney or Attorney General to inform a victim of the status and decision of a case. He noted that in practice, the Attorney General or District Attorney is in contact with the victim by phone or mail.

#### Ms. Ann Vallandingham

Ms. Vallandingham explained that the CVRA has had a tremendous impact on the Department of Justice and for victims of federal crimes. She noted that the rights provided by the CVRA are guaranteed from the time that criminal proceedings are initiated until all charges are dismissed either voluntarily or on the merits or if the Government declines to bring formal charges after the filing of a complaint.

She also discussed the Victim Notification System (VNS) implemented by the Department of Justice in 2001, explaining that VNS is used to provide notifications to victims of the status of a case, including notice of direct appeal, dates of oral arguments, and the outcome of the direct appeal.

Ms. Vallandingham noted that on a direct appeal, the Government may assert as error any denial of the victim's rights in a proceeding. A Government attorney seeking to file a petition or a direct appeal must obtain written authorization from the Solicitor General.

#### Mr. Chris Johnson (via telephone)

Mr. Johnson explained the procedures relating to appellate counsel review of records of trial in New Hampshire, noting that at the trial level, the defendant must make a threshold showing that

records are likely to contain relevant matters. After making this showing, the trial court will conduct an *in camera* review with no lawyers present. The defendant will only get access to these records if they are found to be “essential and reasonably necessary for a fair trial.” Appellate counsel do not have access to documents the trial judge determined to be irrelevant. Mr. Johnson explained that there are concerns in New Hampshire about this judge-centric procedure, particularly because it is difficult for a trial judge to assess, before the trial even commences, whether particular items will be essential and reasonably necessary for the defense.

### Public Comment

There was no public comment.

The DFO closed the public meeting at 11:51 a.m.

### **CERTIFICATION**

I hereby certify, to the best of my knowledge, the foregoing minutes are accurate and complete.



Elizabeth Holtzman  
Chair  
Judicial Proceedings Panel

### **MATERIALS**

#### Meeting Records:

1. Transcript of October 14, 2016 JPP Public Meeting, prepared by Neal R. Gross and Co., Inc.

#### Read-Ahead Materials Provided Prior to the Public Meeting:

2. Summary of September 23, 2016 JPP Public Meeting
3. Issue Checklist on Victims’ Appellate Rights
4. Rule for Courts-Martial 1103A
5. Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims’ Rights Act’s Mandamus Provision*, 87:3 Denver Law Review 599-631 (2010)
6. Additional Comments Following September 23, 2016 Public Meeting from Major Meredith Steer, JAGC, USAF
7. Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Brief in Support, U.S. v. A.F. Ct. Crim. App. and Slape, (C.A.A.F. 2016)

#### Materials Provided at the Public Meeting:

8. Meeting Agenda
9. Summaries of Presenters’ Biographies
10. Copy of Read-ahead Materials Provided Prior to Meeting