IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| In Re Airman First Class (E-3) LRM, USAF, Petitioner<br><br>v.<br><br>Lieutenant Colonel **JOSHUA E. KASTENBURG,** Respondent<br><br>Airman First Class (E-3) NICHOLAS E. DANIELS, Real Party In Interest | *AMICUS CURIAE* BRIEF OF THE ARMY DEFENSE APPELLATE DIVISION<br><br>Crim. App. No. 2013-05<br><br>USCA Dkt. No. 13-5006/AF |

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IN THE UNITED STATES COURT OF CRIMINAL APPEALS
FOR THE ARMED FORCES

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| In Re Airman First Class (E-3) LRM, USAF, Petitioner | *Amicus Curiae* Brief of the Army Defense Appellate Division |
| v. | Crim. Appellant. No. 2013-05 |
| | USCA Dkt. No. 13-5006/AF |
| Lieutenant Colonel JOSHUA E. KASTENBURG, Respondent | |
| Airman First Class (E-3) NICHOLAS E. DANIELS, Real Party in Interest | |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:**

**Certified Issues**

I

**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.**

II

**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.**

III

**WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS.**

Pursuant to Rule 26(a) of this Court's Rules of Practice and Procedure, United States Army Defense Appellate Division submits the following *amicus* brief.

## Statement of Statutory Jurisdiction

This Honorable Court has jurisdiction to address the Certified Issues, pursuant to Article 67(a)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(2). However, as explained in the real party in interest's brief and in appellee's brief, this Honorable Court does not have jurisdiction to issue the requested relief.

## Summary of Proceedings and Statement of Facts

*Amicus* adopts the Summary of Proceedings and Statement of Facts as presented in the real party in interest's brief. *Amicus* writes to establish that 18 U.S.C. § 3771 has no applicability to courts-martial, nor do the Military Rules of Evidence provide Petitioner the relief she seeks, nor does any amorphous claim to "due process."

## Argument

### THE CRIME VICTIMS' RIGHTS ACT, THE MILITARY RULES OF EVIDENCE, AND THE DUE PROCESS CLAUSE DO NOT AFFORD PETITIONER THE "RIGHTS" SHE SEEKS.

The Air Force Court of Criminal Appeals correctly determined it had no jurisdiction to issue a writ of mandamus on behalf of Airman First Class (E-3) LRM. Petitioner LRM 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. Nor did the Air Force Court of Criminal Appeals deny LRM "due process," as LRM was afforded all those rights she was entitled pursuant to the Constitution, the UCMJ, and the Manual for Courts-Martial. *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013).

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

Petitioner maintains courts-martial must comply with 18 U.S.C. § 3771. However, the statute, as was true with its predecessors, is a statute of general applicability, and thus, has no applicability to courts-martial.

In *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999), this Court 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.*

This Court agreed with Spann, expressing "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). This Court refused to apply 42 U.S.C. § 10606 to courts-martial for two reasons. First, this Court found the effect of application of the federal statute in U.S. district courts anything but clear, specifically in its effect on Federal Rule of Evidence (Fed.R.Evid.) 615. 51 M.J. at 92. Because of that ambiguity, this Court refused to apply the statute to courts-martial.

Second, this Court 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. This 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. This Court emphasized Congress established a system by which the Manual for Courts-Martial would be 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, this Court 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. This Court noted the "military and civilian justice systems are separate as a matter of law." 54 M.J. at 124. This Court observed Congressional intent was to "separate military justice from the military justice system. 54 M.J. at 124, quoting *United States v. Dowty*, 48 M.J. 102, 111 (C.A.A.F. 1998).

This Court found the VCAA inapplicable in part because the text of the statute indicated it 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." 54 M.J. 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. *Id.* at (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, 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 post-conviction and attendance, sentencing, protection, and restitution. The victim has a right to be "reasonably heard," but that right is limited to proceedings "involv[ing] release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(3). As the Second Circuit Court of Appeals determined, "the CVRA does not grant victims any rights against individuals who have not been convicted of a crime." *In re Huff*, 409 F.3d 555, 564 (2d Cir. 2005). Thus, Petitioner's attempt to intervene in appellant's court-martial before findings is simply not contemplated by 18 U.S.C. §3771.

Further, a victim has a right to notice of proceedings, but may be excluded if 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, cobbling together the victims' rights afforded by 18 U.S.C. § 3771 with certain phrases in Mil. R. Evid. 412 and 513, claims she has a right to be heard through counsel during appellant's court-martial. 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. Indeed, the Department of Defense Instruction (DoDI) 1030.01, *Victim and Witness* Assistance, ¶ 4.4 (23 April 2007) provides UCMJ victims approximately the same protections as those found in 18 U.S.C. § 3771(a)(1-8). However, the instruction explicitly limits exactly the type of cause of action Petitioner seeks. "This Directive is not intended to, and does not, create any entitlement, cause of action, or defense in favor of any person arising out of the failure to accord to a victim or a witness the assistance outlined in this Directive." *Id.* at ¶ 4.3. Furthermore, the language employed in those Rules of Evidence do not support Petitioner's claim.

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, but must be notified. *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. 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 legal 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-victim advocates, requires, upon admission or production of victim-victim advocate 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 does not provide the "rights" Petitioner claims she is entitled to, and the DoDI 1030.01 specifically states Petitioner has no right to mandamus review. Petitioner is seeking a quasi-party status that no other United States court affords purported victims, nor

should this Court. 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).

Nor does Petitioner's claim she has some "due process" constitutional right make it so. Petitioner claims "due process" requires she be afforded a hearing, and as an extension, provided counsel to represent her at this constitutionally required hearing. However, in so asserting, Petitioner relies upon *Goldberg v. Kelly*, 397 U.S. 254 (1970), which found Kelly had a due process right pursuant to the Fourteenth Amendment, because an entitlement, a property interest, was at stake as a result of a governmental decision. In order to prevail in a due process claim, appellant must show "(1) a cognizable liberty or property interest; (2) the deprivation of that interest by some form of state action; and

(3) that the procedures employed were constitutionally inadequate." *Kendall v. Balcerzak,* 650 F.3d 515, 528 (4th Cir.2011) (emphasis added). Petitioner can make no such showing here. Her interests do not implicate constitutional due process, and Petitioner has only those rights provided by the UCMJ and the Manual for Courts-Martial, which, as established above and by the real-party-in-interest and appellee, do not violate due process. *See Vazquez*, 72 M.J. at 19. Indeed, the only person who can claim a risk to due process is the real-party-in-interest, Airman Daniels. "Due process" simply does not afford Petitioner relief.

## Conclusion

WHEREFORE, the Air Force Court of Criminal Appeals correctly found that it lacked jurisdiction to hear Petitioner's petition for a writ of mandamus. Even if this Court determined the Air Force Court erred regarding its jurisdictional limitation, this Court should affirm the military judge's determination Petitioner had no right to intervene in appellant's court martial.

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# CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Kastenburg,* Crim.App.Dkt.No. 2013-05, USCA Dkt. No. 13-5006/AF, was electronically filed with both the Court and Government Appellate Division on May 23, 2013.

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